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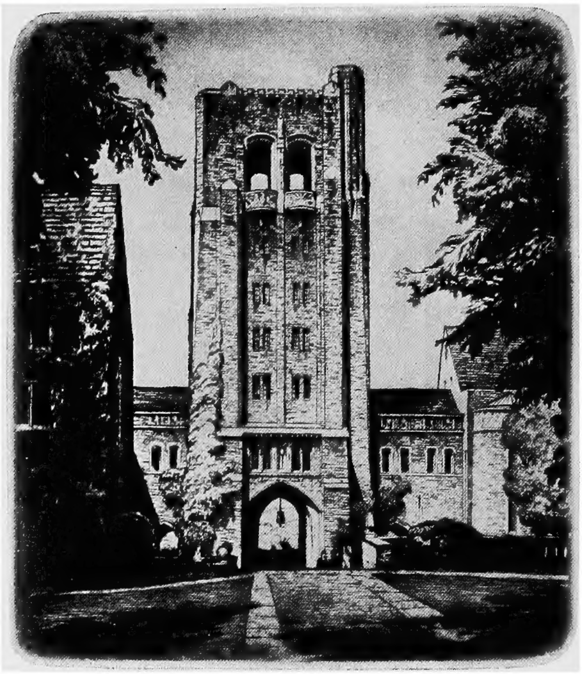

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Jos L Caron

Feby 1st 1872

A TREATISE

ON THE LAW OF

TRUSTS AND TRUSTEES

BY

JAIRUS WARE PERRY

BOSTON
LITTLE, BROWN, AND COMPANY
1872

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TO THE HONORABLE

HORACE GRAY, JR.,

ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,

THIS WORK IS INSCRIBED IN ACKNOWLEDGMENT OF THE ASSISTANCE RECEIVED FROM HIS JUDICIAL OPINIONS, AND FROM HIS PERSONAL INTEREST IN THE PROGRESS OF ITS CONSTRUCTION,

BY THE AUTHOR.

PREFACE.

An American book upon the subject of Trusts has long been needed by the profession. At the solicitation of too partial friends, the writer was induced to undertake its preparation. The result is now given to the public.

The writer of a law book would be inexcusable if he failed to use all the materials at his command, which could in any way enable him to state and illustrate the law. The treatises and opinions of eminent writers, as well as the reports of the decisions and opinions of judges, must all be studied and mastered. And where the book is intended for the daily use of the lawyer in busy practice, it must contain a notice and citation of the latest cases and authorities. To this end all the treatises and essays, as well as the reported decisions, upon the subject, have been used.

In addition to the original opinions of judges contained in the Reports, the excellent treatise on the Law of Trustees by Mr. Hill, and the notes and commentaries of the learned American editors, have been carefully considered upon all the subjects treated by them.

The most complete work upon the Law of Trusts is the fifth edition of Mr. Lewin's Treatise. This work, first

printed more than thirty years ago, has received in its various editions the most careful emendations, corrections, and additions by its author, until in the last edition it has grown into a remarkably full and clear exposition of the Law of Trusts, as administered in England.

It has been the constant object of the writer to cover all the ground embraced by the treatises of Mr. Lewin and Mr. Hill, so far as the same is important to the American lawyer; and in addition to include such other subjects and matters, relating to the Law of Trusts, not treated fully in those works, as are useful and necessary in American practice.

Perhaps the accumulation of authorities upon the many topics discussed may call for some explanation. A large and increasing number of States and courts are yearly sending out a great number of volumes of Reports. Few lawyers can have access to the whole number, but all desire to see the cases in their own State Reports bearing upon each proposition of the text. It has therefore been the aim of the writer to cite the cases in all the States, although the citation of a few leading cases is always sufficient to sustain an elementary proposition. He cannot hope that he has cited all the cases upon the many matters treated, but it has been his purpose to do so, and this has caused an accumulation of cases which to some may seem unnecessary.

Conscious of defects in the execution of his work, he trusts that a liberal profession will rather consider how much of a difficult task has been accomplished, than how much has been omitted or imperfectly done.

The writer cannot send this book forth to the public without acknowledging the constant kindness and encourage-

ment which he has received from his friends during the labor of its composition; and it is his especial duty and pleasure to acknowledge his obligations to his friend and associate in business for nearly twenty years, William Crowninshield Endicott, Esquire, whose sound learning and clear judgment have been a never-failing resource in matters of doubt and difficulty, and whose refined and severe taste has been freely employed in pruning redundancies and softening asperities of manner and style.

Salem, Mass., Nov. 1871.

CONTENTS.

N.B. An analysis of each chapter may be found at its beginning, in the body of the volume.

CHAPTER VII.

CHAPTER VIII.

CHAPTER IX.

CHAPTER X.

CHAPTER XI.

CHAPTER XII.

CHAPTER XIII.

CHAPTER XIV.

CHAPTER XV.

CHAPTER XVI.

CHAPTER XVII.

CHAPTER XVIII.

CHAPTER XIX.

CHAPTER XX.

CHAPTER XXI.

CHAPTER XXII.

CHAPTER XXIII.

CHAPTER XXIV.

CHAPTER XXV.

CHAPTER XXVI.

CHAPTER XXVII.

CHAPTER XXVIII.

CHAPTER XXIX.

CHAPTER XXX.

CHAPTER XXXI.

CHAPTER XXXII.

TABLE OF CASES.

C.

D.

E.

H.

I.

L.

N.

Q.

R.

T.

U.

Y.

Z.

ADDENDA ET CORRIGENDA.

The practitioner will find it convenient to enter these cases at the pages and sections referred to.

Page	Sect.
5	8. To first sentence add Penny *v.* Allen, 7 De G., M. & G. 422.
48	77, n. 5. Add Ivory *v.* Burns, 56 Penn. St. 303.
49	77, n. 1. Add Willard *v.* Willard, 56 Penn. St. 119.
52	81, n. 3. Add Cook *v.* Barr, 44 N. Y. 158.
53	59, n. *passim.* Add Furman *v.* Fisher, 4 Cold. 626.
67	96, n. 1. Add Crawford's App., 61 Penn. St. 52; Morgan *v.* Mallison, L. R. 10 Eq. 475.
67	97, n. *passim.* Add Lowry *v.* McGee, 3 Head, 269; Lister *v.* Hodgson, L. R. 4 Eq. 30.
73	103, n. 6. Add Alexander *v.* Brown, 7 De G., M. & G. 525.
76	108, *passim.* Add Beal *v.* Warren, 2 Gray, 447; Perry Herrick *v.* Attwood, 2 De G. & J. 39.
83	112, n. 12. Add Warner *v.* Bates, 98 Mass. 276; Lambe *v.* Eames, L. R. 10 Eq. 267.
87	114, n. 3. Insert Warner *v.* Bates, 98 Mass. 276.
88	115, 116, n. *passim.* Add Warner *v.* Bates, 98 Mass. 277; Whipple *v.* Adams, 1 Met. 444; Eaton *v.* Wells, L. R. 4 Eq. 151.
91	117 notes. Add Loring *v.* Loring, 100 Mass. 340; Wilson *v.* Bell, L. R. 4 Ch. 581.
93	118. At the end of the section add: "Where a fund is given or a trust created for the maintenance of a person, his family, or children, such fund cannot be reached by a creditor's bill or trustee process against the person who is to maintain the family: White *v.* White, 30 Vt. 342; Rife *v.* Geyer, 59 Penn. St. 393; Wells *v.* McCall, 64 Penn. St. 207; Clute *v.* Bool, 8 Paige, 83; Bramhall *v.* Ferris, 14 N. Y. 44; Doswell *v.* Anderson, 1 P. & H. (Va.) 185; but if such trust for maintenance or any other purpose, except a public charity, is so limited that its duration may transcend the limits of a perpetuity, it will be void."
95	165, n. Add Stanley *v.* Colt, 5 Wallace, 119.

Page	Sect.	
99	126, *passim*.	Add Harrold *v.* Lane, 55 Penn. St. 268; Cecil Bank *v.* Snively, 23 Md. 253.
103	129, *passim*.	Add King *v.* Cushman, 43 Ill. 31; Clark *v.* Cantwell, 3 Head, 202.
106	134.	Add Willard *v.* Willard, 56 Penn. St. 119.
108	137, n. 8.	Add Peiffer *v.* Lytle, 58 Penn. St. 386; McGinity *v.* McGinity, 63 Penn. St. 38; Nixon's App. 63 Penn. St. 279.
120	148, *passim*.	Add Perkins *v.* Nichols, 11 Allen, 542.
126	157, *passim*.	Add Aston *v.* Wood, L. R. 6 Eq. 419.
126, 127	157, 158, *passim*.	Add Sturtevant *v.* Jaques, 14 Allen, 526; Shaw *v.* Spencer, 100 Mass. 526.
133	165, *passim*.	Add Robinson *v.* Robinson, 17 Ohio St. 480, n. 3; insert 6 Ves. after Curtis *v.* Perry.
139	171, *passim*.	Add Baegle *v.* Wentz, 53 Penn. St. 268.
169	195, notes *passim*.	Add Boynton *v.* Brastow, 53 Me. 362; Staats *v.* Bergen, 2 C. E. Green, 554; Coffee *v.* Ruffin, 4 Cold. 487; Faucett *v.* Faucett, 4 Bush, 521; Korns *v.* Shaffer, 27 Md. 83; Baltimore *v.* Caldwell, 25 Md. 423; Smith *v.* Townshend, 27 Md. 368; Colborn *v.* Morton, 3 Keyes (N. Y.), 296.
176	202, *passim*.	Add Webster *v.* King, 33 Cal. 348.
178	203, *passim*.	Add Smith *v.* Brotherline, 62 Penn. St. 461.
182	207, *passim*.	Add Ashhurst's Appeal, 60 Penn. St. 290.
183	207, n. 2.	Add Imperial Mer. Cred. Ass. *v.* Colman, L. R. 6 Ch. 566.
184	210, *passim*.	Add Falk *v.* Turner, 101 Mass. 194.
188	215, *passim*.	Add Miller *v.* Antle, 2 Bush, 407; Brannin *v.* Brannin, 18 N. J. Ch. 212.
204	230, n. 3.	Add Ashhurst's Appeal, 60 Penn. St. 290.
213	236.	2d line from bottom insert "it."
240	259, n. 2.	Add Matter of Robinson, 37 N. Y. 261.
	259, n. 5.	Add Furman *v.* Fisher, 4 Cold. 626.
241	260.	First line of n. 8 strike out "Law R."
249	268, n. 8.	Add Thatcher *v.* Conelee, 3 Keyes, 157.
285	304, n. 3.	Add Freyvogle *v.* Hughes, 56 Penn. St. 228; Dodson *v.* Ball, 60 Penn. St. 492; McMullin *v.* Beatty, 56 Penn. St. 389; Keyser's App., 57 Penn. St. 636; Koenig's App., 57 Penn. St. 352; Bacon's App., 57 Penn. St. 504.
286	305, *passim*.	Add Wickham *v.* Berry, 53 Penn. St. 70; Manice *v.* Manice, 43 N. Y. 203; Adams *v.* Perry, 43 N. Y. 487.
292	312, n. 1.	Add Ivory *v.* Burns, 56 Penn. St. 300; Wilcox *v.* Wilcox, 47 N. H. 488.
	n. 2.	Add Koenig's App., 57 Penn. St. 352.
304	328, n. 9.	Add Woodruff *v.* Orange, 33 N. J. 49.
329	359, n. 2.	Add Thompson *v.* Fisher, L. R. 10 Eq. 207.

Page	Sect.	
353	386, n. 1.	Add Bramhall *v.* Ferris, 14 N. Y. 44; Blackstone Bank *v.* Davis, 21 Pick. 42; Hallett *v.* Thompson, 5 Paige, 585.
354	388, n. 3.	Add Bramhall *v.* Ferris, 14 N. Y. 44; Degraw *v.* Clason, 11 Paige, 140; Etches *v.* Etches, 3 Drew, 441, § 555, and cases cited *passim.*
361	397, n. 3.	Insert Maggs, 9 Hare, 605, in place of Moggs, 10 Hare, 605.
365	402, n. 4.	Add Taylor *v.* Hopkins, 41 Ill. 442.
397	438, *passim.*	Add Lloyd *v.* Bank, L. R. 4 Eq. 222, overruled in L. R. 3 Ch. 488.
401, 402	443, 444, *passim.*	Add School District in Greenfield *v.* First National Bank, 102 Mass. 174.
403	447, n. 5.	Add Cook *v.* Addison, L. R. 7 Eq. 470.
408	454, *passim.*	Add Flagg *v.* Ely, 1 Edm. N. Y. 206; King *v.* Talbot, 50 Barb. 453.
410	455, *passim.*	Add Baud *v.* Fardell, 7 De G., M. & G. 623, 628.
413	457, n. 5.	Read 1 De G. & Sm. for 1 De G. & M.
415	458.	5 lines from top read "are" for "is."
416	459, n. 2.	Add King *v.* Talbot, 40 N. Y. 76.
417	460, n. 2.	Add Amory *v.* Green, 13 Allen, 413.
417, 418	460, *passim.*	Add McIntire *v.* Zanesville, 17 Ohio St. 352.
428	468, n. 2.	Add Nelson *v.* Hagerstown Bank, 27 Md. 53; line 2 read 519 for 843.
432	471, *passim.*	Add McElheny's App., 61 Penn. St. 188.
475	532, n. 4.	Insert 17 Ves. 485, in place of 448.
502	552, n. 2.	After Giff. 22, insert s. c., 7 De G., M. & G. 207.
505	555, *passim.*	Add Bramhall *v.* Ferris, 14 N.Y. 44; Blackstone Bank *v.* Davis, 21 Pick. 42; Etches *v.* Etches, 3 Drew, 441. Also add at the end of the section: "If a legal or equitable estate is given to a person to be devoted to a particular purpose and to no other, as to a charitable use, or for the support and maintenance of one and his family, such interest cannot be alienated nor reached by a creditor's bill or trustee process, nor by an assignee in bankruptcy; not because such a settlement is in the legal or technical sense a restraint upon alienation, but because a sale or alienation is a breach of the trust, and renders it impossible for the trustee to perform his duties. Rife *v.* Geyer, 59 Penn. St. 393; Wells *v.* McCall, 64 Penn. St. 207; White *v.* White, 30 Vt. 342; Clute *v.* Bool, 8 Paige, 83; Bramhall *v.* Ferris, 14 N. Y. 44; Doswell *v.* Anderson, 1 P. & H. (Va.) 185; Raikes *v.* Ward, 1 Hare, 445; Crockett *v.* Crockett, 1 Hare, 451. If a trust for maintenance, or for any other purpose except a public charity, is so limited that its duration may extend beyond the limits of a perpetuity, it is void."
538	593, n. 1.	Read Acton *v.* Woodgate, 2 M. & K. 492, in place of M. & R.
538	593, *passim.*	Add Furman *v.* Fisher, 4 Cold. 626.
547	602, n. 6.	Read Hall *v.* Denison, 17 Vt. 311, in place of Hale *v.* Denison, 1 Vt. 311.

Page Sect.

614 671, *passim*. Add Wells *v.* McCall, 64 Penn. St. 207.

676 725. Insert in 6th line, n. 1, Att'y-Gen. *v.* Mayor of Beverly, 6 De G., M. & G. 256, 6 H. L. Cas. 310.

677 726, n. 1. Add Fisk *v.* Att'y-Gen. L. R. 4 Eq. 521.

684, 685 733, 734, *passim*. Add First Constitutional Presby. Church *v.* Congregational Soc., 23 Io. 567.

689 696, n. 3. Add University, &c. *v.* Yarrow, 1 De G. & J. 79.

693 744, n. 5. Add : But see Henderson *v.* Hunter, 59 Penn. St. 335.

720 768, n. 2, 3, 4. Add *In re* Chawner's Will, L. R. 8 Eq. 569.

732, 733 785, *passim*. Add Penniman *v.* Sanderson, 13 Allen, 193.

740 795, n. 2. Add Langmead's Trusts, 7 De G., M. & G. 353.

753 814. At the end of the section, add the following sentences : "Nor can trustees sell or pledge the assets of the trust for their own individual debt or benefit. If a trustee assigns, sells, or pledges the trust fund or any part of it for his private debt, or in breach of the trust, the *cestui que trust* may follow the fund into the hands of the assignee or the vendee, if the assignee or vendee have notice of the trust in any way, and the fact that the word 'trustee' appears upon the face of the securities will be ample notice of the character of the fund transferred. Sturtevant *v.* Jaques, 14 Allen, 523; Bancroft *v.* Consen, 13 Allen, 50; Trull *v.* Trull, 13 Allen, 407; Shaw *v.* Spencer, 100 Mass. 388, and cases cited in §§ 800, 810, 811. But if a trustee has power to vary the securities, he may sell and assign the assets in the ordinary course of business, and the fact that the word 'trustee' appears upon the face of the securities will put the purchaser upon no inquiry except to know whether the trustee has power to vary the investment. Ashton *v.* Atlantic Bank, 3 Allen, 219, and all the cases cited to §§ 225, 799, 800, 809–814, 828–843."

758, 759 821–823, *passim*. Add Hopkinson *v.* Burghly, L. R. 2 Ch. 447.

761 827, *passim*. Add Hazell *v.* Currie, L. R. 2 Ch. 449.

774 849, n. 9. Add Vreeland *v.* Van Horn, 2 Green, 137.

784 863, n. 1. Add McCandless' Estate, 61 Penn. St. 9; read Decouche for Delouche.

785 863, n. 3. Add Brittlebank *v.* Goodwin, L. R. 5 Eq. 545; Butler *v.* Carter, L. R. 5 Eq. 276.

812 900, n. 6. Add Bickham *v.* Smith, 55 Penn. St. 335.

826 918, n. 2. Mass'ts. Add Blake *v.* Peagram, 101 Mass. 592.

828 918, n. 1. Penn. Add Myers' App., 62 Penn. St. 104.

832 920, *passim*. Add Manice *v.* Manice, 43 N. Y. 203.

838 928, n. 3. Add Att'y-Gen. *v.* Moore, 4 C. E. Green, 503.

LAW OF TRUSTS.

CHAPTER I.

INTRODUCTION.

ORIGIN, HISTORY, DEFINITION, AND DIVISION OR CLASSIFICATION OF TRUSTS.

§ 1. In the earlier states of society the rules that govern the ownership, disposition, and use of property, are simple and of easy application. But as states increase, as property accumulates, and the business and relations of life become more complex, the rules of law which the new complications demand become themselves complicated, and sometimes difficult to understand and apply. The law, doctrine, and learning of trusts thus had a late origin and a slow and gradual development. The word "trust," in its popular and broadest sense, embraces a multitude of relations, duties, and responsibilities. Thus, executors and administrators, guardians of infants and lunatics, assignees in insolvency and bankruptcy, bailees, factors, agents, commission merchants, and common carriers, as well as the officers of public and private corporations, all exercise a kind of trust. Indeed, one definition of a trustee is

"a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." This definition embraces all the trusts and offices above named, but the law in relation to many, if not all of them, is or may be administered in the common-law courts. It is not of the law of such trusts that this treatise concerns itself.

§ 2. The trusts here treated are defined to be "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence."[1] Another author says that "a trust is in the nature of a deposition by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it should be applied to certain uses for the behoof of a third party."[2] Such trusts originated, and were first defined and reduced to practice under the jurisdiction of courts by the civil law. It was a rule of that law that a testator could not name a devisee to succeed the first devisee of property, but the first devisee took the absolute legal and beneficial ownership of the property; that is, a testator could not direct and control the use of his property after his death. This rule was modified so far that a testator might name an heir to succeed, if the first heir died too young to make a will, but in all other cases the testator could only rely upon the good faith of the first taker of his property, to bestow the use according to his directions. This trust or confidence was called *fidei commissum*, but there were no means whereby the performance of the commission could be compelled. It was called *infirmum* or *precarium*, because it depended upon the personal inclination, integrity, and good faith of the person trusted. There were many of these *imperfect* trusts, where in conscience the first taker was bound to give the beneficial use, or to transfer the property itself, to a third person. Such third persons had an equitable, moral claim or right, but no legal remedy. Under these circumstances, application was made to the Emperor Augustus, and he directed the consuls to interpose their authority, and compel the execution of such trusts. Finally a prætor was appointed, called *fidei commissarius*, who had jurisdiction over all *fidei commissa*, and full power to give adequate relief in all proper cases.[3]

[1] Stair's Institutions of the Laws of Scotland, B. IV. tit. 6, § 2, p. 591; § 3, pp. 592–594.

[2] Erskine's Institutes of the Laws of Scotland, B. III. p. 454.

[3] Ulpianus, tit. 25; Inst. Lib. II. tit. 23, § 2; 2 Fonb. Eq. p. 2; 1 Cruise,

§ 3. It is supposed that these *fidei commissa* were the models of uses which were afterwards introduced into England by the clergy to elude and avoid the operation of the statutes of mortmain. After the passing of those statutes, which were intended to forbid and prevent the accumulation of the lands of the kingdom in the hands of religious houses and corporations, it became the practice to convey lands to one person for the use of another, or for the use of a corporation. Thus the legal title was in one individual, but the beneficial use was in another. At this time the writ of subpœna was contrived which issued out of chancery, and compelled a person who held a legal title to another's use to answer in chancery, and to perform and execute the use. Thus uses were introduced in England to circumvent the public policy of the kingdom and to avoid the statutes of mortmain, and the writ of subpœna was introduced after the model of the jurisdiction of the *prætor commissarius* to prevent those persons who were trusted to execute a use, from committing a fraud in refusing to perform it.[1] These contrivances, originating in evasions of the law, were laid hold of during the civil wars of York and Lancaster to facilitate family settlements, and to prevent the forfeiture of estates for treason during those unhappy strifes. Thus conveyances to uses became the common form of transferring land.

§ 4. Under this practice a very refined system grew up. The legal estate was in one person, and the use and enjoyment was in another. There were two titles and estates in the same land, — that of the feoffee, who was the legal owner, and yet had nothing, and that of the *cestui que use*, who had the whole beneficial right and interest, and yet had no legal right or title. He had nevertheless a substantial interest and estate which he could convey, devise, and otherwise deal with, as with tangible property. Great inconveniences arose from this double system. Bacon's Abridgment, Uses and Trusts, sums them up as follows: "By this course of putting lands into uses there were many inconveniences, as this use, which grew first from a reasonable cause, namely, to give men the power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights, as, namely, a

Dig. p. 398; and see Willis on Trustees, pp. 1-8, and notes; Bacon, Readings upon the Stat. of Uses, Vol. XIV. pp. 301, 302, Boston ed. 1861.

[1] Attorney-General *v.* Sands, Hard. 491. "The parents of trusts were *fraud and fear*, and a court of conscience was the *nurse*."

man that had cause to sue for his land knew not against whom to bring his action nor who was owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtesy, the lord of his wardship, relief, heriot, and escheat, the creditor of his extent for debt, the poor tenant of his lease; for these rights and duties were given by law from him that was owner of the land, and none other, which was now the feoffee of the trust."

§ 5. Many statutes were passed during a series of years to cure or to prevent these mischiefs or hardships. At last the statute of uses, 27 Hen. VIII. c. 10, was enacted, which converted the beneficial use into the legal ownership; that is to say, if lands were conveyed to A. to the use of B., the statute executed or converted the use into a legal estate in B., and divested all title out of A. By the operation of this statute the Court of Chancery lost for a time much of its business; for after the statute the legal title as well as the beneficial use was in the *cestui que use*, and he could deal with his estate as his own in every respect; he was no longer compelled to appeal to the conscience of the feoffee to uses, nor to the equity powers of the court.

§ 6. But there were certain gifts, grants, or estates to uses which the statute did not touch, and which remained as before the statute. Thus, if A. enfeoffed B. to the use of C., in trust for D., the statute immediately transferred the legal estate to C., and extinguished all interest in B., but it did not touch or effect the use or trust for D. It had been settled before the statute, as a rule of property, that a use could not be raised upon a use. At law such use raised upon a use was simply void. And at law it was held that the statute extended only to execute the first use by transferring the legal estate from B. to C., and that all its powers were exhausted in that act, and thus C. held a legal title in trust or for the use of D., which the statute did not execute. And although C. was bound in equity and good conscience to give to D. the use and enjoyment of the estate, there was no remedy for D. at law, and he could only proceed as before the statute by subpœna in chancery to compel C. to perform the trust. Again, if A. conveyed land to B. for a term of years for the use of C., the statute did not execute the legal title in C., for it was held, under the words of the statute, that it only executed the legal titles of estates of which the first taker was *seised*, and that, according to the use of words in the law, no one could be said to be *seised* of a term of years. Thus in this

last case C. could have relief only by subpœna in chancery. And, again, the statute did not execute the legal title to the *cestui que use*, if the first taker was to perform any active duties in regard to the estate; as if he was to hold the same for a certain time, or if he was to improve or lease the same and pay over the rents and profits to the use of C., the statute left the estate where it was before, and C. had no redress for any abuse of the trust or use except by subpœna in chancery. And, further, the statute did not apply at all to personal chattels given to one for the use and benefit of another. In these four cases the parties beneficially interested in the property, and equitably owning the whole of it, had no remedy at law for any withholding of their rights. The Court of Chancery laid hold of these four instances of a want of redress at law, and by its writ of subpœna compelled the performance of these four *uses* under the name of *trusts*. The legislation of our States now recognizes trusts, and provisions and rules are made for their creation, regulation, and duration, and in some States for their administration; but they are still left to the exclusive cognizance and jurisdiction of courts of equity, or to the equity powers of the common-law courts.

§ 7. Thus, interests in land became of three kinds: first, the estate in the land itself, the *old common-law fee*; secondly, the *use*, which was originally a creature of equity, but after the statute of uses it drew the estate in the land to itself, so that the fee and use were joined and made but one legal estate, not differing from the old common-law fee except in the manner of its creation; and, thirdly, the trust of which the common law takes no notice, but which in a court of equity carried the beneficial interest and profits, and is still a creature of that court, as the use was before the statute.[1] The statute of uses has never been repealed, and is still in force in many of the United States, so that if a trust should now be created in such form that the statute would have executed it if it had been a use, the statute will now execute the trust by giving the *cestui que trust* the legal title as well as the equitable without any action on the part of the trustee.[2]

§ 8. It is thus seen that our present trusts are almost identical with the old uses. Of course the growth of this system of juris-

[1] Per Lord Hardwicke, in Willett *v.* Sandford, 1 Ves. 186; Coryton *v.* Helyar, 2 Cox, 342.

[2] Shep. Touch. 508; *post*, § 296.

prudence has been slow and gradual, and it has sometimes fallen into inconsistencies and absurdities; but the abilities of upright and wise chancellors, aided by a learned and watchful profession, have finally given a regular and simple form to the administration of trusts. Lord Chief Justice Mansfield observed that in his opinion "trusts were not on a true foundation until Lord Nottingham held the great seal. By steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has since been raised. Trusts are made to answer the exigencies of families, and all other purposes, without producing one of the inconveniences, frauds, or private mischiefs which the statute of Henry VIII. c. 10, was intended to avoid. The forum where they are adjudged is the only difference between trusts and legal estates."[1] During the development of this system a vast number of distinctions and subtleties have been established and exploded. It is not necessary to follow them, as many of them never obtained a foothold in America.[2]

§ 9. Lord Nottingham became chancellor in 1673; consequently, when America was first settled, the doctrine of trusts had not been reduced to a system. Nor was there occasion for many years to apply the doctrine to the affairs of the colonists. Lands were abundant and cheap, and could be had by the taking; personal property had not accumulated; habits of life were simple and industrious; and there was little occasion for family or other settlements that rendered the intervention of a trustee either convenient or necessary. The statute of uses was passed before the colonists left England, and it became a part of the law of many, if not all the colonies. The system of trusts which grew upon the statute of uses was adopted in America much later. Even in England the development of the equitable jurisdiction of chancery met with great opposition, upon the ground, among others, that it subjected the laws of the realm to the arbitrary discretion of one man, or "made the rights of the subject depend upon the length of the chancellor's foot." Considering this opposition to the equity jurisdiction of the Court of Chancery in England, considering that trusts were not established upon a reasonable foundation when the

[1] Burgess *v.* Wheate, 1 Ed. 223; Phillips *v.* Brydges, 3 Ves. 127; Kemp *v.* Kemp, 5 Ves. 858.

[2] See them stated in Lewin on Trusts, pp. 2–17.

colonists left England, and considering the pecuniary condition of America, it is not surprising that it was long before the system received any countenance here.

§ 10. Mr. Story says that there was no equity jurisdiction in any State prior to the Revolution.[1] There was an attempt to create such a jurisdiction in the province of New York in the governor and council; but it was so unpopular[2] that it did little or no business. A court was established in Massachusetts in 1692 with full equity powers; but the act failed to receive the approval of the king in council.[3] Even since the Revolution equity jurisdiction has been of slow growth, and it is only since the beginning of this century that it has received its present development in America. As property has increased, and pecuniary affairs have become complex, and it has become necessary or convenient to make marriage settlements, or settlements upon families, children, relations, or dependants, and upon charities, the English system of trusts, fully grown, has been introduced into most of the States, and they have conferred full equity powers either upon their common-law courts, or they have established separate courts with an equity jurisdiction very similar to the jurisdiction of the Lord Chancellor in the High Court of Chancery in England.[4]

§ 11. Mr. Story further observes that it is a favorable circumstance that jurisdiction in equity was conferred upon the courts in America at so late a period, and therefore they did not become acquainted with the system until it had been settled upon a broad and rational foundation;[5] thus they were saved from crude and unintelligent opinions and judgments, which must have been given in the then condition of the law in England, and of the profession in America. These judgments must of necessity have formed a body of precedents which would have continued to plague the profession and the courts, and would have marred the symmetry of the system. As now established, the doctrine of equity and of trusts in the United States is a well-formed system; and Mr. Story thinks it even more symmetrical than the original system in England.[5]

[1] 1 Dane, Ab. c. 1, art. 7, § 51; 7 Dane, Ab. c. 225, arts. 1, 2; 2 Swift's Dig. 15; 3 Tuck. Black. App. 7.

[2] 1 John. Ch., Preface.

[3] Ancient Char. c. 222; 1 Story, Eq. Jur. § 56.

[4] 1 Story, Eq. Jur. § 56, and notes.

[5] 1 Story, Eq. Jur. § 58.

§ 12. It is not the purpose of this treatise to trace the rise and growth of the law of trusts in each one of the States. It is, on the other hand, its purpose to state the general principles which prevail in all the States. It is not possible to know or to state the legislation of so many States upon the various matters connected with the administration of trusts. The intelligent lawyer must do this for himself, when the questions before him depend upon the statutes of his State rather than upon the general principles common to all the States.[1]

§ 13. Sir Edward Coke's definition of a *use* has been adopted as an accurate legal description and definition of a *trust.* In his words applied to a use, "a trust is a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpœna in chancery."[2] The *confidence* here spoken of need not be *expressly* reposed by one party in another, for the law frequently *implies* or *construes* it to arise out of transactions between parties, when neither party supposed at the time that a trust was created between them. The trust or confidence is a thing distinguished from *legal* property, or legal *right* to property. It is neither *jus in re* nor *jus ad rem,*[3] and so the confidence may not always be reposed by a person other than the trustee, for any person may convert himself into a trustee, and give from his own acts an equitable right to another person, as *cestui que trust.* But no person can be both trustee and *cestui que trust* at the same time, for no person can sue a subpœna against himself. Therefore, if an equitable estate and a legal estate meet in the same person, the trust or confidence is extinguished, for the equitable estate merges in the legal estate. As when a father holds the legal title to land in trust for an only child, and the father dies, such legal title descends to the child as only heir, and thus both estates meet in the same person.[4] But both estates must

[1] See 4 Kent, Com. 163, and notes. See Preface to Campbell and Cambreleng's Amer. Chan. Dig. (1828); 1 Fonb. Eq. 11–20, by Laussat, 1831; 1 Amer. Jurist, 314.

[2] Co. Lit. 272 b.

[3] Wainewright *v.* Elwell, 1 Mad. 634, Bac. Uses, 5.

[4] Goodright *v.* Wells, Doug. 747; Selby *v.* Alston, 3 Ves. 339; Harwood *v.* Oglander, 8 Ves. 127; Philips *v.* Brydges, 3 Ves. 126; Wade *v.* Paget, 1 Bro.

be commensurate with each other, otherwise there can be no merger.[1]

§ 14. Again, a trust or confidence is something collateral to the land, and not part or parcel of it. Thus a charge, an incumbrance, or a term of years is a legal title in, or issuing out of, the land itself, and binds every person, however he may come into possession of the estate. The trust or confidence is an incident to the land, and so far collateral that it does not go inseparably with it. Thus it only charges those who are privy in the estate. If the trustee is disseized, or if he is turned out of the possession by a person holding a paramount title, the disseizor is not bound by the trust or confidence, because there is no privity of estate between a disseizor and disseizee. And so there must be privity between the persons to be bound by the trust; as, if a trustee dies, the legal estate will descend to his heir, who will be bound by the trust, because there is both privity of estate and of person in such a case. And so if the trustee sell the estate to a purchaser with full notice of the trust or confidence, or if he transfer the estate to a volunteer without consideration, the estate and the persons to whom it comes in such manner will be bound by the trust, because there is both privity of estate and of persons. But if the trustee sells the estate to a third person for a valuable consideration, without notice of the trust, neither the estate nor the purchaser for value and without notice will be bound by the trust, for there is in such case no privity between the persons.[2]

§ 15. All those persons who take under the trustee by operation of law are privies, both in estate and in person, to the trustee. Thus those who take as heirs under the trustee, or as tenants in dower or curtesy, or by extent of an execution, or by an assignment in insolvency or bankruptcy, are bound by the trust. It has been thought that a lord, who takes by an escheat or by a title

Ch. 363, 1 Cox, 76; Finch's Case, 4 Inst. 85, 3d Res.; Creagh v. Blood, 3 Jo. & La. 133.

[1] Phillips v. Brydges, 3 Ves. 125; Robinson v. Cuming, T. Talb. 164, 1 Atk. 473; Boteler v. Allington, 1 Bro. Ch. 72; Kendal v. Mickfield, Barn. 50; Buchanan v. Harrison, 1 John. & Hem. 662; Habergham v. Vincent, 2 Ves. Jr. 204; Merest v. James, 6 Mad. 118; Canning v. Hicks, 2 Ch. Ca. 187, 1 Vern. 412; Tabor v. Grover, 2 Vern. 367, 1 Eq. Ca. Ab. 328; Clerkson v. Bower, 2 Vern. 66, 193.

[2] Finch's Case, 4 Inst. 85, 1st Res; Gilbert on Uses, 429.

paramount, would not be bound by the trust; but the point has not been adjudged.[1]

§ 16. The doctrines of trusts are equally applicable to real and personal estate, and the same rules will govern trusts in both kinds of property.

§ 17. The *cestui que trust* has *no remedy except by subpœna in chancery;* that is, in some court with an equity jurisdiction, adequate to decree relief.[2] The *cestui que trust* cannot maintain a real action upon his equitable title, but such action must be brought in the name of the trustee.[3] There is, however, this exception, the *cestui que trust* may maintain a real action upon his equitable title against a stranger who shows no title, or no title under the trustee.[4] But the trustee may successfully defend the legal title against a suit at common law by the *cestui que trust,* unless the trust has ceased, or the trustee is enjoined by a court of equity.[5] And so the grantee of the trustee can defend such action, even though the grant may be a breach of trust.[6] At one time the common-law courts attempted to punish trustees for a breach of trust in damages, as upon an implied contract,[7] but the exercise of such an authority was soon abandoned.[8] And the rule of confining the administra-

[1] Burgess *v.* Wheate, 1 Eden, 203.

[2] Sturt *v.* Mellish, 2 Atk. 612; Allen *v.* Imlet, Holt, 641; Holland's Case, Styl. 41; Queen *v.* Orton, 14 Q. B. 139; Vanderstegen *v.* Witham, 6 M. & W. 457; Bond *v.* Nurse, 10 Q. B. 244; Edwards *v.* Lowndes, 1 El. & Bl. 81; Drake *v.* Pywall, 1 H. & C. 78; Miller's Case, Freem. 283; Witter *v.* Witter, 3 P. Wms. 102; King *v.* Jenkins, 3 Dow. & R. 41; Edwards *v.* Graves, Hob. 265; Farrington *v.* Knightly, 1 P. Wms. 149.

[3] Davis *v.* Charles River R. Co. 11 Cush. 506; Raymond *v.* Holden, 2 Cush. 268; Chapin *v.* Universalist Soc. 8 Gray, 581; Crane *v.* Crane, 4 Gray, 323; Fitzpatrick *v.* Fitzgerald, 13 Gray, 400; Baptist Soc. *v.* Hazen, 100 Mass. 322; Mordecai *v.* Parker, 3 Dev. 425; Cox *v.* Walker, 26 Me. 504; Mathews *v.* Ward, 10 G. & J. 443; Beach *v.* Beach, 14 Vt. 28; Wright *v.* Douglass, 3 Barb. S. C. 559; Moore *v.* Burnett, 11 Ohio, 334; Hopkins *v.* Ward, 6 Munf. 38; Daggett *v.* Hart, 5 Fla. 215; Goodtitle *v.* Jones, 7 T. R. 47.

[4] Stearns *v.* Palmer, 10 Met. 35; Queen *v.* Abraham, 4 Q. B. 157; Ropes *v.* Holland, 3 Ad. & El. 99; Sloper *v.* Cottrell, 2 Jur. N. S. 1046.

[5] Obert *v.* Bordine, 1 Spencer, 394; Nicoll *v.* Walworth, 4 Denio, 385; Stearns *v.* Palmer, 10 Met. 35.

[6] Stearns *v.* Palmer, 10 Met. 35; Canoy *v.* Troutman, 7 Ired. 155; Taylor *v.* King, 6 Munf. 358; Reece *v.* Allen, 5 Gil. 241.

[7] Megod's Case, Godb. 64; Jevon *v.* Bush, 1 Vern. 344; Smith *v.* Jameson, 5 T. R. 603, 1 Eq. Ca. Ab. 384, D. A.

[8] Barnadiston *v.* Soame, 7 St. Trials, 443; Sturt *v.* Mellish, 2 Atk. 612; Holland's Case, Styl. 41; Allen *v.* Imlet, Holt, 14.

tion of trusts to the courts of equity has been carried so far that the Court of King's Bench may issue prohibitions, forbidding spiritual courts from intermeddling with a trust.[1] In Pennsylvania ejectment is an equitable action, and may be maintained by the *cestui que trust*, even against the trustee, when the former is entitled to the possession.[2]

§ 18. Trusts are divided into *simple* and *special* trusts. A *simple* trust is a simple conveyance of property to one upon trust for another, without further specifications or directions. In such case the law regulates the trust, and the *cestui que trust* has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estate as are necessary. A *special* trust is where special and particular duties are pointed out to be performed by the trustee. In such cases he is not a mere passive agent, but he has active duties to perform, as when an estate is given to a person to sell, and from the proceeds to pay the debts of the settlor.

§ 19. Trusts have been further divided into *ministerial* and *discretionary* trusts. A trust to do a simple act, as to convey to the *cestui que trust*, at his request, is a ministerial trust, as it is a mere ministerial or instrumental act requiring the exercise of no judgment or discretion; but if a choice of time, manner, or place is given to the trustee, or if he must use his best judgment in the execution of the trust, it is a *discretionary* trust.[3] Mr. Fearne contends that a trust to sell is a ministerial trust, for the price is not arbitrary, nor at the trustee's discretion, but is to be the best that can be obtained;[4] but Mr. Lewin insists that it is a discretionary trust, as there is much room for judgment in the proceeding,[5] and it may be added that there is room for skill in procuring the best possible price. But the distinction is not very important, as the duties of a trustee for sale are the same, whether the trust is called ministerial or discretionary.

[1] Petit *v.* Smith, 1 P. Wms. 7; Edwards *v.* Freeman, 2 P. Wms. 441; Barker *v.* May, 4 M. & R. 386; *Ex parte* Jenkins, 1 B. & C. 655.

[2] Kennedy *v.* Fury, 1 Dall. 72; Presbyterian Cong. *v.* Johnson, 1 W. & S. 56; School, &c. *v.* Dunklelerger, 6 Barr, 29.

[3] Attorney-General *v.* Gleg, 1 Atk. 356; Cole *v.* Wade, 16 Ves. 27; Gower *v.* Mainwaring, 2 Ves. 87; Hibbard *v.* Lambe, Amb. 309; Potter *v.* Chapman, Amb. 98; Attorney-General *v.* Scott, 1 Ves. 413, 4 Kent Com. 304, 305.

[4] Fearne's P. W. 313.

[5] Lewin on Trusts, 19; King *v.* Bellord, 1 Hem. & Mil. 343; Robson *v.* Flight, 5 N. R. 344; Clarke *v.* Royal Panopticon, 4 Drew. 29.

§ 20. There is a mixed *trust and power*, as where the settlor sketches the outline of a trust and leaves the details to be settled and carried into effect, according to the best judgment of his trustees. The power joined to the trust in such case is *imperative* and must be exercised; but the mode of its execution is a matter of judgment and *discretionary*. But this kind of trust and power is not to be confounded *with a trust to which a power is annexed*. In this case the trust is complete in itself, and the power is a simple addition, which may or may not be exercised, as the trustee shall choose, as where lands are given to trustees for a particular purpose, and a power of sale, or of changing the securities, is added; the power is no part of the trust, but it is something collateral, which the court cannot compel the trustee to perform. But a trust to distribute the trust fund, according to the discretion of the trustee, is an imperative trust and power.[1]

§ 21. Trusts are also said to be *legal* or *illegal*. Trusts are legal when they are for some honest purpose, as to pay debts or make a provision for families. They are illegal when they are for purposes of immorality, or vice, or contravene some statute, or are contrary to public policy. In such case a court of equity will not give its aid in carrying them into execution.[2]

§ 22. Again, trusts are either *public* or *private*. Private trusts concern only individuals or families, for private convenience and support. *Public trusts* are for public charities or for the general public good. They concern the general and indefinite public.

§ 23. Private trusts which concern individuals are limited in their duration. Being for individuals, they must be certain, and the individual or individuals must be identified within a limited period. They can endure only for a life or lives in being, and twenty-one years in addition. On the other hand, public trusts or charities, existing for the general and indefinite public, may continue for an indefinite period.[3]

[1] Cole *v.* Wade, 16 Ves. 43; Gower *v.* Mainwaring, 2 Ves. 89; Steere *v.* Steere, 5 John. Ch. 1.

[2] Bacon on Uses, 9.

[3] Christ's Hospital *v.* Grainger, 1 Mac. & G. 460; Attorney-General *v.* Aspinal, 2 M. & Cr. 622; Attorney-General *v.* Heelis, 2 S. & S. 76; Attorney-General *v.* Shrewsbury, 6 Beav. 220; Walker *v.* Richardson, 2 M. & W. 892. See Attorney-General *v.* Forster, 10 Ves. 344; Attorney-General *v.* Newcombe, 14 Ves. 1; Fearon *v.* Webb, 14 Ves. 19.

§ 24. Trusts are divided in reference to their creation into express trusts, implied trusts, resulting trusts, and constructive trusts. Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, persons, and purposes of the trust; hence they are called direct or express trusts in contradistinction from those trusts that are implied, presumed, or construed by law to arise out of the transactions of parties. As express trusts are directly declared by the parties, there can never be a controversy whether they exist or not. In such trusts these questions arise, Are they legal or illegal, and what is the construction of the various terms and provisions which they contain?

§ 25. Implied trusts are trusts that the courts imply from the words of an instrument, where no express trust is declared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust.

§ 26. Resulting trusts are trusts that the courts presume to arise out of the transactions of parties, as if one man pays the purchase-money for an estate, and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money.

§ 27. A constructive trust is one that arises when a person, clothed with some fiduciary character, by fraud or otherwise gains some advantage to himself. Courts construe this to be an advantage for the *cestui que trust* or a constructive trust.

CHAPTER II.

PARTIES TO TRUSTS; AND WHAT PROPERTY MAY BE THE SUBJECT OF A TRUST.

I. *Who may create a trust.*

§ 28. It may be stated, as a general proposition, that every one competent to enter into a contract, or to make a will, or to deal with the legal title to property, may make such disposition of it as he pleases; and he may annex such conditions and limitations to the enjoyment of it as he sees fit; and he may vest it in trustees for the purpose of carrying out his intention. All persons, *sui juris*, have the same power to create trusts that they have to make a disposition of their property. A conveyance or disposition of property by persons not *sui juris* is valid to the extent of their legal capacity.

§ 29. The king may, by charter, grant his private property to one person upon trust for another.[1] But the trust must appear upon the face of the patent, and cannot be proved by parol.[2] He can also by will in writing under the sign-manual bequeath his private personal property to trustees for the use of another.[3] He may by warrant grant prizes taken in war to trustees, to be distributed among the captors,[4] and by statute he is authorized to convey trust property which has escheated to the Crown to trustees to execute the trust.[5]

§ 30. In the United States the sovereignty resides in the organized people; and all public officers are subjects and citizens, and they can convey their private property to trustees in the same manner as private individuals. The State itself by its legislation, or by its public officers duly authorized, can create a trust, convey property, and appoint trustees;[6] and such trustees are equally amenable to the jurisdiction of chancery.[7] But a State cannot remove the trustees of a private corporation and appoint others in their stead.[8]

[1] Bac. Uses, 66.

[2] Fordyce *v.* Willis, 3 Bro. Ch. 577.

[3] 39 & 40 Geo. III. c. 88. But it is said that probate of his will cannot be granted. Williams' Ex'rs, 13.

[4] Alexander *v.* Duke of Wellington, 2 R. & M. 35; Stevens *v.* Bagwell, 15 Ves. 140. But it is said that the *cestui que trust* cannot maintain a suit against the trustees in such cases.

[5] 39 & 40 Geo. III. c. 88.

[6] Commissioners *v.* Walker, 6 How. (Miss.) 143.

[7] Cottrell *v.* Hampson, 2 Vern. 5; Buchanan *v.* Hamilton, 5 Ves. 722.

[8] State *v.* Bryce, 7 Ohio, 414; Dart. Coll. *v.* Woodward, 4 Wheat. 518.

§ 31. All corporations, subject to the terms of the charters and laws under which they exist, may alienate their property; and their power to appoint trustees, and to declare in what manner the property shall be enjoyed, is coextensive with the right of alienation.[1]

§ 32. By the civil law married women could alienate their property and dispose of it by will. By the common law they were almost wholly incapacitated from dealing with their estates. The tendency of modern legislation is to remove these disabilities, and to enable them to make contracts and wills, as if they were sole, in relation to property held by them in their own right. By joining their husbands in fines and recoveries in England,[2] and in deeds in America executed according to the prescribed formalities, they can, as a general rule, convey their property to trustees.[3] In those States where a married woman can convey her real and personal property without joining her husband, she can convey it to trustees to such uses as she may appoint; and where statutes have given her a testamentary capacity, she can create trusts and appoint trustees by her will.[4] A married woman is considered in all respects as a *feme sole* in regard to property settled to her separate use;[5] as if real estate is conveyed to a trustee and his heirs, or if personal estate is assigned to a trustee and his executors, for her sole and separate use, the absolute interest to be at her sole disposal, she has the entire control, and may exercise her ownership or implied power of appointment by creating a trust extending even beyond her coverture.[6] If she is tenant for life,

[1] Colchester *v.* Lowten, 1 V. & B. 226; Attorney-General *v.* Aspinwall, 2 M. & Cr. 613; Attorney-General *v.* Wilson, 1 Cr. & Ph. 1; Catlin *v.* Eagle Bank, 6 Conn. 233; State of Maryland *v.* Bank of Maryland, 6 Gill & J. 205; Dana *v.* Bank of United States, 5 W. & S. 224; Arthur *v.* Comm. Bank, 9 S. & M. 394; Barry *v.* Merchants Exch. Co. 1 Sand. Ch. 280; Hopkins *v.* Turnpike Co. 4 Humph. 403; Reynolds *v.* Stark County, 5 Ham. 204; Angell on Corp. § 191. In England, municipal corporations are declared by statute to be trustees of their real and personal estate, and they are debarred from alienating it without the consent of the Lords of the Treasury. 5 & 6 Wm. IV. c. 76, § 94.

[2] 3 & 4 Wm. IV. c. 74.

[3] Durant *v.* Richie, 4 Mason, 45.

[4] 1 Redfield on Wills, pp. 21–28.

[5] Lewin on Trusts, p. 23 (5th London ed.); Hill on Trustees, p. 421 (4th Amer. ed.).

[6] The English rule is stated in the text. The courts in some of the United States follow the same rule; in others, a different rule is established. All the distinctions are stated, and the authorities collected in the chapter upon Trusts for Married Women.

to her sole use, she can make a settlement of her life-estate. But if the power of anticipation is restrained, she can make no disposition except of the annual produce, which has actually accrued or become due. A married woman will be treated as a *feme sole* only in regard to property *settled* upon her, and her power of disposing of property thus *settled* will be governed by a strict interpretation of the instrument of settlement. If the deed of settlement points out the manner in which she may dispose of her interest, she must follow that particular manner; as if the power is given her to convey or appoint by deed, she cannot convey or appoint by will; and if by will, she cannot convey by deed. If the instrument is silent as to her power to convey, she may devise the property by will.[1] Savings by a wife out of an allowance made by her husband for her separate maintenance are treated in equity as her separate estate, which she may dispose of;[2] and so are the accumulations and savings from the income of a trust for her sole benefit.[3] But savings from pin-money allowed by the husband for the personal expenses, clothing, and adornment of the wife, revert to the husband, and the wife cannot dispose of them.[4]

§ 33. Infants can create trusts which are good until they are avoided.[5] The tendency of modern decisions is to hold that the acts and contracts of infants are voidable only, and subject to their election when of age either to avoid or confirm them.[6] Mr. Greenleaf says that "it may be safely stated as the result of the American authorities, that the act or contract of an infant is in no case to be held purely void, unless from its nature and solemnity, as well as from the operation of the instrument, it was manifestly and necessarily prejudicial to him. Wherever it *may be* for his benefit, it is at most but voidable; and if it be an act which it was either his duty[7] to do, or was manifestly for his benefit, it shall bind him."[8] But a court of equity would not allow an equitable

[1] Michael *v.* Baker, 18 Md. 158. [2] Brooke *v.* Brooke, 25 Beav. 342.

[3] Story, Eq. Jur. § 1375; Frazier *v.* Center, 1 McCord, Eq. 270; Picquet *v.* Swann, 4 Mason, 455.

[4] Jodrell *v.* Jodrell, 9 Beav. 45; Story, Eq. Jur. § 1375 a.

[5] Co. Litt. 248 a; Hearle *v.* Greenbank, 1 Ves. 304.

[6] 2 Kent, 235; Tucker *v.* Moreland, 10 Pet. 58, 71.

[7] Zouch *v.* Parsons, 3 Burr. 1794, 2 Kent, 234–236; People *v.* Moores, 4 Denio, 518; McCall *v.* Parker, 13 Met. 372.

[8] 4 Cruise, Dig. by Greenleaf, p. 15, note, and authorities cited; Eagle Fire Co. *v.* Lent, 1 Edw. Ch. 301; 6 Paige, 635.

interest to be enforced against an infant to his prejudice, and would give him the same power of avoidance over the equitable, as over the legal estate. And if the infant died without having avoided the trust, the court will still investigate the transaction and see that no unfair advantage was taken.[1]

§ 34. The effect of a marriage settlement by a female infant, by which her real and personal estate is conveyed to trustees has been frequently mooted in courts. It has been decided that as infants may contract marriage, a settlement made by the consent of their parents and guardians in consideration of a marriage to be afterwards solemnized, should be binding, inasmuch as if the marriage afterwards takes place, the situation of the parties is altered, and the interests of third persons, or children born of the marriage, may be affected. Lord Macclesfield and Lord Hardwicke upon these considerations refused to disturb such settlements.[2] But Lord Thurlow dissented from these opinions;[3] and the law is now settled, that a deed, executed by a female infant in consideration of marriage, does not bind her real estate, unless, having come of age, she assents to it after the death of her husband.[4] There is no reason why the marriage settlement of a male infant should not be governed by the same rule, except that he could confirm the same after he became of age, and before the death of his wife. The settlement will bind the husband if he is of full age.[5] It has been settled, however, after considerable conflict, that a female infant may bar herself of dower and of a distributive share in her husband's estate by accepting a jointure before marriage.[6] And she may, before marriage, make a binding settle-

[1] Lewin on Trusts, p. 25; 4 Cruise, Dig. p. 130.

[2] Cannel *v.* Buckle, 2 P. Wms. 243; Harvey *v.* Ashley, 3 Atk. 607; Tabb *v.* Archer, 3 Hen. & M. 399; Healy *v.* Rowan, 5 Grat. 414; Lester *v.* Frazer, Riley, Ch. 76; 2 Hill, Ch. 529.

[3] Dumford *v.* Lane, 2 Bro. Ch. 106.

[4] Milner *v.* Lord Harewood, 18 Ves. 259; Trollop *v.* Linton, 1 Sim. & Stu. 477; Simson *v.* Jones, 2 Russ. & My. 365; Temple *v.* Hawley, 1 Sand. Ch. 153; Dominick *v.* Michael, 4 Sand. Ch. 374; Levering *v.* Levering, 3 Md. Ch. 365; Shaw *v.* Boyd, 5 S. & R. 312; Wilson *v.* McCulloch, 19 Penn. St. 77; Healy *v.* Rowan, 5 Grat. 414; *In re* Waring, 12 Eng. L. & Eq. 351; Cave *v.* Cave, 19 Eng. L. & Eq. 280; Field *v.* Moore, 7 De G., M. & G. 691; 35 Eng. L. & Eq. 498; Lee *v.* Stuart, 2 Leigh, 76.

[5] Ibid.; Whichcote *v.* Lyle's Ex'rs, 28 Penn. St. 73; Levering *v.* Heighbee, 2 Md. Ch. 81.

[6] Drury *v.* Drury, 2 Eden, 39; Buckinghamshire *v.* Drury, 2 Eden, 60–75; McCartee *v.* Teller, 2 Paige, 511.

ment of her personal estate, for such a settlement will be for her benefit, as otherwise it would vest in the husband, and it would in effect be his settlement and not hers;[1] but such settlement is not good of chattels that would not go to the husband. It is now settled in England by statute that a male infant over twenty years of age and a female over seventeen may make a valid marriage settlement of their real and personal estates, under the sanction of the Court of Chancery.[2]

§ 35. It was a maxim of the common law, that no man of full age could be allowed to stultify himself; hence the acts, deeds, and feofments of idiots and lunatics were held to be binding, and not voidable by the party himself, though they could be avoided by his heirs, executors, or administrators.[3] This maxim never prevailed in the United States, and is not now the law of England. The conveyance of a lunatic is not, however, absolutely void, but only voidable by himself as well as by his friends and representatives.[4] But after inquisition declaring him incompetent, all contracts made by him, until restored to the control of his property, are void.[5] It follows that a conveyance by a lunatic upon a trust will be good until it is avoided, and a court of equity would not set it aside, if it was fair and reasonable,[6] and if the parties could not be restored to their original condition; nor would the court interfere against *bona fide* purchasers without notice of the lunacy.[7]

§ 36. An alien may take real estate by devise or purchase, though he cannot take by operation of law, as by descent, or as tenant by

[1] Dumford *v.* Lane, 1 Bro. Ch. 111; Levering *v.* Levering, 3 Md. Ch. 365; Field *v.* Moore, 7 De G., M. & G. 691; Ainslie *v.* Medlicott, 9 Ves. 19; Stamper *v.* Barker, 5 Mad. 164; Williams *v.* Chitty, 3 Ves. 551; Johnson *v.* Bayfield, 1 Ves. 315; Simson *v.* Jones, 2 Russ. & My. 365.

[2] 18 & 19 Vict. c. 43. 1855.

[3] Co. Litt. 247 b.

[4] Allis *v.* Billings, 6 Met. 415; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 239; Price *v.* Berrington, 3 Mac. & G. 486; Moulton *v.* Camroux, 2 Exch. 487, 4 Exch. 17; Milner *v.* Turner, 4 Monr. 245; Ballew *v.* Clark, 2 Ired. 23; Owing's Case, 1 Bland, 370; Elliott *v.* Ince, 7 De G., M. & G. 488; Campbell *v.* Hooper, 3 Sm. & Giff. 153; Wait *v.* Maxwell, 5 Pick. 217; Mitchell *v.* Kingman, ib. 431; Snowdon *v.* Dunlavey, 11 Penn. St. 522.

[5] L'Amoureux *v.* Crosby, 2 Paige, 422; Pearl *v.* McDowell, 3 J. J. Marsh. 658.

[6] Niel *v.* Morley, 9 Ves. 478; Story, Eq. Jur. § 228.

[7] Carr *v.* Halliday, 1 Dev. & Batt. 344; Price *v.* Berrington, 3 Mac. & G. 486; Greenslade *v.* Dare, 20 Beav. 285.

curtesy. If an alien takes land by purchase, he may hold it until office found; and if he conveys it in trust or otherwise, his grantee will hold it until office found. An alien can therefore create a trust of real estate only until the State interposes. An alien may exercise all rights of ownership over personal property, consequently he can create a valid trust in it.[1]

§ 37. By the bankrupt law of England all the property which the bankrupt is entitled to up to the date of the certificate of his discharge vests in his assignees;[2] and he can create no trust in it, except in the surplus that may remain after the payment of all his debts.[3] Under the bankrupt laws of the United States and the insolvent laws of the various States, only the interests of the bankrupt existing at the date of the assignments vest in his assignees;[4] he may therefore create a valid trust in property acquired after the assignment and before the certificate.

II. *Who may be a Trustee.*

§ 38. It is a rule that admits of no exception, that equity never wants a trustee, or, in other words, that if a trust is once properly created, the incompetency, disability, death, or non-appointment of a trustee shall not defeat it.[5] Thus, if property has been bequeathed in trust, and no trustee, or a trustee disabled from taking, or one who is dead, or refuses to take, is appointed, the court will decree the execution of the trust by the personal representatives, if it is personal property, and by the heirs or devisees, if it is real estate.[6] Property once charged with a valid trust will be followed in equity into whosesoever hands it comes, and he will be charged with the execution of the trust, unless he is a purchaser

[1] 2 Kent, pp. 1–36; Lewin on Trusts, p. 25; Hill on Trustees, p. 47.

[2] 12 & 13 Vict. c. 106, §§ 141, 142.

[3] Lewin on Trusts, p. 26; Hill on Trustees, p. 47.

[4] In matter of Grant, 2 Story, 312; Mosby *v.* Steele, 7 Ala. 299; *Ex parte* Newhall, 2 Story, 360.

[5] Co. Litt. 290 b, 113 a, Butler's note (1); Story, Eq. Jur. §§ 98, 976; McCartee *v.* Orph. Asy. Soc. 9 Cow. 437; Crocheron *v.* Jaques, 3 Edw. 207.

[6] Piatt *v.* Vattier, 9 Pet. 405; Gibbs *v.* Marsh, 2 Met. 243; Withers *v.* Yeadon, 1 Rich. Eq. 325; King *v.* Donnelly, 5 Paige, 46; Dawson *v.* Dawson, Rice, Eq. 243; Cushney *v.* Henry, 4 Paige, 345; De Baranti *v.* Gott, 6 Barb. 492; Malin *v.* Malin, 1 Wend. 625; McIntire *v.* Janesville, C. & M. Co. 9 Ham. 293; Kerr *v.* Day, 14 Penn. St. 114; Attorney-General *v.* Downing, Amb. 550; Bennett *v.* Davis, 2 P. Wms. 316; Sonley *v.* Clockmakers' Co. 1 Bro. Ch. 81.

for value, and without notice.[1] The holder of the legal title and the absolute interest in property may convert himself into a trustee by making a valid declaration of trust upon good consideration;[2] or if he conveyed the property by some conveyance which was inoperative in law, equity would hold him to be a trustee;[3] as if a man conveys property directly to his wife, a transaction inoperative in most of the States, equity would uphold the act, and decree the husband to be a trustee.[4]

§ 39. It may be stated, in general terms, that whoever is capable of taking the legal title or beneficial interest in property, may take the same in trust for others.[5] Whatever persons or corporations are capable of having the legal title or beneficial interest cast upon them by gift, grant, bequest, descent, or operation of law, may take the same subject to a trust, and they will become trustees. But it does not follow that whoever is capable of taking in trust, is capable of performing or executing it. The inquiry, then, is not so much who may take in trust, as it is who may execute and perform a trust. If a trust is cast upon a person incapable of taking and executing it, courts of equity will execute the trust by decree, or they will appoint some person capable of performing the requirements of the trust. Mr. Lewin says that "in general terms, a person to be appointed trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and domiciled within the jurisdiction of the court."[6] Sir George J. Turner, L. J., laid down the general rules which govern courts in making appointments of trustees as follows: —

[1] Ibid.; Shepherd *v.* McIvers, 4 John. Ch. 136.

[2] See notes to Woollam *v.* Hearne, 2 Lead. Cas. Eq. 404; Mackreth *v.* Simmons, 1 Lead. Cas. Eq. 235.

[3] McKay *v.* Carrington, 1 McLean, 50; Kerr *v.* Day, 14 Penn. St. 114; Crawford *v.* Bertholf, Saxt. Ch. 458; Malin *v.* Malin, 1 Wend. 625; Tyson *v.* Passmore, 2 Barr, 122; Ten Eick *v.* Simpson, 1 Sand. Ch. 244; Waddington *v.* Banks, 1 Brock. 97; Atcherly *v.* Vernon, 10 Mad. 518; Davie *v.* Beardsham, 1 Ch. Ca. 39; Green *v.* Smith, 1 Atk. 572; Pollexfen *v.* Moore, 3 Atk. 293; Wall *v.* Bright, 1 J. & W. 500.

[4] Huntly *v.* Huntly, 8 Ired. Eq. 250; Livingston *v.* Livingston, 2 John. Ch. 537; Garner *v.* Garner, 1 Busb. Eq. 1.

[5] Fonb. Eq. 139, n.; Hill on Trustees, 48; Commissioners *v.* Walker, 6 How. (Miss.) 146.

[6] Lewin on Trusts, 27.

"First, the court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be trustee of the instrument, there cannot, as I apprehend, be the least doubt that the court would not appoint to the office a person whose appointment was so prohibited; and I do not think that upon a question of this description any distinction can be drawn between express declaration and demonstrated intention. The analogy of the course which the court pursues in the appointment of guardians affords, I think, some support to this rule. The court in those cases attends to the wishes of the parents, however informally they may be expressed.

"Another rule which may, I think, safely be laid down, is this, — that the court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator, or to the interests of other of the *cestuis que trust*. I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties interested in the trust. Every trustee is in duty bound to look after the interests of all, and not of any particular member or class of members of his *cestuis que trust*.

"A third rule which may be safely laid down is, that the court, in appointing a trustee, will have regard to the question whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into execution." [1]

§ 40. The sovereign may sustain the character of a trustee. He has a legal capacity to take and hold the estate, and to execute the trust,[2] but there is a difficulty in every country in executing the judgments and decrees of a court against the sovereign power of the country. In England it is said that the Court of Chancery has no jurisdiction over the king's conscience, for the Lord Chancellor only exercises the equitable authority of the king himself in judging between his subjects. But the greater difficulty is in enforcing the decrees of a court against the sovereign power; for "the arms of equity are very

[1] *In re* Tempest, 1 Law Rep. Ch. 487.
[2] Lewin on Trusts, 27.

short against the prerogative."[1] The subject may have a clear right, but no remedy either at law or equity against the Crown; in such case his only resource is an appeal to the king by a petition of right, and it cannot be supposed that he would be refused. The question is now of less importance; for by statute, if trust property vests in the Crown by escheat, the king is enabled to grant it to trustees for the purpose of executing the trust.[2] And by an amendment, it is further provided that property held in trust shall not escheat or be forfeited to the Crown by the failure or forfeiture of the trustee;[3] and it is still further provided, that in such cases trust property shall be under the control of the Court of Chancery for the use of the parties beneficially interested, and that new trustees shall be appointed.[4] Under these statutes it is said that an equity will be enforced against the Crown.[5] The only cases where the question is still open, whether a trust can be enforced against the Crown, is where the person of the sovereign takes by descent as heir, or by representation, or where he may have held as trustee previously to his acquiring the crown, or where a grant or bequest is made to him as a trustee.[6]

§ 41. The United States, and each one of the separate States, may sustain the character of trustee. They have legal capacities to take and execute trusts for every purpose.[7] But a court cannot execute its judgments and decrees against a sovereign State with any more effect than the courts of England can enforce their orders against the king. The arms of equity in America are as short against the sovereign power as they are in England against the prerogative. Mr. Justice Gray has clearly shown that a State can not be sued in law or equity against its consent, or unless there is

[1] Pawlett *v.* Attorney-General, Hard. 467; Burgess *v.* Wheate, 1 Ed. 255; Kildare *v.* Eustace, 1 Vern. 439; Wike's Case, Lane, 54; Penn *v.* Lord Baltimore, 1 Ves. 453; Reeve *v.* Attorney-General, 2 Atk. 224; Hoveden *v.* Lord Annesley, 2 Sch. & L. 617; Hodge *v.* Attorney-General, 3 Yo. & Col. 342; Briggs *v.* Life-boats, 11 Allen (Mass.), 157, where all the authorities are commented on.

[2] 39 & 40 Geo. III. c. 88.

[3] 4 & 5 Wm. IV. c. 23.

[4] 13 & 14 Vict. c. 60, §§ 15, 46, 47.

[5] Hughs *v.* Wells, 9 Hare, 749; 13 Eng. L. & Eq. 389.

[6] Hill on Trustees, 50.

[7] See Mitford *v.* Reynolds, 1 Phill. 185; Nightingale *v.* Goulbourne, 2 Phill. 54; 5 Hare, 484. It was denied, however, that the United States could take in trust in Levy *v.* Levy, 33 N. Y. 97.

some general or special statute authorizing the suit.[1] A subject may have a clear right, but no remedy; in such case he must petition the legislative power, and there is no reason to suppose that his right would be refused. If a State accepts a trust by grant or bequest, it must act through its legislative powers in administering the trust, or in creating and appointing agents or officers to perform the duties which it assumes; as the United States acted in relation to the bequest of James Smithson in trust for the establishment of the Smithsonian Institution for the increase and diffusion of knowledge among men.[2] A limitation over of a charitable devise to the States of Maryland and Louisiana in case of forfeiture by the first takers was held not to vitiate the bequest.[3]

§ 42. It was formerly laid down that corporations could not be seised of lands to the use of another, and could not be trustees.[4] The reason assigned for this rule was, that no trust or confidence could be reposed in them; that they could not be compelled to execute a use or perform a trust, for courts of equity, in decreeing the execution of a trust, lay hold upon the conscience;[5] and it is impossible to attach any demand upon the conscience of a body so artificially created that it cannot in the nature of things have a conscience. Again it was said that they could not be imprisoned, if they refused to obey the decrees of the court. But the technical rules upon which it was held that corporations could not be trustees have ceased to operate; and at the present day corporations of every description may take and hold estates, as trustees, for purposes not foreign to the purposes of their own existence; and they may be compelled by courts of equity to carry the trusts into execution.[6] If they misapply the trust fund, or refuse to obey

[1] Briggs v. Life-boats, 11 Allen, 157.

[2] U. S. Stat. 1836, c. 252, Vol. V. p. 64 (L. & Bro. ed.); also, Stat. 1846, c. 178, Vol. IX. p. 102.

[3] McDonogh's Ex'rs v. Murdock, 15 How. 367.

[4] Bacon on Uses, 57; 1 Cruise, Dig. p. 340.

[5] Sugd. V. & P. p. 417.

[6] Attorney-General v. St. John's Hosp. 2 De G., J. & Sm. 621; Attorney-General v. Landerfield, 9 Mod. 286; Dummer v. Chippenham, 14 Ves. 252; Green v. Rutherford, 1 Ves. 468; Attorney-General v. Whorwood, 1 Ves. 536; Attorney-General v. Stafford, Barn. 33; Attorney-General v. Found. Hosp. 2 Ves. Jr. 46; Attorney-General v. Clarendon, 17 Ves. 499; Attorney-General v. Caius Coll. 2 Keen, 165; Attorney-General v. Ironmongers' Co. 2 Beav. 313; Jackson v. Hartwell, 8 John. 422; Trustees Phillips Academy v. King, 12

the decrees of the court the proper remedy is by distringas, sequestration, or injunction, or by removal and appointment of new trustees.[1]

§ 43. It must be understood, however, that corporations are the creatures of the law, and that as a general rule they cannot exercise powers not given to them by their charters or acts of incorporation.[2] For this reason they cannot act as trustees in a matter in which they have no interest, or in a matter that is inconsistent with, or repugnant to, the purposes for which they were created.[3] Nor can they act as trustees if they are forbidden to take and hold lands, as by the statutes of mortmain, nor if they are not empowered to take the property. But if the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but germane to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them,[4] if it accepts them. Thus towns, cities, and parishes may take and hold property in trust for the establishment of colleges,[5] for the purpose of educating the poor,[6] for the relief of the poor, though not paupers, by furnishing them fuel at a low price,[7] and for the support of schools.[8] So also overseers of the poor, supervisors of a county,[9] commissioners of roads in South Carolina,[10] trustees of the poor in Mississippi, and also trus-

Mass. 546; Attorney-General *v.* Utica Ins. Co. 2 Johns. Ch. 384; Vidal *v.* Girard, 2 How. 187; Miller *v.* Lerch, 1 Wal. Jr. 210; Columbia Bridge Co. *v.* Kline, Bright. N. P. 320; Greenville Acad. 7 Rich. Eq. 476; McDonogh *v.* Murdock, 15 How. 367; Green *v.* Dennis, 6 Cow. 304; Dublin Case, 38 N. H. 577.

[1] Mayor of Coventry *v.* Attorney-General, 2 Bro. P. C. 235; 2 Mad. Ch. 77, 209.

[2] In Matter of Howe, 1 Paige, 214.

[3] In Matter of Howe, 1 Paige, 214; Jackson *v.* Hartwell, 8 Johns. 422.

[4] Story, J., Vidal *v.* Girard, 2 How. 188-190; McDonogh *v.* Murdock, 15 How. 367; First Cong. Soc. of Southington *v.* Atwater, 23 Conn. 56.

[5] Vidal *v.* Girard, *ut supra.*

[6] McDonogh *v.* Murdock, *ut supra.*

[7] Webb *v.* Neal, 5 Allen, 575; McIntire Poor School *v.* Zanesville Canal Co. 8 Ohio, 217.

[8] First Parish in Sutton *v.* Cole, 3 Pick. 232.

[9] North Hampstead *v.* Hampstead, 2 Wend. 109; Jansen *v.* Ostrander, 1 Cow. 670.

[10] Com. Roads, 1 Speer, 218.

tees of the school fund,[1] are corporations *sub modo;* and they may take and execute trusts within the scope of their official duties.

§ 44. A bank may receive a deed, and hold land in trust to receive a debt due to it.[2] One corporation may take and hold in trust for another, or for a stranger,[3] or for an individual; as where one gave a legacy to a church corporation in trust to pay the income to his housekeeper for life, and after her death to apply it to church purposes, it was held that the corporation might well execute the trust, on the principle that when property is given to a corporation partly for its own use and partly for the use of another, the power of the corporation to take and hold for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others.[4] The supervisors of a county cannot take in trust for a town or village or for individuals, but only for the body which they represent.[5] Whether a particular corporation can hold as trustee for any specific purpose must generally be determined by the construction of its charter and of the laws of the State in which it acts.[6]

§ 45. If a corporation takes land by grant or bequest in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the State only can interfere.[7] A corporation cannot be compelled to execute a trust in property, the legal title to which it has no power to take and hold;[8] but the trust, if otherwise valid, is not for that reason void, and the court will appoint a competent trustee and direct a conveyance

[1] Govenor *v.* Gridley, Walk. 328; Carmichael *v.* Trustees, &c., 3 How. (Miss.) 84.

[2] Morris *v.* Way, 16 Ohio, 478.

[3] Phillips Academy *v.* King, 12 Mass. 546.

[4] In Matter of Howe, 1 Paige, 214.

[5] Jackson *v.* Hartwell, 8 John. 422.

[6] Dartmouth Coll. *v.* Woodward, 4 Wheat. 636; Head *v.* Providence Ins. Co. 2 Cranch, 127; State *v.* Stebbins, 1 Stew. 299; Beaty *v.* Knowles, 4 Pet. 152; Beaty *v.* Marine Ins. Co. 2 John. 109; People *v.* Utica Ins. Co. 15 John. 358; New York Fire Ins. Co. *v.* Ely, 2 Cow. 678; State *v.* Mayor of Mobile, 5 Porter, 279.

[7] Runyan *v.* Coster's Lessee, 14 Pet. 122; Miller *v.* Lerch, 1 Wal. Jr. 210; Leazure *v.* Hillegas, 7 S. & R. 321; Perin *v.* Cary, 24 How. 465; Chapin *v.* School Dist. 35 N. H. 445; Troy *v.* Haskell, 33 N. H. 533; Philadelphia *v.* Girard, 45 Penn. St. 9.

[8] Sonley *v.* Clockmakers' Co. 1 Bro. Ch. 81; Vidal *v.* Girard, 2 How. 188.

of the property to him; as where a testator gave land to a corporation that could not take by reason of the statute of mortmain, in trust to sell and apply the proceeds to persons competent to take, it was held that though the devise was void at law, yet in equity it was a valid trust, and that the heir was a trustee to the uses declared in the will.[1]

§ 46. Grants or gifts to an unincorporated association in trust for a charitable purpose are sustained in equity, as a legacy to the Seamen's Aid Society, to go to their treasurer for the time being for the purposes of such society;[2] a bequest over to several unincorporated societies, some of them not in the State, was held good,[3] and if the members are too numerous to administer the trust, the court will appoint a trustee.[4] So a bequest to "The Marine Bible Society," for certain purposes, was held to establish a charitable trust, although the society was a voluntary association, and had been disbanded, and the court appointed a trustee to carry the trust into effect.[5] In Pennsylvania substantially the same doctrine has been held.[6] A different doctrine was held in the Supreme Court of the United States;[7] but the case was decided upon the law of Virginia, and may be considered as settling a local rather than a general question.[8] The later cases in the same court hold the general rule to be otherwise.[9]

[1] Sonley *v.* Clockmakers' Co. 1 Bro. Ch. 81, and Vidal *v.* Girard, *ut sup.*; Winslow *v.* Cummings, 3 Cush. 378. This is denied to be the law in the courts of New York, in relation to charitable bequests. See Ayres *v.* Methodist Church, 3 Sand. 351; Andrew *v.* Bible Soc. 4 Sand. 156; Levy *v.* Levy, 40 Barb. 585; 33 N. Y. 97. These cases are governed by a statute as is said, and would not probably be followed outside of that State; nor are they fully concurred in by their own courts, as there was a strong dissent in the Court of Appeals, the court of last resort.

[2] Tucker *v.* Seamen's Aid Soc. 7 Met. 188; First Cong. Soc. of Southington *v.* Atwater, 23 Conn. 56.

[3] Burbank *v.* Whitney, 24 Pick. 146; Washburn *v.* Sewall, 9 Met. 280. But see Methodist Church *v.* Remmington, 1 Watts, 218.

[4] Ibid.

[5] Winslow *v.* Cummings, 3 Cush. 358.

[6] Pickering *v.* Shotwell, 10 Barr, 27; and see the able opinion of Baldwin, J., in Magill *v.* Brown, Bright. N. P. 350. See also Methodist Church *v.* Remmington, 1 Watts, 218.

[7] Baptist Asso. *v.* Hart, 4 Wheaton, 1; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 114.

[8] Baldwin, J., in Magill *v.* Brown, Bright. 354.

[9] Vidal *v.* Girard, 2 How. 187. See chapter on Charitable Trusts, *post.*

§ 47. A trust to a board of officers in their official capacity for purposes within the scope of their official duties may be executed by them.[1] Where a bequest was to the chancellor of the State of New York, the mayor and recorder of the city of New York and several other persons by their official description only, and their successors in office, to build and maintain a hospital, and if this could not be done legally, they were to apply for an act of incorporation, and at all events the estate should be held by an heir charged with the trusts, it was held that the designation of the trustees by their official character was equivalent to naming them by their proper names; that the trust was not to be executed by them in their official character, but in their private and individual capacity; and that if the trust had been to the officers named and their successors to execute, and no other provisions had been made, it would have fallen within the case of Baptist Association *v.* Hart's Executors, and would have been void. It was further held, that it was a good executory devise to a corporation to be created *in futuro*, and in the mean time that the estates in the hands of the heir would be held charged with the trusts.[2] A bequest to the chancellor of the exchequer for the time being for the benefit of Great Britain was held good.[3] And the Governor-General of India may take in trust for the benefit of the city of Decca.[4] Where a British subject bequeathed funds to the President and Vice-President of the United States and the Governor of Pennsylvania for the time being to establish a college in the State of Pennsylvania, and directed that moral philosophy should be taught, and that a professor should inculcate the rights of the black people of every clime, until they were restored to an equality of rights throughout the Union, the Court of Chancery directed an inquiry to be made whether the President, Vice-President, and Governor would accept the trust, and it appearing that they declined to act, it was held that the trust failed; and as it could not be carried into effect, *cy pres*, in a foreign country, that the gift fell into the residue.[5]

§ 48. Married women may become trustees by deed, gift, bequest,

[1] *Ante*, § 30.

[2] Inglis *v.* Trustees of the Sailors' Snug Harbor, 3 Pet. 99.

[3] Nightingale *v.* Goulbourne, 2 Phill. 54, 5 Hare, 484.

[4] Mitford *v.* Reynolds, 1 Phill. 185.

[5] New *v.* Bonaker, 4 Law Rep. Eq. Ca. 655.

appointment, or by operation of law.[1] If an estate comes to a married woman in any way, charged with a trust, her coverture cannot be pleaded in bar of the trust;[2] and a court of equity will enforce its execution; as when the legal title to land in trust was cast by descent upon a married woman, and the law required that a deed executed by her should be acknowledged, as executed voluntarily, and she refused so to acknowledge it, the court compelled her by decree.[3] There is no less judgment and discretion in a woman after marriage than before. Sir John Trevor thought she rather improved by her husband's teaching.[4] The reasons for her disabilities are founded upon her own interests or her husband's, or both;[5] or rather upon the broader policy of the law which, for the purpose of domestic peace and happiness, merges the proprietary interests of the wife during coverture in her husband, and will not permit her to hold interests separate from, and independent of, and possibly antagonistic to, him. The policy of the law has, however, been very much modified by legislation in later years. But where such interests are not concerned, she possesses the same legal capacity as if she were *sui juris*. Thus, she may execute any kind of power, whether simply collateral, appendant, or in gross; and it is immaterial whether it is given to her while sole or married.[6]

§ 49. In equity the absolute interest in the trust fund is vested in the *cestui que trust*, the trustee is a mere instrument, and any power or authority in the trustee must have the character of a power simply collateral;[7] therefore there is nothing, as respects

[1] Lake *v.* DeLambert, 4 Ves. 595; Compton *v.* Collinson, 2 Bro. Ch. 387; Hearle *v.* Greenbank, 1 Ves. 305; Bell *v.* Hyde, Pr. Ch. 350; Moore *v.* Hussey, Hob. 95; Needles *v.* Bish. of Winchester, Hob. 225; Clarke *v.* Saxon, 1 Hill, Ch. 69; Bradish *v.* Gibbs, 3 John. Ch. 523; Livingston *v.* Livingston, 2 John. Ch. 541; Dundas *v.* Biddle, 2 Barr, 160; Claussen *v.* La Franz, 1 Clark (Io.), 226.

[2] Clarke *v.* Saxan, 1 Hill, Ch. 69.

[3] Dundas *v.* Biddle, 2 Barr, 160.

[4] Bell *v.* Hyde, Pr. Ch. 350.

[5] Compton *v.* Collinson, 2 Bro. Ch. 387.

[6] Co. Litt. 112 a, 187 b; Lord Antrim *v.* Buckingham, 2 Freeman, 168; Blithe's Case, ib. 91; Godolphin *v.* Godolphin, 1 Ves. 23; Sugden on Powers, 144–155, 4 Kent, 324; Thompson *v.* Murray, 2 Hill, Ch. 214; Bradish *v.* Gibbs, 3 Johns. Ch. 523.

[7] Smith *v.* Smith, 21 Beav. 385; Drummond *v.* Tracy, 1 John. 608; Kingham *v.* Lee, 15 Sim. 401.

legal capacity, to prevent a married woman from administering a discretionary trust.[1]

§ 50. At the same time a husband must always have a large influence over a *feme covert* trustee; indeed, as he would be answerable for her acts, and liable for her breaches of trust; he must, for his own protection, look to the manner in which she administers the fund. And she must join her husband in suits in relation to the trust property.[2] Again, if land is conveyed to a married woman upon a declared trust without powers of sale, and it becomes necessary to sell and convey the land, is the husband to join or not in the conveyance? and to whom is the purchase-money to be paid, and upon whose receipt?[3] Mr. Lewin thinks that the joint receipt of the husband and wife should be taken; but that the safest way would be to pay the money into some bank upon their joint receipt, to remain until wanted for the purposes of the trust, and that if the husband took it out for any other purpose, he would be liable as for a breach of trust.[4] Another inconvenience arises in probate and other trusts, where the trustee may be required to give bonds for the faithful administration of the trust. A court of equity may require the trustee to give security for the property, even though the trust arises by operation of law.[5] A married woman can enter into contracts only in relation to her sole and separate estate; and how far she can bind herself, or her estate, by a bond to execute a trust in property, the beneficial interests in which belong to another, would always be a perplexing question, although the sureties in such a bond might be liable.[6]

§ 51. Subject to these inconveniences, a married woman can always be a trustee; and she may even be a trustee for her husband,[7] as well as her husband for her,[8] and courts will find means

[1] Ibid.

[2] Still *v.* Ruby, 35 Penn. St. 373.

[3] See Daniel *v.* Uhley, Wm. Jones, 137; Co. Litt. 112 a, Hargrave's note (6); 1 Fonb. Eq. 92; McNeille *v.* Acton, 2 Eq. R. 25.

[4] Lewin on Trusts, 24–25; Drummond *v.* Tracy, John. 611; 4 Cruise, Dig. 143; Co. Litt. 112 a, Hargrave's note 6.

[5] Clarke *v.* Saxon, 1 Hill, Ch. 69.

[6] In Massachusetts married women may now be appointed guardians.

[7] Livingston *v.* Livingston, 2 John. Ch. 541.

[8] Bennett *v.* Davis, 2 P. Wms. 316; Shirley *v.* Shirley, 9 Paige, 363; Jamison *v.* Brady, 6 S. & R. 467; Boykin *v.* Ciples, 2 Hill, Ch. 200; Picquet *v.* Swann, 4 Mason, 455; Griffith *v.* Griffith, 5 B. Monr. 113.

to enforce the trusts; but they will not appoint married women to such offices, nor will they appoint them to be guardians of minors;[1] a woman, on the contrary, will be removed from the office, if she is appointed while sole and afterwards marries.[2] For the same reason it is undesirable to appoint a *feme sole* trustee, for should she marry, her husband, being liable for her breaches of trust, ought to have control of her acts, and the character of the trust is changed. On these grounds the courts at one time refused to appoint a *feme sole* trustee;[3] but it is a matter of sound discretion in the court, and in a more recent case a *feme sole* was appointed.[4]

§ 52. Infants labor under still greater disabilities than married women, for a married woman has judgment, discretion, and capacity, though she cannot in all cases freely exercise them; but an infant wants judgment and capacity.[5] From this want of judgment and capacity an infant can do nothing that requires the exercise of discretion. It is true that his acts are voidable only and not void;[6] but every act, not simply ministerial, is at least voidable; but where he signs an acquittance without receipt of the money, it is an exercise of discretion, and is actually void.[7] An infant is capable of executing a naked power unaccompanied with any interest, or not requiring any discretion.[8] If a power is given to an infant relating to his own estate, it must be inserted in the deed, that he may execute it during his infancy, or his execution

[1] Re Kaye, 1 Law Rep. Ch. 387. In Massachusetts, by Stat. c. 409 of the acts of 1869, married women may be appointed guardians, trustees, or administratrixes with the assent of their husbands; and if holding such offices they afterwards marry, they do not lose their authority.

[2] Lake *v.* DeLambert, 4 Ves. 595. The trustee in this case had married a foreigner, but Lord Chancellor Loughborough simply remarked "that it was very inconvenient for a married woman to be trustee."

[3] Brooks *v.* Brooks, 1 Beav. 531.

[4] Re Campbell's Trusts, 31 Beav. 176.

[5] Hearle *v.* Greenbank, 3 Atk. 712; 1 Ves. 305; Grange *v.* Tiving, O. Bridg. 108; Compton *v.* Collinson, 2 Bro. Ch. 387; Lockett *v.* Wray, 4 Bro. Ch. 486; See Co. Litt. 3 b, 128 a, 88 b, 172 a, 264 b, Hargrave's note (4); 1 Watk. on Copyh. 24; Eddleston *v.* Collins, 3 De G., M. & G. 1; Toller's Ex'rs, 31; Halliburton *v.* Leslie, 2 Hog. 252.

[6] *Ante,* § 33; Lewin on Trusts, 32.

[7] Russell's Case, 5 Rep. 27 a; Co. Litt. 172 a, 264 b; 1 Roll. Ab. 730, F. 2; Cropster *v.* Griffith, 2 Bland, 5.

[8] 4 Kent, 324.

of it will have no effect.[1] As was shown before, trustees generally exercise powers over the trust fund simply collateral;[2] but if the exercise of these powers require the application of any prudence or discretion, an infant is incapable of executing them.[3]

§ 53. From these inconveniences and incapacities attending the administration of a trust by an infant, he never would be appointed by a court to such an office. He could not give a valid security or bond for the safety of the trust fund, nor could a court decree him to make satisfaction for a breach of the trust.[4] But an infant has no privilege to cheat,[5] and he will not be protected in cunning and contrived frauds.[6]

§ 54. But an infant may still be a trustee; he may be actually named as trustee in any instrument, and the estate will pass to him; and if such an appointment is made, he cannot set up any claim to the beneficial interest in the estate;[7] but a court of equity would direct the execution of the trust by himself or guardian,[8] or would remove him and appoint some one competent to act. So an estate charged with a trust may be cast upon an infant by descent, or by operation of law; as where a father bought and paid for land, but took the conveyance in the name of a son five years old, the court held that the land in the hands of the son was charged with a resulting trust for the father.[9] In another case, where the father had purchased land in the name of an infant son, it was presumed to have been an advancement, rather than to make the infant a trustee.[10] From the great inconvenience attending the

[1] 2 P. Wms. 229; 1 Sug. on Powers, 213–220 (6th ed.)

[2] *Ante*, § 14.

[3] King *v.* Bellord, 1 Hem. & M. 343; Hearle *v.* Greenbank, 3 Atk. 695; 1 Ves. 298; Grange *v.* Tiving, O. Bridg. 109.

[4] Whitmore *v.* Weld, 1 Vern. 328; Russell's Case, 5 Rep. 27 a; Hindmarsh *v.* Southgate, 3 Russ. 324.

[5] Evroy *v.* Nickolas, 2 Eq. Ca. Ab. 489.

[6] Cory *v.* Gertcken, 2 Mad. 40; Buckingham *v.* Drury, 2 Ed. 71, 72; Clare *v.* Bedford, 13 Vin. 536; Watts *v.* Cresswell, 9 Vin. 415; Beckett *v.* Cordley, 1 Bro. Ch. 358; Savage *v.* Foster, 9 Mad. 37; Overton *v.* Banister, 3 Hare, 503; Stikeman *v.* Dawson, 1 De G. & Sm. 503; Wright *v.* Snowe, 2 De G. & Sm. 321; Davies *v.* Hodgson, 25 Beav. 117; Hillyer *v.* Bennett, 3 Edw. Ch. 544; Hill *v.* Anderson, 5 S. & M. 216.

[7] King *v.* Denison, 1 Ves. & B. 275; Jevon *v.* Bush, 1 Vern. 343; Lake *v.* De Lambert, 4 Ves. 596, n.

[8] *Ex parte* Sergison, 4 Ves. 149, and n.

[9] Binion *v.* Stone, 2 Freem. 169; see Bowra *v.* Wright, 4 De G. & Sm. 265.

[10] Lamplugh *v.* Lamplugh, 1 P. Wms. 112; Matter of Rindle, 2 Edw. 585.

appointment of an infant as trustee, a strong presumption arises that property conveyed to an infant is intended for his benefit, as an advancement or otherwise, and the court will not infer an intention that he is to take it in trust, unless it distinctly appears.[1]

§ 55. Aliens can take and hold real estate by grant in trust to the same extent as they can take and hold the legal title;[2] that is, until office found; though it is said that they cannot take by act of law as by descent.[3] There is a conflict of decisions, whether they can take by devise or not.[4] But an alien cannot plead his alienage to defeat any trust that may be charged upon the lands that come to him, nor in bar of any contract made by him in relation to the purchase of lands.[5] If lands in the hands of an alien charged with a trust escheat to the State, the State as a general rule takes only the title that the alien had; and there are statutes in many States that provide for carrying the trust into execution. It has been held that an alien may be a corporator and trustee for a corporation,[6] and that if an alien trustee sold and conveyed the trust estate, equity would not set the sale aside.[7] As to personal property aliens have the same rights and privileges as citizens, and they can execute trusts of personal chattels to the same extent as citizens. An alien may take a mortgage of land as security for debt, and he may have a decree of foreclosure or sale of the land for the payment of the debt.[8] But if the alien is domiciled abroad,

[1] Ibid.; Blinkhorne *v.* Feast, 2 Ves. 30; Mumma *v.* Mumma, 2 Vern. 19; Taylor *v.* Taylor, 1 Atk. 386; Smith *v.* King, 16 East, 283. See also Grey *v.* Grey, Finch, 338; 1 Ch. Ca. 296; Elliott *v.* Elliott, 2 Ch. Ca. 231; Stileman *v.* Ashdown, 2 Atk. 480; Ebrand *v.* Dancer, 2 Ch. Ca. 26; Scroope *v.* Scroope, 1 Ch. Ca. 27; Pole *v.* Pole, 1 Ves. 76.

[2] *Ante*, § 36; Marshall *v.* Lovelass, Cam. & Nor. 217.

[3] Orr *v.* Hodgson, 4 Wheat. 453; Wright *v.* Trust. Meth. Ep. Church, 1 Hoff. Ch. 202; Buchanan *v.* Deshon, 1 Har. & G. 280; *Ex parte* Dupont, 1 Harp. Ch. 5; Trembles *v.* Harrison, 1 B. Monr. 140; Montgomery *v.* Dorion, 7 N. H. 475; Foss *v.* Crisp, 20 Pick. 121; Smith *v.* Zaner, 4 Ala. 99.

[4] In Craig *v.* Radford, 3 Wheat. 594; Atkins *v.* Kron, 2 Ired. Ch. 58, it was held that a devise to an alien would not vest the title in him; but in Vaux *v.* Nesbit, 1 McC. Ch. 352; Clifton *v.* Haig, 4 Des. 330; Stephen *v.* Swann, 9 Leigh, 404, it was held that a devise would vest the title in him subject to escheat on office found.

[5] Dunlop *v.* Hepburn, 1 Wheat. 179; 3 Wheat. 231; Scott *v.* Thorpe, 1 Edw. Ch. 512; Waugh *v.* Riley, 8 Met. 290.

[6] Commeyer *v.* United German Churches, 2 Sand. Ch. 186.

[7] Ferguson *v.* Franklin, 6 Munf. 305; Escheator *v.* Smith, 4 McC. 452.

[8] Hughes *v.* Edwards, 9 Wheat. 489.

it is an objection to his fitness for the office, as he is not within the jurisdiction of the court.[1]

§ 56. Lunatics can take a legal title by descent or by devise, and they can take by purchase or grant, although they have not mind enough to accept the conveyance. A valid acceptance will be presumed after long acquiescence by all parties, or if the *cestui que trust* accept the deed, it will be sufficient.[2] But lunatics cannot execute a trust that requires judgment and discretion, as they are incapable of giving a valid assent that will bind themselves, the estate, or the *cestui que trust.*[3] Whenever a trust estate is vested in a lunatic, it must be administered by his guardian, or by the court, or he will be removed and a competent person appointed. An habitual or common drunkard may be a trustee, but he may be removed.[4]

§ 57. A religious person, who by vows has renounced the world, as a nun or monk, may be a trustee or guardian. It is a matter for their own consciences, whether they will take such an office, and courts cannot regard their religious associations.[5]

§ 58. A bankrupt or insolvent is competent to take, hold, and execute a trust. The trust estate does not pass to his assignees, nor does his certificate discharge him from any fiduciary debts or obligations. As he holds only for the *cestui que trust* he cannot charge or incumber the estate otherwise than for the beneficiary.[6]

§ 59. *Cestuis que trust* are not incapable of taking in trust for themselves and others, but they are not altogether fit persons to be appointed, by reason of a possible conflict between their duty and interest. Near relatives and connections, like husband and wife, are also objectionable as trustees, as by reason of affection

[1] Meintzhagen *v.* Davis, 1 Coll. 335; *In re* Tempest, Law Rep. 1 Ch. 485.

[2] Eyrick *v.* Hetrick, 13 Penn. St. 494; *Re* Bloomar, 2 De G. & Jon. 88.

[3] Loomis *v.* Spencer, 2 Paige, 153; Swartwout *v.* Burr, 1 Barb. 495; Person *v.* Warren, 14 Barb. 488.

[4] Webb *v.* Deitrich, 7 W. & S. 401.

[5] Smith *v.* Young, 5 Gill, 197.

[6] Scott *v.* Surnam, Willes, 402; Carpenter *v.* Marnell, 3 B. & P. 41; Gladstone *v.* Hadwen, 1 M. & S. 526; *Ex parte* Glanys, 1 Mont. & Mac. 258; *Ex parte* Painter, 2 Deac. & Ch. 584; Butler *v.* Merchants Ins. Co. 14 Ala. 798; Shryock *v.* Waggoner, 28 Penn. St. 431; Harris *v.* Harris, 29 Beav. 107; Copeman *v.* Gallant, 1 P. Wms. 314; Gardner *v.* Rowe, 2 Sim. & St. 346; Lounsbury *v.* Purdy, 11 Barb. 490; Ludwig *v.* Highley, 5 Barr, 132; Welhelm *v.* Falmer, 6 Barr, 296; Kep *v.* Bank of N. Y. 10 John 63; Bliss *v.* Pierce, 20 Vt. 25; Ontario Bank *v.* Mumford, 2 Barb. Ch. 596.

and influence frequent breaches of trust may happen, and other irregular proceedings are always to be feared; but there is no absolute rule of law that forbids such appointments, and they are sometimes inevitable[1] or necessary.

III. *Who may be cestuis que trust.*

§ 60. As a general rule, equity follows the law, and all persons who are capable of taking the legal title to property may take the equitable title as *cestuis que trust*, through the medium of a trustee.[2]

§ 61. A trust may be declared in favor of the Crown. By the old law the King could take the use of real estate only by matter found of record;[3] but Mr. Hill says that it has never been decided that a court of chancery would refuse to execute a trust in land in favor of the Crown, if found otherwise than by matter of record.[4] The King can take personal property as *cestui que trust*, in the same manner as a private person.[5]

§ 62. The State may be a *cestui que trust*, and when there are no statutes to forbid it, property may be given to trustees for the use of the State or the United States in the same manner as for the use of individuals. A deed to a trustee and his heirs in trust for the State of South Carolina was held to vest, by the statute of uses, the whole legal title in the State.[6] And a deed to trustees in trust to sell and apply the proceeds to pay a debt due to the United States from the grantor is valid, notwithstanding the statute which forbids the purchase of any land on account of the United States, unless authorized by act of Congress.[7]

§ 63. If there are statutes, like the statutes of mortmain, which

[1] Wilding *v.* Bolder, 21 Beav. 222; *Ex parte* Clutton, 17 Jur. 988. See also *In re* Tempest, Law Rep. 1 Ch. 485.

[2] Sand. on Uses, 370; Lewin on Trusts, 35; Hill on Trustees, 52; Trotter *v.* Blocker, Porter, 269.

[3] Bac. on Uses, 60; Gilbert on Uses, 44, 204.

[4] Hill on Trustees, 52.

[5] Middleton *v.* Spicer, 1 Bro. Ch. 201; Brummel *v.* McPherson, 5 Russ. 264; Nightingale *v.* Goulbourne, 5 Hare, 484; 2 Phil. 594; Mitford *v.* Reynolds, 1 Phill. 185; Ashton *v.* Langdale, 4 Eng. L. & Eq. 80.

[6] Lamar *v.* Simpson, 1 Rich. Ch. 71.

[7] Neilson *v.* Lagow, 12 How. 107; 3 Stat. at Large, 568, May 1, 1820.

prevent corporations from taking the legal title to lands, they cannot evade the statutes by taking the legal title to trustees and the beneficial interest to themselves; thus they cannot be *cestuis que trust* in lands the legal title to which they are not licensed or enabled to take.[1] They can be the *cestuis que trust* of personal property to the same extent as individuals.[1]

§ 64. If an alien is made the *cestui que trust* of land he may enjoy it as against all but the State, but the State can at any time claim the equitable interest.[2] This rule applies where a mere naked trust is created in a trustee for the benefit of an alien. But if the trustee is to do any thing with the land; that is, if the trust is executory, the court will do nothing to transfer the right of the alien to the State. As where a testator directed lands to be sold and the proceeds divided among certain persons, some of whom were aliens, the court considered that as done at the time of the death which was ordered to be done, and that it was a devise of mere personalty, and it refused to allow the Crown to elect to keep the funds in land in order to work a forfeiture.[3] So where an agent to collect a debt for an alien took a deed of real estate in trust to sell and pay the proceeds to the alien creditor, the heirs of the agent were ordered, having sold the land, to pay the proceeds to the principal.[4] But where an alien paid the money for lands, and took the deed in the name of a citizen as trustee, the trustee was adjudged to hold the land in trust for the commonwealth.[5] Equity will not raise a resulting trust in favor of an alien.[6] Nor

[1] Hill on Trustees, 52; Lewin on Trusts, 36.

[2] Dumoncel *v.* Dumoncel, 13 Ir. Eq. 92; Vin. Ab. Alien, A. 8; Godfrey *v.* Dixon, Godb. 275; Barrow *v.* Wadkin, 24 Beav. 1; King *v.* Holland, Al. 16; Styl. 21; Burney *v.* Macdonald, 15 Sim. 6; Rittson *v.* Stordy, 3 Sm. & Gif. 230; Attorney-General *v.* Sands, Hard. 495; Fourdrin *v.* Gowdy, 3 M. & K. 383; Burgess *v.* Wheate, 1 Eden, 188; Du Hourmelin *v.* Sheldon, 1 Beav. 79; 4 My. & Cr. 525; Master *v.* De Croismar, 11 Beav. 184.

[3] Burney *v.* Macdonald, 15 Sim. 14; Rittson *v.* Stordy, 3 Sm. & Gif. 240; Du Hourmelin *v.* Sheldon, 1 Beav. 79; 4 My. & Cr. 525. And see Master *v.* De Croismar, 11 Beav. 184; Barrow *v.* Wadkin, 24 Beav. 1; Craig *v.* Leslie, 3 Wheat. 563; Austin *v.* Brown, 6 Paige, 448; Neilson *v.* Lagow, 12 How. 107; Commonwealth *v.* Martin, 5 Munf. 117; Meakings *v.* Cromwell, 1 Selden, 136.

[4] Austin *v.* Brown, 6 Paige, 448; McCaw *v.* Galbrath, 7 Rich. (Law) 74.

[5] Hubbard *v.* Goodwin, 3 Leigh, 492.

[6] Leggett *v.* Dubois, 5 Paige, Ch. 114; Phillips *v.* Crammond, 2 Wash. C. C. 441. See Taylor *v.* Benham, 5 How. 270, and Farley *v.* Shippen, Wythe, 135.

will it allow a legacy given to an alien to be charged upon real estate,[1] nor lands liable to escheat to be sold for the payment of debts in order that aliens may take their legacies out of the personalty.[2] Aliens may be the *cestuis que trust* of personal property without objection;[3] and trustees for aliens, and alien *cestuis que trust* may maintain actions in our courts to maintain their rights in the trust property.[4]

§ 65. There is another class of cases that illustrates the principle, that the beneficial donee of property cannot take as *cestui que trust*, if he is prohibited from taking the legal title to that property, as where a slave is prohibited from holding property, he cannot be made a *cestui que trust* of property.[5] In Virginia a free negro was prohibited from holding slaves, and it was held that he could not be a *cestui que trust* of slaves.[6] So where emancipation was forbidden, a slave could not be the *cestui que trust* of his own freedom.[7] But in Mississippi it was held that land purchased with money furnished by a slave with the acquiescence of her master, and the title taken in the name of a free man, was held in trust for the slave after her actual emancipation by living in Ohio, and that the trust could be enforced against all persons who took the land with notice of the facts.[8]

§ 66. But in charitable trusts the *cestuis que trust* are not, and need not be, capable of taking the legal title, as when property is given in trust for the poor of a parish, or for the education of youth, or for pious uses, or for any charitable purpose, the beneficiaries are generally unknown, uncertain, changing, and incapable of taking or dealing with the legal title; but such trusts are valid in equity, and courts of equity will administer them and protect the rights of the *cestuis que trust*.[9] And in trusts not charitable it is not always necessary that the *cestui que trust* should be in existence at the time of the creation of the trust, as a devise to a

[1] Atkins *v.* Kron, 2 Ired. Eq. 423.

[2] Trezavant *v.* Howard, 5 Des. 87.

[3] Bradwell *v.* Weeks, 1 John. Ch. 206.

[4] Hamersley *v.* Lambert, 2 John. Ch. 508.

[5] Skrine *v.* Walker, 3 Rich. Eq. 262; Pool *v.* Harrison, 18 Ala. 514.

[6] Dunlap *v.* Harrison, 14 Grat. 251.

[7] Trotter *v.* Blocker, Port. 269; Graves *v.* Allen, 13 B. Monr. 190.

[8] Leiper *v.* Hoffman, 26 Miss. 615; and see Frazier *v.* Frazier, 2 Hill, Ch. 305; Ross *v.* Duncan, Freem. Ch. 603; Osterman *v.* Baldwin, 6 Wal. 116.

[9] *Post*, Chapter on Charitable Trusts.

father in trust for accumulation for his children lawfully begotten at the time of his death was held to be good, although the father had no children at the time of the vesting of the funds in him as trustee.[1] So an illegitimate child born, or in *ventre sa mere*, may be a *cestui que trust;*[2] but a trust for illegitimate children to be thereafter begotten will not be enforced, as being against good morals.[3] But a trust not charitable created *in præsenti* for *cestuis que trust* does not take effect until the *cestuis que trust* are identified; as, where land was conveyed under articles of agreement in trust for the subscribers thereto, the title of the grantor was not divested until there were subscribers.[4] In some cases a person is capable of taking an equitable interest, in a manner in which the legal interest could not be limited. Thus at law no property can be so limited to a married woman as to exclude the legal rights of the husband; but, by way of trust, property can be so given to her use as to place it entirely beyond the right of enjoyment by the husband.[5]

What property may be the subject of a trust.

§ 67. Every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a trust. Every kind of vested right which the law recognizes as valuable may be transferred in trust, as a receipt for a medicine,[6] the copyright of a book,[7] a patent right,[8] a trade secret,[9] or growing crops.[10]

§ 68. At common law no possibility, right, title, nor *chose in*

[1] Ashurst *v.* Given, 5 Watts & S. 329.

[2] Gabb *v.* Prendergast, 3 Eq. R. 648; Pratt *v.* Flamer, 7 Har. & J. 10; Gardner *v.* Heyer, 2 Paige, 11; Collins *v.* Hoxie, 9 Paige, 81; *In re* Connor, 2 Jones & Lat. 456; Evans *v.* Davies, 7 Hare, 498; Owen *v.* Bryant, 21 L. J. Ch. 860.

[3] Medworth *v.* Pope, 27 Beav. 21; Wilkinson *v.* Wilkinson, 1 Younge & C. Ch. Ca. 657; Pratt *v.* Mathew, 22 Beav. 528; Howarth *v.* Mills, L. R. 2 Eq. 389.

[4] Urkett *v.* Coryell, 5 W. & S. 61.

[5] Lewin on Trusts, 37.

[6] Green *v.* Folgham, 1 Sim. & St. 398.

[7] Sims *v.* Marryal, 17 Q. B. 281.

[8] Russell's Patent, 2 De G. & Jon. 130.

[9] Morrison *v.* Moat, 6 Eng. L. & Eq. 14; 9 Hare, 241.

[10] Robinson *v.* Maulden, 11 Ala. 908; Grantham *v.* Hawley, Hob. 132; Petch *v.* Tutin, 15 M. & W. 110; McCarty *v.* Blevins, 5 Yerg. 195.

action could be granted or assigned to strangers.[1] But in equity the rule is different, and *choses in action*,[2] expectancies,[3] contingent interests,[4] and even possibilities[5] may be assigned, and a valid trust created in them. Equitable reversionary interests stand upon the same ground.[6] Property not owned by the assignor at the time, and not even *in esse*, may be assigned in equity;[7] and a valid trust may be created in a naked power or authority.[8]

§ 69. But there are some *choses in action*, rights, claims, and interests that cannot be assigned in equity; either because some statute prohibits, or because it is against public policy to allow assignments of them to strangers. Thus an officer in the army cannot assign or pledge his commission,[9] nor his full or half pay.[10] A judge cannot assign his salary;[11] nor can a pension given for the honorable support of the dignity of a title be assigned.[12]

[1] Lampet's Case, 10 Coke, 48; Thallhimer *v.* Brinckerhoff, 3 Cow. 623.

[2] Row *v.* Dawson, 1 Ves. 322; Ryall *v.* Rolles, 1 Ves. 348; Townsend *v.* Windham, 2 Ves. 6; *Ex parte* Alderson, 1 Mad. 53; Burn *v.* Carvalho, 4 My. & Cr. 690; Yeates *v.* Grover, 1 Ves. Jr. 280; *Ex parte* South, 3 Swans. 393; Morton *v.* Naylor, 1 Hill, 583; Clemson *v.* Davidson, 5 Binn. 392.

[3] Fitzgerald *v.* Vestal, 4 Sneed, 258; Hobson *v.* Trevor, 2 P. Wms. 191; Beckley *v.* Newland, ib. 182; Wetherhed *v.* Wetherhed, 2 Sim. 183; Douglass *v.* Russell, 4 Sim. 184; Langton *v.* Horton, 1 Hare, 549.

[4] Ibid.; Varish *v.* Edwards, 1 Hoff. Ch. 382.

[5] Ibid.

[6] Ibid.; Voyle *v.* Hughes, 2 Sm. & Gif. 18; Kekewich *v.* Manning, 1 De G., M. & G. 187.

[7] Pennock *v.* Coe, 23 How. 117; Mitchell *v.* Winslow, 2 Story, 630; 6 Law Rep. 347; Holroyd *v.* Marshall, 2 Gif. 382; 2 De G., F. & J. 596; 9 Jur. N. S. 213; 33 L. J. Ch. 193; Hope *v.* Hayley, 5 El. & Bl. 845; Calkins *v.* Lockwood, 17 Conn. 154; Langton *v.* Horton, 1 Hare, 549; Brooks *v.* Hatch, 6 Leigh, 534; Leslie *v.* Guthrie, 1 Bing. N. C. 697; Field *v.* Mayor of N. Y. 2 Selden, 179; Robinson *v.* Macdonald, 5 M. & S. 228; *In re* Ship Warre, 8 Price, 269; Stewart *v.* Kirkland, 19 Ala. 162; Hinkle *v.* Wanzer, 17 How. 353; McWilliams *v.* Nisby, 2 S. & R. 509; Wilson's Estate, 2 Barr, 325.

[8] Brown *v.* Higgs, 8 Ves. 570.

[9] Collier *v.* Fallon, 1 Turn. & Rus. 459; and see L'Estrange *v.* L'Estrange, 1 Eng. L. & Eq. 153.

[10] Stone *v.* Lidderdale, 2 Anst. 533; Priddy *v.* Rose, 3 Mer. 102; Tunstall *v.* Boothby, 10 Sim. 540; Flarty *v.* Odlum, 3 T. R. 681; Lidderdale *v.* Montrose, 4 T. R. 248.

[11] Arbuthnot *v.* Norton, 5 Moore, P. C. C. 219; Cooper *v.* Reilly, 2 Sim. 560; Palmer *v.* Bate, 6 Moore, 28; 2 Brod. & Bing. 673; Hill *v.* Paul, 8 Cl. & Fin. 295. But in State Bank *v.* Hastings, 15 Wis. 75, it was held that a judge could assign his salary.

[12] Davis *v.* Marlborough, 1 Swanst. 79; McCarthy *v.* Gould, 1 Ball & Beatt.

The principle seems to be that when a salary, annuity, or pension is given by the State for the support of its own dignity and the administration of its affairs, it is not becoming that its officers should deprive themselves of the means of support which it gives to them; but a pension or annuity for past services may be assigned.[1] The mere right to file a bill in equity for a fraud committed upon the assignor, or to sue for a tort, cannot be assigned and a trust created in such rights.[2] A mere naked expectancy arising from a peculiar position, such a position as that a person expects to make a favorable bargain and purchase (and he employs an agent to negotiate the purchase, and such agent purchases for another), is not such property that a trust can be created in it.[3]

§ 70. The question has been frequently mooted in courts, how far a trust could be engrafted and enforced upon foreign property, or property beyond the limits of the jurisdiction of the court where the suit is pending. In regard to personal property there is no difficulty, for it follows the person; and if the court has jurisdiction over the parties, it has jurisdiction over the subject-matter, and can enforce a trust or any other equity.[4] If the personal property is, however, in fact beyond the jurisdiction of the court, there may arise some practical obstructions to the execution of the decrees of the court.[5]

§ 71. As to lands lying in a foreign jurisdiction, the court will enforce natural equities and compel the specific performance of contracts, if the parties are within its jurisdiction. Thus Lord

387; Price *v.* Lovett, 4 Eng. L. & Eq. 110; Grenfell *v.* Dean, &c., 2 Beav. 550. See also Wells *v.* Foster, 8 M. & W. 149; Spooner *v.* Payne, 10 Eng. L. & Eq. 207.

[1] Alexander *v.* Wellington, 2 Rus. & My. 35; Tunstall *v.* Boothby, 10 Sim. 452; Feistal *v.* King's College, 10 Beav. 491; and see Berkley *v.* King's College, 10 Beav. 499, and Butcher *v.* Musgrove, 2 Beav. 550; Stevens *v.* Bagwell, 15 Ves. 139.

[2] Prosser *v.* Edmonds, 1 Yo. & Col. 481; Gardner *v.* Adams, 12 Wend. 297; Dunklin *v.* Wilkins, 5 Ala. 199; McKee *v.* Judd, 2 Ker. 622. It is not intended to enter into all the niceties of the law of assignments. An exhaustive statement of the law and a collection of all the cases will be found in Story's Eq. Jur. §§ 1040–1055, and 3 Lead. Ca. in Eq. pp. 279–380 (3d Am. ed.).

[3] Garrow *v.* Davis, 15 How. 277.

[4] Hill *v.* Reardon, 2 Russ. 608; Hill on Trustees, 44; Lewin on Trusts, 39; Chase *v.* Chase, 2 Allen, 101; Mason *v.* Chambers, 4 J. J. Marsh. 401.

[5] Booth *v.* Clark, 17 How. 327.

Eldon allowed a lien to a consignor for advances upon estates in the West Indies;[1] and a specific performance of articles between parties for the settlement of their boundaries was enforced;[2] effect was given to an equitable mortgage by deposit of the title-deeds to land in Scotland, though by the law of Scotland such deposit created no lien;[3] an account was ordered of the rents and profits of lands abroad;[4] and an absolute sale,[5] or a foreclosure of a mortgage[6] decreed; a fraudulent conveyance was relieved against,[7] and injunction granted against taking possession.[8] Chief-Justice Marshall said: "Upon the authority of these cases and others which are to be found in the books, as well as upon general principles, this court is of opinion that in case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."[9] But if the person is not within the jurisdiction of the court, and the land is, the court cannot decree a specific performance of an agreement for a sale.[10] If a trust is created by the will of a citizen of a particular State, and his will is allowed by the Probate Court of that State, and a trustee is appointed by the Probate

[1] Scott *v.* Nesbitt, 14 Ves. 438.

[2] Penn *v.* Lord Baltimore, 1 Ves. 444 and Belt's Sup.; Roberdeau *v.* Rous, 1 Atk. 543, West, 23; Tullock *v.* Hartley, 1 Yo. & Col. 114; Cood *v.* Cood, 33 Beav. 314; Portarlington *v.* Soulby, 3 My. & K. 104; Athol *v.* Derby, 1 Ch. Ca. 221.

[3] *Ex parte* Pollard, 3 Mont. & Ayr. 340; Mont. & Chit. 239; Norris *v.* Chambers, 29 Beav. 246; Martin *v.* Martin, 2 R. & M. 507.

[4] Roberdeau *v.* Rous, 1 Atk. 543.

[5] Ibid.

[6] Toller *v.* Carteret, 2 Vern. 494.

[7] Arglasse *v.* Muschamp, 1 Vern. 75; Archer *v.* Preston, 1 Vern. 77; 1 Eq. Abr. 133.

[8] Cranstown *v.* Johnston, 5 Ves. 278; Bunbury *v.* Bunbury, 1 Beav. 318; Hope *v.* Carnegie, L. R. 1 Ch. 320.

[9] Massie *v.* Watts, 6 Cranch, 160; Farley *v.* Shippen, Wythe, 135; Kildare *v.* Eustace, 1 Vern. 419; Ward *v.* Arredondo, Hopk. 213; DeKlyn *v.* Watkins, 3 Sand. Ch. 185; Guerrant *v.* Fowler, 1 Hen. & M. 4; Shattuck *v.* Cassidy, 3 Edw. Ch. 152; Newton *v.* Bronson, 3 Ker. 587; Sutphen *v.* Fowler, 9 Paige, 280; Epis. Church *v.* Wiley, 2 Hill, Ch. 584; Dickinson *v.* Hoomes, 8 Grat. 353; Hughes *v.* Hall, 5 Munf. 431; Vaughn *v.* Barclay, 6 Whar. 392; Watkins *v.* Holman, 16 Pet. 25; Guild *v.* Guild, 16 Ala. 121; White *v.* White, 7 Gill & J. 208.

[10] Spurr *v.* Scoville, 3 Cush. 578; Meux *v.* Maltby, 2 Swanst. 277; Fell *v.* Brown, 2 Bro. Ch. 276.

Court, courts of equity will have jurisdiction over the trust, although both the trustee and the property are beyond the jurisdiction of the court. Chief-Justice Bigelow, in determining this point, said: "The residence of the trustee and *cestui que trust* out of the commonwealth does not take away the power of this court to regulate and control the proper administration of trust estates which are created by wills of citizens of this State, and which have been proved and established by the courts of this commonwealth. The legal existence of the trust takes effect and validity from the proof of the will, and the right of the trustee to receive the trust fund is derived from the decree of the Probate Court. If the trustee is unfaithful or abuses his trust, that court has jurisdiction to remove him in concurrence with this court on the application of those beneficially interested in the estate."[1] And where A. had fraudulently obtained a deed of land, in a foreign State, from B., and had conveyed it to C. without consideration, it was held that although the courts of other States would not declare such deeds to be nullities, yet they would order reconveyances from the parties before the court; and if such parties went beyond the jurisdiction, the court could appoint special commissioners to execute such reconveyances.[2]

§ 72. The foundation of this doctrine is the jurisdiction of the court over the person, which was originally the only jurisdiction of courts of equity.[3] They cannot, when the property is in a foreign jurisdiction, make a decree *in rem*, binding upon the land; but they can enter a decree *in personam* and compel its performance by process in contempt;[4] hence if the parties are not before the court, or the court has no jurisdiction over them, the specific performance of a contract cannot be decreed;[5] and if the court cannot give relief by a decree against the person, but must go further and make a decree to be executed by its own officers against the land, it must, of course, if the land is beyond its jurisdiction, refuse to act.[6] It is not necessary that the person to be bound by

[1] Chase *v.* Chase, 2 Allen, 101.

[2] Cooley *v.* Scarlett, 38 Ill. 316.

[3] Penn *v.* Baltimore, 1 Ves. 444; Massie *v.* Watts, 6 Cranch, 160.

[4] Ibid.; White *v.* White, 7 Gill & J. 208; Mead *v.* Merritt, 2 Paige, 404.

[5] Spurr *v.* Scoville, 3 Cush. 578; Meux *v.* Maltby, 2 Swanst. 277; Fell *v.* Brown, 2 Bro. Ch. 276.

[6] Morris *v.* Remington, 1 Pars. Eq. 387; Bank of Virginia *v.* Adams, 1

a decree should be domiciled within the jurisdiction of the court. It will be sufficient if the person is found and served with process within the jurisdiction, and a *ne exeat* may be obtained to prevent his departing until the decree of the court is performed;[1] or if a person is prosecuting a suit at law within a jurisdiction, a suit in equity may be maintained, and an injunction may be decreed against him, and service on his attorney in the suit at law would be a good service to bring him within the jurisdiction.[2] But courts of equity acting *in personam* or otherwise cannot grant an injunction staying proceedings in courts of a foreign jurisdiction, nor can courts of the States enjoin proceedings in the courts of the United States, nor, *vice versa*, can the courts of the United States enjoin courts of the States.[3]

Pars. Eq. 547; Blunt *v.* Blunt, 1 Hawks, 365; White *v.* White, 7 Gill & J. 208; Cartwright *v.* Pettus, 2 Ch. Ca. 214; 2 Swanst. 323 n.; Waterhouse *v.* Stansfield, 9 Hare, 234; 10 Hare, 254; Martin *v.* Martin, 2 R. & My. 507; Nelson *v.* Bridport, 8 Beav. 547; Walker *v.* Ogden, 1 Dana, 252; Williams *v.* Mans, 6 Watts, 278; Booth *v.* Clark, 17 How. 322; Hawley *v.* James, 7 Paige, 213; White *v.* White, 7 Gill & J. 208.

[1] Mitchell *v.* Bunch, 2 Paige, 606; Baker *v.* Dumaresque, 2 Atk. 66; Howden *v.* Rogers, 1 Ves. & B. 129; Flack *v.* Holm, 1 Jac. & W. 406; Grant *v.* Grant, 3 Russ. 598; Woodward *v.* Schatzell, 3 John. Ch. 412; Gilbert *v.* Colt, 1 Hopk. 496.

[2] Chalmers *v.* Hack, 19 Maine, 124.

[3] Story, Eq. Jur. §§ 899, 900.

CHAPTER III.

EXPRESS TRUSTS, AND HOW EXPRESS TRUSTS ARE CREATED AT COMMON LAW, SINCE THE STATUTE OF FRAUDS, AND IN PERSONAL PROPERTY, AND HEREIN OF VOLUNTARY CONVEYANCES OR SETTLEMENTS IN TRUST.

§ 73. Division of trusts, according to the manner of their creation.
§§ 74-77. Trusts at common law.
§ 74. At common law, a writing not necessary to convey land.
§ 75. Uses might also be created without writing, and so may trusts, in States where the statute of frauds is not in force.
§ 76. If a trust is created in writing, parol evidence cannot control it.
§ 77. Same rule as to trusts created by parol.
§ 78. The statute of frauds, and its form in various States.
§ 79. Effect of the statute upon the creation of express trusts.
§§ 80, 81. Effect of the different forms of the words of the statutes in the several States.
§ 82. How express trusts may be proved or manifested under the statute.
§ 83. Certainty of the terms of the trust, and the person by whom it is to be declared.
§§ 84, 85. Trusts declared or proved by answers in chancery.
§ 86. Trust in personal property may be created by parol.
§§ 87, 88. Trusts arising from gifts *mortis causa* and for charitable uses.
§ 89. Statute of wills, and the execution of wills.
§ 90. Trust cannot be *created in* a will, unless it is properly executed, to pass the property.
§§ 91, 92. But might be manifested by a recital in a will not properly executed.
§ 93. The effect of the necessity of probate of wills.
§ 94. Parol evidence cannot convert a bequest in a will into a trust. An executor is a trustee of the surplus.
§ 95. An agreement upon a valuable consideration will be carried into effect as a trust or a contract.
§§ 96–98. If a complete trust is created without consideration, it will be carried into effect.
§ 97. But if any thing remains to be done to complete the trust, it will not be carried into effect, if without consideration.
§ 99. Whether a trust is completely created or not a question of fact in each case.
§ 100. Trust for a stranger without consideration not completed without transfer of the legal title.
§ 101. But if the legal title cannot be transferred, a different rule will apply.
§ 102. If the subject of the proposed trust is an equitable interest, the legal title need not be transferred.
§ 103. The instrument of trust need not be delivered.
§ 104. If once perfected cannot be destroyed, though voluntary.
§ 105. Notice not necessary to trustee or *cestui que trust.*
§§ 106, 107. Voluntary settlements upon wife and children.
§ 108. When they will not be enforced.
§ 109. Tendency of the rule in the United States.
§ 110. Marriage a valuable as well as meritorious consideration.
§ 111. Effect of a seal.

§ 73. Having considered who may be the parties to a trust, and what may be the subject-matter of it, it is now to be considered in what manner a trust may be created, or how it may arise. Trusts are divided in this respect into direct or express trusts, implied, resulting, and constructive trusts. Direct or express trusts are created by the direct or express words of a grantor or settlor. Implied, resulting, and constructive trusts arise by operation of law upon the transactions of the parties, and they will be hereafter discussed. This chapter will treat of the creation of direct or express trusts. In this connection it will be necessary to inquire: (1) how trusts were created in lands at common law prior to the statutes of frauds and of wills; (2) how trusts are created in lands since the statutes; (3) how trusts may be created in personal property; and (4) the effect of a voluntary conveyance or declaration of trust.

§ 74. At common law a deed in writing was not necessary to transfer land. What was called a feoffment was the common and earliest mode of conveyance. The feoffment was a short and simple charter, and was accompanied by livery of seisin; the feoffor went upon the land in the presence of the freeholders of the neighborhood with the charter, and made a manual delivery to the feoffee of some symbolical thing in the name of delivering seisin, or ownership and possession of all the lands named in the charter. But not even this deed or charter was necessary. The land could be conveyed by mere livery of seisin in the presence of the freeholders of the neighborhood, who might be called upon to witness the act. The feoffment and livery of seisin operated upon and transferred the possession, and it barred the feoffor from all future right or possibility of right in the land, and vested an estate in freehold in the feoffee.[1]

§ 75. It has been a mooted question whether at common law uses could be raised by parol, or even by deed without seal, upon a conveyance of lands.[2] But there seems to be no good reason for the doubt. As the estate itself could be transferred without writing, it would seem to follow that uses declared at the time in the presence of witnesses might be effectually established. Mr. Sanders says that in their commencement uses were of a secret

[1] 4 Kent, 480, 481; 2 Sand. Uses and Trusts, 1–8.

[2] 2 Story, Eq. Jur. § 971; Hill on Trustees, 55.

nature, and were usually created by a parol declaration.[1] Mr. Lewin says, that trusts like uses are in their own nature *averrable*, i.e., may be declared by word of mouth without writing, in the absence of a statute requiring it; as if an estate had been conveyed unto and to the use of A. and his heirs, a trust might have been raised by parol in favor of B.[2] Lord Chief Baron Gilbert reconciled most of the conflicting cases by stating the law thus: "At common law a use might have been raised by words upon a conveyance that passed the possession by some solemn act, as a feoffment; but where there was no such act, then it seems a deed declaratory of the use was necessary; for as a feoffment might be made at common law by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the uses. Thus a man could not covenant to stand seised to uses without a deed; but a bargain and sale by parol has raised a use without."[3] Lord Thurlow observed that "he had been accustomed to consider uses as averrable; but perhaps when looked into, the cases may relate to feoffment, and not to conveyances by bargain and sale or lease and release."[4] And Duke says expressly, "that when the things given may pass without deed, then a charitable use may be averred by witnesses; but, where the things cannot pass without deed, these charitable uses cannot be averred without a deed proving the uses."[5] This question is almost purely speculative in the United States where the statute of frauds is perhaps universally adopted, and all conveyances of land and of interests in land must be by deed acknowledged and recorded; but it may arise when questions arise upon transactions prior to the passage of the statute, as it arose in Ohio upon a conveyance before 1810, the time when the statute of frauds was adopted in that State; and it was determined that a trust in land could be created, at common law, by parol.[6] The same question arose in

[1] 1 Sand. on Uses, 14, 218 (2d Am. ed.).

[2] Lewin on Trusts, 41. See Fordyce *v.* Willis, 2 Bro. Ch. 587; Benbow *v.* Townsend, 1 My. & K. 506; Bayley *v.* Boulcott, 4 Russ. 347; Crabb *v.* Crabb, 1 My. & K. 511; Kilpin *v.* Kilpin, ib. 520; Bellasis *v.* Compton, 2 Vern. 294; Thruxton *v.* Attorney-General, 1 Vern. 341.

[3] Gilb. on Uses, 270; Adlington *v.* Cann, 3 Atk. 141.

[4] Fordyce *v.* Willis, 3 Bro. Ch. 587.

[5] Duke on Char. 141; Adlington *v.* Cann, 3 Atk. 141.

[6] Fleming *v.* Donohoe, 5 Ohio, 250; but see Starr *v.* Starr, 1 Ohio, 321.

Connecticut, and it was denied that at common law a trust in lands could be raised by parol. The court said that the rules of evidence as well as the statute prevented it.[1] In some other States the statute, or at least the seventh section of the statute, has not been adopted; and in those States it has been determined that trusts in land can be proved by parol, as in Texas,[2] North Carolina,[3] Tennessee,[4] and Virginia.[5] In Pennsylvania, under the act of 1799, it was determined that trusts in land might be created by parol.[6] The statute was amended, however, in 1851.[7] In Kentucky, the seventh section was omitted; but the courts treat all parol agreements that would create a trust as agreements for the sale or purchase of some interest in land, and therefore void as within the fourth section of the statute.[8] In nearly all the other States the statute of frauds was substantially re-enacted at an early day in its full extent, and in those States it has not since been an open question whether parol trusts could be created.[9]

§ 76. It must also be observed that if a trust is declared in writing, courts never permit parol proof of a trust to contradict an intention expressed upon the face of the instrument itself,[10] for that would be to allow parol evidence to vary, contradict, or annul a written instrument; nor is it necessary, in order to exclude evidence, that the beneficial estate should be expressly conferred upon

[1] Dean *v.* Dean, 6 Conn. 287.

[2] Miller *v.* Thatcher, 9 Tex. 482; Hale *v.* Layton, 16 Tex. 262; Bailey *v.* Harris, 19 Tex. 102; Osterman *v.* Baldwin, 6 Wallace, 116.

[3] Fay *v.* Fay, 2 Hayw. 131; Shelton *v.* Shelton, 5 Jones, Eq. 292.

[4] Thompson *v.* Thompson, 1 Yerg. 100; McLanahan *v.* McLanahan, 6 Humph. 99; Haywood *v.* Ensley, 8 Humph. 460; Wilburn *v.* Spofford, 4 Sneed, 705.

[5] Bank of United States *v.* Carrington, 7 Leigh, 576; Walraven *v.* Lock, 2 P. & H. 549.

[6] German *v.* Gabbald, 3 Binn. 302; Wallace *v.* Duffield, 2 S. & R. 521; Slaymaker *v.* St. Johns, 5 Watts, 27; Murphy *v.* Hubert, 7 Barr, 420; Tritt *v.* Crotzer, 13 Penn. St. 452; Wetherell *v.* Hamilton, 15 Penn. St. 195; Money *v.* Herrick, 18 Penn. St. 128; Blyholder *v.* Gilson, 18 Penn. St. 134. See Freeman *v.* Freeman, 2 Pars. Eq. 81.

[7] Shoofstall *v.* Adams, 2 Grant's Cas. 209; Barnett *v.* Dougherty, 32 Penn. St. 371.

[8] Parker *v.* Bodley, 4 Bibb, 102; Childs *v.* Woodson, 2 Bibb, 72.

[9] See Brown's Statute of Frauds, §§ 79–82.

[10] Lewis *v.* Lewis, 2 Ch. R. 77; Finch's Cas. 4 Inst. 86; Childers *v.* Childers, 3 K. & J. 310; 1 De G. & J. 482; Fordyce *v.* Willis, 3 Bro. Ch. 587; Leman *v.* Whitley, 4 Russ. 423; Lloyd *v.* Inglis, 1 Des. 333; Sims *v.* Smith, 11 Ga. 198; Harris *v.* Barnett, 3 Grat. 339; Dickenson *v.* Dickenson, 2 Murph. 279; Steere *v.* Steere, 5 John. Ch. 1.

the grantee of the legal estate, for a trust cannot be raised by parol if, from the nature of the instrument or from any circumstance of evidence appearing upon the face of it, an intention can be clearly implied of making the holder of the legal estate also the holder of the beneficial estate.[1] Thus a trust cannot be proved by parol where a valuable consideration was paid from the grantor's own money.[2] But where A. agreed to purchase land for B., and purchased it and took an absolute title to himself, it was held that B., not being privy to the deed, was not bound by it, and might prove a trust by parol.[3]

§ 77. If a trust is once effectually created by parol, it cannot subsequently be revoked or altered by the party creating it, for it is governed by the same rules that govern trusts created by writing.[4] The declarations of the grantor, to create a trust, must be prior to, or contemporaneous with, the conveyance, for it would be against reason and the rules of evidence to allow a man who has parted with all interest in an estate to charge it with any trust or incumbrance after such conveyance;[5] nor can the *cestui que trust* give his own declarations in evidence to create a trust in his favor; but where parties may be witnesses, he can testify to the facts like any other witness; and if the circumstances are such as to raise a resulting or implied trust upon the conveyance, the person entitled to such beneficial interest has the right at any time to declare the trust.[6] The declarations of a trustee can be given in

[1] Ibid.; Lewin, 42, 5th ed.; Gilb. on Uses, 56, 57; Pilkington *v.* Bailey, 7 Bro. P. C. 526; Dean *v.* Dean, 6 Conn. 285; Hutchinson *v.* Tindall, 2 Green Ch. 257; Starr *v.* Starr, 1 Ohio, 321; Movan *v.* Hays, 1 John. Ch. 343; Philbrooke *v.* Delano, 29 Me. 410; Clagett *v.* Hall, 9 Gill & J. 80. See notes to Woollam *v.* Hearn, 2 Lead. Ca. Eq. 404; Irnham *v.* Child, 1 Bro. Ch. 92; Bartlett *v.* Pickersgill, 1 Ed. 515.

[2] Ibid.

[3] Strong *v.* Glasgow, 2 Murph. 289.

[4] Kilpin *v.* Kilpin, 1 M. &. K. 531; Adlington *v.* Cann, 3 Atk. 151; Freeman *v.* Freeman, 2 Pars. Eq. 81; Crabb *v.* Crabb, 1 M. & K. 511; Greenfield's Est., 14 Penn. St. 489; Kirkpatrick *v.* McDonald, 11 Penn. St. 387; Walgrave v. Tibbs, 2 K. &. J. 313; Lee *v.* Ferris, 2 K. &. J. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 2 Sm. & Gif. 48; *In re* Dunbar, 2 Jon. & La. 120; Brown *v.* Brown, 12 Md. 87; Tritt *v.* Crotzer, 13 Penn. St. 451.

[5] Adlington *v.* Cann, 3 Atk. 145; Walgrave *v.* Tibbs, 2 K. & J. 313; Lee *v.* Ferris, 2 K. & J. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Brown *v.* Brown, 12 Md. 87; Tritt *v.* Crotzer, 13 Penn. St. 451; *In re* Dunbar, 2 Jon. & La. 120.

[6] Bellasis *v.* Compton, 2 Vern. 294; Lee *v.* Huntoon, 1 Hoff. Ch. 447; Harris *v.* Barnett, 3 Grat. 339.

evidence to show how he held the estate;[1] that is, in those States where the trust may be proved by parol. But these declarations must be clear and explicit, and point out with certainty both the subject-matter of the trust and the person who is to take the beneficial interest. Casual and indefinite expressions of mere inchoate intentions, not carried into effect, are insufficient to raise a trust.[2] If a pension from the government is granted to A., a trust cannot be raised by parol in favor of B., for a pension is conferred as an honor, and is founded upon the personal services and merits of the annuitant.[3]

§ 78. The seventh section of the statute of frauds enacted that all declarations or creations of trusts or confidences in any lands, tenements, or hereditaments, "shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing," or else they shall be utterly void and of none effect.

Sec. 8. Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of like force as the same would have been if this statute had not been made, any thing hereinbefore to the contrary notwithstanding.

Sec. 9. All grants or assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.[4]

[1] Ambrose *v.* Ambrose, 1 P. Wms. 322; Gardner *v.* Rowe, 2 S. & S. 346; 5 Russ. 258; Wilson *v.* Dent, 3 Sim. 385.

[2] Kilpin *v.* Kilpin, 1 M. & K. 520; Benbow *v.* Townsend, 1 M. & K. 506; Bayley *v.* Boulcott, 4 Russ. 345; Harrison *v.* McMennomy, 2 Edw. Ch. 251; Slocumb *v.* Marshall, 2 Wash. C. C. 398; Sidle *v.* Walters, 5 Watts, 389; Mercer *v.* Stock, 1 S. & M. Ch. 479; Hurst *v.* McNeil, 1 Wash. C. C. 70.

[3] Fordyce *v.* Willis, 3 Bro. Ch. 587.

[4] 29 Car. II. c. 3, §§ 7, 8, 9.

In Arkansas, Florida, Georgia, Illinois, Maryland, Missouri, New Jersey, and South Carolina, the statute of Charles is re-enacted almost in words, and the trust or confidence must be "manifested or proved by some writing signed by the party."

In Alabama, California, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, Rhode Island, Vermont, and Wisconsin, "the trust must be created

§ 79. Wherever this statute or the substance of the statute is in force, express trusts cannot be *proved* by parol. They must be *manifested* or *proved* by some writing, signed by the party to be charged with the trust. They need not *be created and declared in writing*, but only manifested or proved by writing; for if there be written evidence of the existence of the trust, the danger of parol evidence, against which the statute was directed, is effectually removed.[1] It may be questioned whether it was not the intention of the statute that the creation or declaration itself should be in writing; for the ninth section enacts that "all grants and assignments of any trust or confidence *shall likewise* be in writing, signed by the party granting or assigning the same, or by his last will or devise;" but whatever may have been the actual intention of the legislature, the construction put upon the clause is now firmly established.[2]

§ 80. In many of the United States the words of the seventh section are replaced by words to the effect that "the trust must be created or declared by an instrument in writing signed by the party;"[3] and the question has arisen whether this is a change of

or declared by instrument in writing signed by the party creating or declaring the same."

In New York the seventh section was re-enacted; but in the revised statutes it was enacted "that the trust should be created or declared by deed or conveyance in writing," signed, &c.; but in 1860 it was enacted "that any writing signed by the parties" should be sufficient.

In Pennsylvania the seventh section was not enacted, and trusts could be created and proved by parol; but in 1856 the seventh section was substantially enacted.

In Texas, North Carolina, Tennessee, Virginia, Connecticut, Delaware, Kentucky, Indiana and Ohio the seventh section does not seem to be re-enacted. See *ante*, § 75.

In Iowa declarations and creations of trust or powers in relation to real estate must be executed in the same manner as deeds of conveyance.

The ninth section seems to be in force in all the States.

[1] Forster *v.* Hale, 3 Ves. Jr. 707; 5 Ves. 315; Smith *v.* Mathews, 3 De G., F. & J. 139; Randall *v.* Morgan, 12 Ves. 74; Unitarian Society *v.* Woodbury, 14 Maine, 281; Steere *v.* Steere, 5 John. Ch. 1; Movan *v.* Hays, 1 John. Ch. 339; McCubbin *v.* Cromwell, 7 Gill & J. 157; Barrell *v.* Joy, 16 Mass. 221; Pinney *v.* Fellows, 15 Vt. 525; Rutledge *v.* Smith, 1 McCord, Ch. 119; Johnson *v.* Ronald, 4 Munf. 77; Hutchinson *v.* Tindall, 2 Green, Ch. 357; Lane *v.* Ewing, 31 Mo. 75. Numerous other cases might be cited; but the rule is so well established, that it is not necessary.

[2] Lewin on Trusts, 45.

[3] See *ante*, § 78, note.

the law as established under the words of the original statute of frauds.

§ 81. The question has not been directly adjudged in a reported case raising the exact point; but it has arisen incidentally before the courts, and the intimations are that these words do not change the law, and that "created and declared" are equivalent to "manifested and proved." In practice, the great majority of trusts are not created by a deed or conveyance of land, but they arise from the transactions and agreements of parties; and if these transactions or agreements are evidenced in writing, the trust is sufficiently created, declared, manifested, or proved. Thus Mr. Justice Bennett, in Vermont where the words are "created and declared by instrument," said, that "our statute is the same in effect as the English statute."[1] And Mr. Justice Story said, that "in his opinion, there was no substantial difference between the Massachusetts statute of frauds" (which is in substance the same as the statute of Vermont) "and the statute of 29 Car. II. c. 3; and such is the conclusion to which I have arrived upon an examination of these statutes."[2] And in Wisconsin, where the statute is the same as the statutes of Massachusetts and Vermont, it was held that an express trust need not be declared in express terms, that it is sufficiently declared or created if shown by any proper written evidence, such as an answer to a bill in equity, note, letter, or memorandum, disclosing facts which create a fiduciary relation.[3] In New York, the words of the statute were that "the trust should be created or declared by deed or conveyance in writing." In relation to this Mr. Justice Strong said, that "the definition of the term conveyance given in the Revised Statutes[4] comprehends a declaration of trust, although not under seal, as it is an instrument by which the title to such estate may be affected in law or equity."[5] In another case, Chief-Justice Ruggles said: "The statute prescribes no particular form by which the trust is to be created or declared. Under our former statute, in relation to this subject, it was only necessary that the trust should be manifested in writing, and therefore letters from the trustee disclosing the

[1] Pinnock v. Clough, 17 Vt. 508.
[2] Jenkins v. Eldredge, 3 Story, 294.
[3] Pratt v. Ayer, 3 Chand. 265.
[4] 1 R. S. 762, § 38.
[5] Corse v. Leggett, 25 Barb. 394.

trust were sufficient; such is the law of England.[1] Our present statute requires that the trust should be created or declared by deed or conveyance in writing, subscribed by the party creating or declaring the trust;[2] but it need not be done in the form of a grant. A declaration of trust is not a grant. It may be contained in the reciting part of a conveyance. Such a recital in an indenture is a solemn declaration of the existence of the facts recited; and if the trustee and the *cestui que trust* are parties to the conveyance, the trust is as well and effectually declared in that form as in any other." [3] Upon sound reason then, and upon the decided cases, it would seem that the peculiar form of words in some of the statutes of the American States has not altered the general rule, as established under the English statute; and that the same evidence would be generally received in the United States to establish a trust, as in England.[4]

§ 82. It may be stated, then, as the law, that the statute of frauds will be satisfied if the trust can be manifested or proved by any subsequent acknowledgment by the trustee, as by an express declaration,[5] or any memorandum to that effect,[6] or by a letter under his hand,[7] or by his answer in chancery,[8] or by his affi-

[1] Stat. 29 Car. II. c. 3, § 7; Forster *v.* Hale, 3 Ves. Jr. 696.

[2] The act of 1860 now makes the statute of New York conform in words to the statutes of the other States.

[3] Wright *v.* Douglass, 3 Seld. 569.

[4] Mr. Browne, in his able treatise upon the statute of frauds, cites the case of Jaques *v.* Hall, where the Supreme Judicial Court of Massachusetts, notwithstanding the words of the Massachusetts statute, considered an entry in a private memorandum book of the trustee, setting forth clearly a previous transaction by which he had become trustee, as a satisfactory declaration of trust. There was other evidence; and, as the case is not put upon this ground in the printed report, 3 Gray, 194, the court probably chose to rest the decision upon other grounds. In Titcomb *v.* Morrill, 10 Allen, 15, Mr. Justice Chapman said it was not necessary to decide the question. See Browne on Statute of Frauds, § 104, 1st ed.

[5] Ambrose *v.* Ambrose, 1 P. Wms. 321; Cross *v.* Norton, 10 Mod. 233.

[6] Bellamy *v.* Burrow, Cas. tem. Talb. 97.

[7] Forster *v.* Hale, 3 Ves. Jr. 696; 5 Ves. 308; Morton *v.* Tewart, 2 Yo. & Col. Ch. 67; Steere *v.* Steere, 5 John. Ch. 1; Bentley *v.* Mackay, 15 Beav. 12; Childers *v.* Childers, 1 De G. & J. 482; Smith *v.* Wilkinson, 3 Ves. 705; O'Hara *v.* O'Neill, 7 Bro. P. C. 227; Gardner *v.* Rowe, 2 S. & S. 346; Crook *v.* Brooking, 2 Vern. 106. But this case was before the statute.

[8] Hampton *v.* Spencer, 2 Vern. 288; Nab *v.* Nab, 10 Mod. 404; 1 Eq. Ca. Ab. 464; Gil. Eq. 146; Cottington *v.* Fletcher, 2 Atk. 155; Ryall *v.* Ryall,

davit,[1] or by a recital in a bond[2] or deed,[3] or by a pamphlet[4] written by the trustees; in short, by any writing in which the fiduciary relation between the parties and its terms can be clearly read.[5] And if there is any competent written evidence that the person holding the legal title is only a trustee, that will open the door for the admission of parol evidence to explain the position of the parties,[6] as where there are entries in the books of the grantee of the payments made by him to or on account of the grantor, which payments were consistent only with the fact that the grantee took in trust, he was decreed to be a trustee.[6] Nor is it necessary that the letters, memoranda, or recitals should be addressed to the *cestui que trust*, or should have been intended when made to be evidence of the trust.[7] The trust thus proved, however late the proof, will relate back to its creation, as where a lease was granted to A., who afterwards became a bankrupt, and *then* executed a declaration of trust in

1 Atk. 59; Wilson *v.* Dent, 3 Sim. 385; Butler *v.* Portarlington, 1 Conn. & Laws. 1, 1 Dr. & W. 20; McCubbin *v.* Cromwell, 7 Gill & J. 175; Jones *v.* Slubey, 5 Har. & J. 372.

[1] Barkworth *v.* Young, 4 Drew. 1; Pinney *v.* Fellows, 15 Vt. 525.

[2] Moorcroft *v.* Dowding, 2 P. Wms. 314; Wright *v.* Douglass, 3 Sel. 564.

[3] Deg *v.* Deg, 2 P. Wms. 412.

[4] Barrell *v.* Joy, 16 Mass. 221.

[5] Baylies *v.* Payson, 5 Allen, 473; Plymouth *v.* Hickman, 2 Vern. 167; Blake *v.* Blake, 2 Bro. P. C. 250; Dale *v.* Hamilton, 2 Phill. 266; Orleans *v.* Chatham, 2 Pick. 29; Hardin *v.* Baird, 6 Litt. 346; Graham *v.* Lambert, 5 Humph. 595; Gome *v.* Tradesman's Bank, 4 Sand. 106; Bragg *v.* Paulk, 42 Maine, 502; McCubbin *v.* Cromwell, 7 Gill & J. 157; Unitarian Society *v.* Woodbury, 14 Maine, 281; Podmore *v.* Gunning, 7 Sim. 655; Fisher *v.* Fields, 10 John. Ch. 505; Murray *v.* Glass, 23 L. J. Ch. 126; Paterson *v.* Murphy, 17 Jur. 298; Raybold *v.* Raybold, 20 Penn. St. 308; Barron *v.* Barron, 24 Vt. 375; Steere *v.* Steere, 5 John. Ch. 1.

[6] Cripps *v.* Lee, 4 Bro. Ch. 472; Hollinshed *v.* Allen, 17 Penn. St. 275; Prevost *v.* Gratz, 1 Pet. C. C. 366; Morton *v.* Tewart, 2 Yo. & Coll. Ch. 67–77; Hutchins *v.* Lee, 1 Atk. 447.

[7] Forster *v.* Hale, 5 Ves. 308; Hutchinson *v.* Tindall, 2 Green, Ch. 357; Barrell *v.* Joy, 16 Mass. 221; Welford *v.* Beazeley, 3 Atk. 503; Browne on Statute of Frauds, § 99. In Steere *v.* Steere, 5 John. Ch. 1, Mr. Chancellor Kent recognized and approved the general proposition that trusts could be proved by letters signed by the party; but in showing that the letters in that particular case were insufficient to prove a trust, he took notice of the fact that they were not addressed to the *cestui que trust*, and seemed to intimate that it was necessary that letters should be so addressed in order to manifest the trust. If the eminent chancellor intended to lay down such a rule, it would seem to be effectually overthrown by the well considered cases cited above.

favor of B., the jury having found upon an issue out of chancery that A.'s name was used in good faith in the lease as the trustee of B., it was held that the assignees of A. took nothing in the property.[1]

§ 83. The same principles of construction apply to trusts proved by this description of evidence as in other cases; and the objects and nature of the trust must always appear from such writings with sufficient certainty, and also their connection with the subject-matter of the trust.[2] Indeed courts require demonstration on the latter point; and the trust will not be executed if the precise nature of it, and the particular persons who are to take as *cestuis que trust*, and the proportions in which they are to take, cannot be ascertained.[3] When all these particulars properly appear from writings signed by the party, the trust will be executed; but if the terms of the trust are collected from several papers, it is not necessary that all of them should be signed, provided they are so referred to and connected with the paper that is signed that they may be identified and read as genuine papers, and a part of the transaction.[4] Nor need there be an actual subscription of the party's name, if the paper is authenticated by the party as his writing for the purpose of declaring the trust by writing his initials.[5] The party whose signature is essential is the party who by law is enabled to declare the trust; and it has been decided, that, whether the property is real or personal, the party enabled to declare the trust is the owner of the beneficial interest, who has therefore the absolute control over the property, the holder of the legal estate being a mere instrument or conduit pipe for him.[6] But if there is an absolute conveyance of the legal title to a supposed trustee, and there is no declaration of a trust prior to or at the time of

[1] Gardner *v.* Rowe, 2 S. & S. 346; 5 Russ. 258; Plymouth *v.* Hickman, 2 Vern. 167; Ambrose *v.* Ambrose, 1 P. Wms. 322; Wilson *v.* Dent, 3 Sim. 385; Smith *v.* Howell, 3 Stockt. 349.

[2] Forster *v.* Hale, 3 Ves. Jr. 708; Steere *v.* Steere, 5 John. Ch. 1; Abeel *v.* Radcliff, 13 John. 297; Rutledge *v.* Smith, 1 McC. Ch. 119; Freeport *v.* Bartol, 3 Greenl. 340; Arms *v.* Ashley, 4 Pick. 71; Hill on Trustees, 61.

[3] Ibid.; Smith *v.* Mathews, 3 De G., F. & J. 139; Morton *v.* Tewart, 2 Yo. & Col. Ch. 80; Lewin on Trusts, 46; Leman *v.* Whitley, 4 Russ. 423.

[4] Ibid.; Denton *v.* Davis, 18 Ves. 503; Lewin on Trusts, 47; Browne on the Statute of Frauds, §§ 105, 350–355.

[5] Smith *v.* Howell, 3 Stockt. 349.

[6] Tierney *v.* Wood, 19 Beav. 330; Donahoe *v.* Conrahy, 2 Jon. & La. 688; Lewin on Trusts, 47.

the conveyance by the grantor, and the *cestui que trust* attempts to charge the grantee with a trust in respect to the land, he must produce some writing signed by the grantee of the legal title in order to charge him with the trust.[1] It is only when there is no dispute concerning the existence of a trust, or when the trust arises by operation of law as a resulting or implied trust, that the *cestui que trust* himself can declare its terms.[2]

§ 84. It remains to consider when and how far trusts may be declared or proved by the answers of parties in chancery. It has been decided that a defendant is bound to answer to a bill suggesting a parol trust, and that a general demurrer[3] would be overruled; but perhaps this doctrine is confined to parol trusts that arise from fraud, accident, or mistake; for, in the case of express trusts, if it can be gathered from the bill that the plaintiff relies upon parol evidence alone, with no circumstances to take it out of the statute, it has been held that the defendant may demur.[4] But the general rule is that if a trust is alleged in a bill it will be presumed to be legally created, *i. e.*, in writing, unless the contrary appears; therefore it must clearly appear from the bill that the alleged trust rests in parol only, or the demurrer will be overruled.[5] It has also been decided, that if the bill simply omits to state that the trust is in writing, a demurrer will be overruled; for, as the statute only requires that it should be proved, not created, by writing, the writing is no part of the trust, but only evidence of the trust to be adduced at the hearing.[6] In all cases, however, the defendant *may* answer, and if in his answer he confess the trust without insisting upon the statute of frauds, he will be held to

[1] Browne on Statute of Frauds, § 106; Adlington *v.* Cann, 3 Atk. 145; Wallgrave *v.* Tebbs, 2 K. & J. 313; Lee *v.* Ferris, ib. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Brown *v.* Brown, 12 Md. 87; Tritt *v.* Crotzer, 13 Penn. St. 451; *In re* Dunbar, 2 Jon. & La. 120.

[2] Ibid.; Bellasis *v.* Compton, 2 Vern. 294; Lee *v.* Huntoon, 1 Hoff. Ch. 447; Harris *v.* Barnet, 3 Grat. 339.

[3] Muckleston *v.* Brown, 6 Ves. 52; Stickland *v.* Aldridge, 9 Ves. 516; Chamberlain *v.* Agar, 2 V. & B. 259; Newton *v.* Pelham, 1 Ed. 514; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Peralta *v.* Castro, 6 Cal. 354; Cottington *v.* Fletcher, 2 Atk. 155; Childers *v.* Childers, 3 K. & J. 310; 1 De G. & J. 485.

[4] Walker *v.* Locke, 5 Cush. 91; Wood *v.* Midgeley, 27 Eng. L. & Eq. 206; 5 De G., M. & G. 41; Ridgway *v.* Wharton, 3 De G., M. & G. 677; Barkworth *v.* Young, 4 Dr. 1. See Skinner *v.* McDonall, 2 De G. & Sm. 265.

[5] Cozine *v.* Graham, 2 Paige, 177.

[6] Davis *v.* Otty, 33 Beav. 540.

have waived the benefit of the statute, and his answer may be used as a written declaration and proof of the trust,[1] on the ground that the plaintiff is not called upon to introduce evidence, and the trust appears upon the written answer before the court.

§ 85. In States where the statute of frauds is not in force, trusts can be proved by parol even in opposition to the defendant's answer denying them. Resulting and implied trusts that arise from fraud can be proved by parol, although the defendant in his answer denies the trusts and sets up the statute in bar; for such trusts are not within the statute. In cases of express trusts, if the defendant denies them, or if he denies them and at the same time sets up the statute, or if he do not answer at all, only legal evidence or evidence in writing can be given in proof.[2] And if the defendant confesses the parol trusts in his answer, and at the same time sets up the statute in bar, he will have the benefit of the statute, and the court will not use the answer as a written declaration and proof of the trust.[3] In one case, it was held, that

[1] Hampton v. Spencer, 2 Vern. 288; Nab v. Nab, 10 Mod. 404; 1 Eq. Ca. Ab. 404; Gil. Eq. 146; Dean v. Dean, 1 Stockt. 425; Whiting v. Gould, 2 Wis. 552; Woods v. Dille, 11 Ohio, 455; Newton v. Swazey, 8 N. H. 9; Rowton v. Rowton, 1 Hen. & Munf. 91; Lingan v. Henderson, 1 Bland, 236; Tarleton v. Vietes, 1 Gilm. 470; Stearnes v. Hubbard, 8 Greenl. 320; Thornton v. Henry, 2 Scam. 219; School Trustees v. Wright, 12 Ill. 432; McCubbin v. Cromwell, 7 Gill & J. 157; Kinzie v. Penrose, 2 Scam. 250; Talbot v. Bowen, 1 A. K. Marsh. 436; Albert v. Ware, 2 Md. Ch. 169, 6 Md. Ch. 66; Chitwood v. Brittain, 1 Green, Ch. 450; Baker v. Hollabaugh, 15 Ark. 322; Cozine v. Graham, 2 Paige, 177; Tilton v. Tilton, 9 N. H. 386; Switzer v. Skiles, 1 Gilm. 529; Allen v. Chambers, 4 Ired. Eq. 125; Hall v. Hall, 1 Gill, 383.

[2] Trapnal v. Brown, 19 Ark. 39; Wynn v. Garland, ib. 23; Smith v. Howell, Stockt. 349.

[3] Dean v. Dean, 1 Stockt. 425; Whiting v. Gould, 2 Wis. 552. The proposition in the text was long a disputed point. It was apparently held that, as the defendant by his answer had admitted the trust, the plaintiff was not called upon to introduce any evidence. There was no danger of fraud and perjury, as the court had the defendant's statement of a trust in writing under oath, and as equity takes hold of a party's conscience, he ought to be held to execute the trust which he confesses, notwithstanding the statute. On the other hand, in bills for the specific performance of a parol contract for the sale of lands, the defendant was held not bound to execute the contract if he set up the statute, although he confessed the contract in his answer. There would seem to be no reason for a different rule in the two cases; and, since it is now established that a defendant may demur to a bill that on its face alleges a mere parol trust, it would seem to follow that the confession of a defendant should not be used to override a positive rule of law. The two cases cited establish the proposition of the text, and

a trust appearing from defendant's answer would be executed by the court although it was entirely different from the trust alleged in the bill;[1] but this case has not been followed. In a late case where a bill was filed setting forth a fraud and asking to have a resulting trust declared and a deed set aside, and the defendant confessed an express trust by parol, and offered to execute it, Chancellor Vroom said, "I am inclined to believe that if the present complainant had filed a bill claiming this deed to be a deed of trust, and praying that it might be so decreed according to the original intention of the parties, the answer of the defendant admitting the trust would have been good evidence of it. It would have amounted to a sufficient declaration of trust. But it would seem to be different when a complainant seeks on the ground of fraud to set aside a deed absolute on its face, and confessedly without any consideration paid; for, to suffer a defendant in such case to come in and avoid the claim by setting up a trust would be to permit him to create a trust according to his own views, and thereby prevent the consequences of a fraud."[2] It must be observed, that if the answer of the trustee is used to prove the trust, the terms of the trust must be gathered from the whole answer as it stands, for one part of the answer cannot be read and another part rejected. If, therefore, the plaintiff read the answer in proof of the trust, he must at the same time read the particular terms of the trust as therein stated.[3]

§ 86. Personal chattels are not within the terms of the statute, and trusts in personal property may be declared and proved by parol, though Mr. Eden said that "he had not been able to find an instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution."[4] And certainly the English cases usually referred to do not establish the

it is presumed that the same rule would be held in all the United States. It is a question of pleading and practice, and it is considered here only incidentally in considering how trusts may be created under the statute of frauds. The reader will find a full discussion of the question in Story's Eq. Pleading, §§ 765–768.

[1] Hampton *v.* Spencer, 2 Vern. 288.

[2] Hutchinson *v.* Tindall, 2 Green, Ch. 357; and see Jones *v.* Slubey, 5 Harr. & J. 372; McCubbin *v.* Cromwell, 7 Gill & J. 157.

[3] Hampton *v.* Spencer, 2 Vern. 288; Nab *v.* Nab, 10 Mod. 404; Freeman *v.* Tatham, 5 Hare, 329; Stearnes *v.* Hubbard, 8 Greenl. 320; Lewin on Trusts, 46.

[4] Fordyce *v.* Willis, 3 Bro. Ch. (n.).

proposition in express terms.[1] There does not seem to be any objection, however, to the establishment of a trust in personal property by parol. The owner in the absence of a statute has entire control of it; he can sell and transfer it without writing and by parol, and if he can transfer it by parol, there is no reason why he may not by parol transfer it upon such lawful terms, and to such uses and trusts, as he may desire. It has been so ruled in express decisions in the United States.[2] Under these decisions trusts may be created by parol in any mere personal property, as in the shares of corporations, although the corporations themselves own real estate.[3] So money or a debt secured by mortgage of real

[1] Nab *v.* Nab, 10 Mod. 404, 1 Eq. Ca. Ch. 404, and Jones *v.* Nabbe, Gil. Eq. are usually cited to sustain the proposition, but they do not. In Crook *v.* Brooking, 2 Vern. 50, 106; Inchiquin *v.* French, 1 Cox, 1; Metham *v.* Devon, 1 P. Wms. 529, and Smith *v.* Attersoll, 1 Russ. 274, there were written declarations of trust, and the question was as to the effect of the writings, though it was remarked in these cases that trusts of personalty could be evidenced by parol. The case of Benbow *v.* Townsend, 1 My. & K. 506, was this: A. had loaned £2000, and taken a mortgage in the name of B. his brother, declaring that he intended it for the benefit of B. After the death of A., his executor brought a bill against B. to obtain the mortgage, and the question was whether the representatives of A. were entitled to the mortgage. It was held that B. was entitled to hold the mortgage, and it was remarked that a trust of personal property was not within the statute of frauds. It will be observed that the mortgage was in writing in the name of B., and that the parol evidence was not used to establish a trust in B., but to rebut a trust resulting to A. from his having paid the purchase-money. If A. had taken the mortgage in his own name, but had declared that it was in trust for B., the question would have fairly arisen, whether a parol declaration could create a trust in a mortgage of real estate. Bayley *v.* Boulcott, 4 Russ. 346 only establishes the proposition that a paper prepared under the direction of the owner, but which she refused to execute, will not create a trust. But in M'Fadden *v.* Jenkyns, 1 Phill. 153, 1 Hare, 458, it was directly held that a parol declaration was sufficient to create a trust in personal property. If there are doubts and difficulty upon the supposed words, the court will give weight to the fact that they were not written to infer that they may not be the deliberate sentiments of the party. Dipple *v.* Corles, 11 Hare, 183; Paterson *v.* Murphy, ib. 91, 92.

[2] Hooper *v.* Holmes, 3 Stockt. 122; Day *v.* Roth, 18 N. Y. 448; Robson *v.* Harwell, 6 Ga. 589; Higgenbottom *v.* Peyton, 3 Rich. Eq. 398; Kirkpatrick *v.* Davidson, 2 Kelley, 297; Gordon *v.* Green, 10 Ga. 534; Kimball *v.* Morton, 1 Halst. Ch. 31. See McFadden *v.* Jenkyns, 1 Hare, 461; 1 Phill. 157; Thorpe *v.* Owens, 5 Beav. 224; George *v.* Bank of England, 7 Price, 646; Hawkins *v.* Gordon, 2 Sm. & Gif. 451; Peckham *v.* Taylor, 3 Beav. 250; Hunnewell *v.* Lane, 11 Met. 163; Simms *v.* Smith, 11 Ga. 195.

[3] Porter *v.* Bank of Rutland, 19 Vt. 410; Forster *v.* Hale, 3 Ves. Jr. 696;

estate is a personal chattel, and a trust in the money or mortgage debt, and in the mortgage itself, may be created by parol.[1] Mr. Hill says, that "it would seem to follow that legacies and annuities, and other sums of money charged on land do not come within the operation of the statute respecting parol declarations of trusts in land."[2] But all chattels real are within the statute, and trusts in them must be evidenced in writing, as in case of freehold or leasehold interests.[3] The same remarks are to be made in relation to parol trusts of personal property that were made in relation to parol trusts of real estate where such trusts are possible.[4] The subject-matter of the trust must be clearly ascertained, as well as the purposes of the trust and the persons who are to take the beneficial interests. Loose, vague, and indefinite expressions are insufficient to create the trust. If the trust is once created in writing it cannot be varied by parol, and if it is once created by parol it cannot be altered or varied by other declarations of the trustee, as where a daughter delivered to her father $7,000 upon the parol trust that he would secure the money in trust for her and invest it for her sole benefit, and the father made his will giving said notes to two trustees to receive and pay over the income and interest to the daughter during her life, and at her decease to pay the principal to such persons as she by her last will should direct and appoint, and in default of such appointment to her heirs-at-law: the father died, and his estate turning out insolvent, she brought a bill praying that the notes might be delivered to some person to be appointed by the court as trustee for her. Mr. Justice Wilde in delivering the opinion of the court, said, "it is very clear that the father, his executor, and his heirs and creditors, are bound by the trust. It was not in the power of the trustee to divest or defeat the trust without the consent of the *cestui que trust*, except by a sale of the trust property to a *bona fide* pur-

5 Ves. 308; Ashton *v.* Langdale, 4 De G. & Sm. 402; 4 Eng. L. & Eq. 80; Myers *v.* Perigal, 16 Sim. 533; 14 Eng. L. & Eq. 229; Hilton *v.* Giraud, 1 De G. & Sm. 183; Kilpin *v.* Kilpin, 1 M. & K. 520; Wheatley *v.* Purr, 1 Keen, 551.

[1] Bellasis *v.* Compton, 2 Vern. 294; Benbow *v.* Townsend, 1 M. & K. 510.

[2] Hill on Trustees, 58, (n); see note 1, p. 58.

[3] Skett *v.* Whitmore, Freem. 280; Forster *v.* Hale, 3 Ves. Jr. 696; Riddle *v.* Emerson, 1 Vern. 108; Hutchins *v.* Lee, 1 Atk. 447; Bellasis *v.* Compton, 2 Vern. 294; Gardner *v.* Rowe, 5 Russ. 258; Otis *v.* Sill, 8 Barb. 102.

[4] *Ante*, § 77.

chaser, for a valuable consideration, and without notice of the trust. Nor could the trustee vary the terms of the trust, or declare any new trust, to the prejudice of the *cestui que trust*, unless with her consent."[1]

§ 87. Under the statutes relating to the execution of last wills and testaments, no parol declaration can take effect as a nuncupative will, except in the case of soldiers in actual service, and mariners at sea. These persons may, according to the statutes of nearly all the States, make nuncupative wills of their wages and other personal property. It would seem to follow that they can create valid trusts in their wages and other personal property by nuncupative wills so made as to be proved and allowed in the courts of probate, or other courts having jurisdiction in such matters. Personal property may be so given and delivered to one in trust for another for a particular purpose that it will be good as a *donatio causa mortis*, and the trust will be executed by courts of equity;[2] but courts do not favor donations *mortis causa*. It has been held that a gift, *mortis causa*, of a fund in trust to be disposed of for benevolent purposes, at the absolute and unlimited discretion of the donee, could not be sustained.[3]

§ 88. An attempt was made at one time to hold gifts to charitable uses as excepted from the statute; but Lord Talbot decided,[4] and Lord Hardwicke affirmed the decision,[5] and Lord Northington said every man of sense must subscribe to it, that a gift to a charity must be treated on the same footing with any other disposition.[6]

§ 89. In addition to the statute of frauds, which forbids the creation of express trusts in lands unless the trust is evidenced by

[1] Hunnewell *v.* Lane, 11 Met. 163.

[2] Blunt *v.* Burrow, 4 Bro. Ch. 75 and Perkin's notes, 1 Ves. Jr. 546 and Sumner's notes; Moore *v.* Darton, 4 De G. & Sm. 517, 7 Eng. L. & Eq. 134; Borneman *v.* Sedlinger, 3 Shep. 429, 8 Shep. 185; Constant *v.* Schuyler, 1 Paige, 316. And see Tate *v.* Leithhead, 1 Kay, 658; Hambrooke *v.* Simmons, 4 Russ. 25; Hill *v.* Hill, 8 M. & W. 401; Drury *v.* Smith, 1 P. Wms. 404; 1 Story, Eq. Jur. § 607.

[3] Dole *v.* Lincoln, 31 Maine, 422. But the court decided the case on the ground: (1) that there was not a sufficient delivery to constitute a good gift *mortis causa*, and (2) that if the gift had been good in form, the trust for the charity could not be executed on account of its vagueness and uncertainty.

[4] Lloyd *v.* Spillett, 3 P. Wms. 344.

[5] Lloyd *v.* Spillett, 2 Atk. 148; Barn. 384; Adlington *v.* Cann, 3 Atk. 150.

[6] Boson *v.* Statham, 1 Eden, 513.

some writing signed by the party, there are statutes in every State that regulate the execution of wills. By the original statute of frauds, all wills to pass real estate were required to be in writing, signed by the testator, and attested in his presence by three or four witnesses.[1] This statute has been substantially adopted in all the States, though there is some diversity in the number of witnesses required. By this statute nuncupative wills of personal chattels were not prohibited, but they were placed under such regulations that they ceased to be in common use. Written wills of personal property were not required to be attested by witnesses. But in England at the present time, and in most of the United States, a will to pass personal property must be executed with the same formalities, and attested by the same number of witnesses, that are required to wills affecting real estate.[2]

§ 90. It follows from these statutes, that no trusts in real or personal estate can be created by any declaration of trust in a will, unless the will is executed in such form that it can be allowed in the Court of Probate having jurisdiction, and in such form that it will pass the estate that it is intended to operate upon. Mr. Hill lays down the proposition, that, if an instrument containing a declaration of trust by reason of some informality cannot be supported as a will, it may, nevertheless, if signed by the party, be a sufficient evidence of the creation of the trust to take it out of the statute.[3] And Lord Northington declared his opinion generally,

[1] 29 Car. II. c. 3, § 5.

[2] It is not within the general purposes of this treatise to enter into a discussion of the manner of executing wills in England and the several States of the Union. The reader will find the laws of the various States fully and accurately stated in the learned notes of the Hon. J. C. Perkins to 1 Jarman on Wills, pp. 113-135 (4th Am. ed.] as to real estate, and pp. 135-144, as to personal property.

[3] Hill on Trustees, 61. Mr. Hill cites Nab *v* Nab, 10 Mod. 404, 1 Eq. Ca. Ab. 404, Gil. Eq. 146. The case was this: A daughter put into her mother's hands £180, and afterwards made a will, which was duly executed, and appointed her mother executrix, but made no mention of the £180. After making the will she desired her mother to give the money to a third person. After the death of the daughter, this third person brought a bill in chancery alleging that the mother held this money in trust. The mother admitted the trust in her answer, and set up that she was not to give the money except at her option. The court held that the trust was admitted by the answer, and that the trust should be executed. It will be observed that the question as to a will informally executed did not arise. The question was wholly upon the effect of the defendant's answer in chancery. And the court, as reported in 1 Eq. Ca. Ab.

"that a writing signed by the party who has power to make the trust, declaring a trust upon the will, is good, though such writing be not attested by three witnesses according to the solemnities of the statute of frauds.[1] But these propositions, in the broad form in which they are stated, are clearly not law. The dictum of Lord Northington stands alone, and the highest authorities are in opposition to it.[2]

§ 91. There is one state of facts in which the above proposition of Mr. Hill may be good law. If a testator in making his will should declare by way of recital that a certain parcel of land, or sum of money, was held by him upon trusts therein stated, and the will should be so informally executed that it could not be proved in a court of probate, still, if it was signed by him, it would seem to be as good proof of the trust as letters and other memoranda signed by the party and found after his death. In such case the will could have no effect in creating the trust, it would be simply proof in writing of a trust already created and existing at the date of the will. But if the validity of the trust in any way depended upon the effect of the will in transferring the title to the property, the will could not be used in evidence, unless it was itself so executed as to be valid as a will. In all cases, where trusts originate in a will, the will must be executed according to the statute, or it cannot be used as a declaration and proof of the trusts.

§ 92. Mr. Lewin clearly states the law and gives the reasons, as follows: "We must bear in mind that the absolute owner of property combines in himself both the legal and equitable interest, and when the legislature enacts that no devise or bequest of property shall be valid without certain ceremonies, a testator cannot by an informal instrument affect the equitable any more than the legal estate, for the one is a constituent part of the ownership as much as the other. Thus a person cannot, but by will duly signed and attested, give a sum of *money* originally and primarily out of land; for the charge is part of the land and to be raised out of it, by sale or mortgage.[3] And if

404, said that if the mother had set up the statute of frauds the trust could not have been carried into effect.

[1] Boson *v.* Statham, 1 Ed. 514.

[2] Adlington *v.* Cann, 3 Atk. 151; Muckleston *v.* Brown, 6 Ves. 67; Stickland *v.* Aldridge, 9 Ves. 519; Puleston *v.* Puleston, Finch, 312.

[3] Brudenell *v.* Boughton, 2 Atk. 272.

a testator by will duly signed and attested give lands to A. and his heirs 'upon trust,' but without specifying the particular trust intended, and then by a paper not duly signed and attested, as a will or codicil, declare a trust in favor of B., the beneficial interest under the will is a part of the original ownership, and cannot be passed by the informal paper, but will descend to the heir-at-law.[1] Again, if a legacy be bequeathed by a will in writing to A. 'upon trust,' and the testator by parol express an intention that it shall be held by A. upon trust for B., such a direction is in fact a testamentary disposition of the equitable interest in the chattel, and therefore void by the statute, which imposes the necessity of a written will. If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and, therefore, that where the legal estate of a freehold is well devised a trust may be engrafted upon it by a single note in writing; and where a personal chattel is well bequeathed, a trust of it, as excepted from the seventh section of the statute of frauds, may be raised by a mere parol declaration, — the answer is, that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. 'The deed,' observed Lord Loughborough, in a similar case, 'is built on the will; if the will is destroyed, the deed, I should consider absolutely gone; the will without the deed is incomplete, and the deed without the will is a nullity.'[2] And Mr. Justice Buller observed, 'a deed must take place upon its execution or not at all; it is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing an interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death.'[3] We may therefore safely assume, as an established rule, that if the intended disposition be of a testamentary character and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative unless, it be declared in writing in strict conformity with the statutory enactments regulating devises and bequests."[4]

[1] Adlington *v.* Cann, 3 Atk. 151.
[2] Harbergham *v.* Vincent, 2 Ves. Jr. 209.
[3] Ibid.
[4] Lewin on Trusts, 66 (2d Am. ed.).

§ 93. There is an additional reason, in the United States, why a will or testamentary paper informally executed cannot be used as an original declaration of trust. In nearly all the United States no will can be used to prove the transfer of any interest, legal or equitable, in property of the testator, unless such will has been duly proved, allowed, and recorded, in a court of probate having jurisdiction over it;[1] and if such will is to be used to affect the title to property in any State other than the one where it is originally proved, it must be recorded in such other State.[2] But no will can be proved and allowed in a probate court unless it is duly executed under the statutes in force where it is made. This rule does not interfere with the doctrine that a testator may by his last will refer to and incorporate therein any document or paper which is in actual existence at the time, and is thus made a part of his will.[3] In such cases, all such papers must be clearly identified and probated and recorded with the will as a part thereof, and such papers must be in actual existence at the time of making the will. If they are made afterwards, they must be so executed that they may be probated as a revocation of the will, or as a codicil thereto, or they will have no effect;[4] as, where a testator made an absolute devise of an estate, and left a declaration of trust not referred to in the will, and not duly attested, and not communicated to the devisee nor assented to by him in the testator's lifetime, the devisee is entitled to both the legal and beneficial interest, because it is a good devise on the face of the will, and the informal declaration of trust cannot be probated or admitted in evidence.[5]

[1] Rex *v.* Netherseal, 4 T. R. 258; 1 Wms. Ex'rs, 172; Strong *v.* Perkins, 3 N. H. 517; Kittredge *v.* Fulsome, 8 N. H. 98; 2 Redf. on Wills, 10; Metham *v.* Devon, 1 P. Wms. 529; Inchiquin *v.* French, 1 Cox, 1. And see Mr. Lewin's remarks upon this last case, Lewin on Trusts, p. 49.

[2] Wilson *v.* Tappan, 6 Ohio, 172; Bailey *v*, Bailey, 8 Ohio, 239; Ives *v.* Allyn, 12 Vt. 589; Campbell *v.* Sheldon, 13 Pick. 8; Campbell *v.* Wallace, 10 Gray, 162; 2 Redf. on Wills, 10.

[3] 1 Wms. Ex'rs, 289, 290, and notes.

[4] Adlington *v.* Cann, 3 Atk. 141–152; Briggs *v.* Penny, 3 De G. & Sm. 547; 3 Mac. & G. 546; 8 Eng. L. & Eq. 231; Johnson *v.* Ball, 5 De G. & Sm. 85; Dawson *v.* Dawson, 1 Chev. 148; Johnson *v.* Clarkson, 3 Rich. Eq. 305.

[5] Adlington *v.* Cann, 3 Atk. 141; Stickland *v.* Aldridge, 9 Ves. 519; Briggs *v.* Penny, 3 De G. & Sm. 547, 3 Mac. & G. 546; 8 Eng. L. & Eq. 231; Wallgrave *v.* Tebbs, 2 K. & J. 313; Lee *v.* Ferris, 2 K. & J. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Brown *v.* Brown, 12 Md. 87.

So, if a testator should devise real or personal property to A. in trust and state no trusts upon which A. is to hold, no paper not referred to in the will, and not duly executed, could be received in evidence to prove the trusts, nor could A. hold the beneficial interest, because he is stamped with the character of a trustee, but he would hold only the legal title while the beneficial interest would descend or result to the testator's heirs-at-law.[1]

§ 94. Even at common law parol evidence could not be received to convert a devisee under a will in writing into a trustee. In Vernon's case it was resolved that a devise implies a consideration, and therefore that it cannot be averred or proved by parol to be for the use of another;[2] "for that," said Lord Ch. B. Gilbert, "were an averment contrary to the design of the will appearing in the words;"[3] and in Lady Portington's case, the court refused to receive parol evidence, not only because of the statute of frauds, but also *from the nature of the thing*.[4] For the same reason, at common law parol evidence of a trust was always inadmissible against a legatee under a written will.[5] Until a late statute[6] in England a person appointed executor had the title to all the personal property, and was entitled to take the surplus, after paying debts and legacies, beneficially to himself, and no parol evidence was admissible to convert him into a trustee for the heirs or next of kin.[7] But the authorities seem to establish that if there was any circumstance appearing on the face of the will, as the gift of a legacy to the executor, the law *presumed* that it was not intended that he should take the surplus beneficially; the executor might rebut that presumption by parol evidence,[8] when, of course, the

[1] Ibid.; Muckleston *v.* Brown, 6 Ves. 52; Boson *v.* Statham, 1 Ed. 508.

[2] Vernon's Case, 4 Coke, R. 4 a.

[3] Gilbert on Uses, 162.

[4] Lady Portington's Case, 1 Salk. 162. It is stated by Jenkins that at common law parol proof might be received to ingraft a trust upon a written will. Jenk. 3 Cent. Ca. 26. But by comparing the case cited by Jenkins with the same case in Fitzherb. Ch. Devise, 22, it will be seen that Jenkins was mistaken in the point decided. And see Lewin on Trusts, 58, 2d Am. ed.

[5] Porey *v.* Juxon, Nels. 135; Fane *v.* Fane, 1 Vern. 30.

[6] 11 Geo. IV., and 1 W. IV. c. 40.

[7] Langham *v.* Sandford, 19 Ves. 644; White *v.* Williams, 3 Ves. & B. 72; Coop. 58.

[8] Walton *v.* Walton, 14 Ves. 322; Clennell *v.* Lewthwaite, 2 Ves. Jr. 477; Langham *v.* Sandford, 17 Ves. 442; Lynn *v.* Beaver, 1 T. & R. 66.

next of kin might fortify the presumption by opposing parol evidence in contradiction. Where, however, the will itself invested the executor with the character of trustee, as by giving him a legacy "for his trouble," or by styling him a "trustee" expressly, the *prima facie* title to the surplus was then in the next of kin, and parol evidence was not admissible to disprove the express intention.[1] By the act referred to in England, and by statutes in all the United States, an executor is made *prima facie* a trustee for the next of kin.[2]

§ 95. Where an agreement is entered into for a *valuable consideration*, and a trust is intended, the mere form of the instrument is not very material; for, if the trust is not perfectly created or executed by the instrument, a court of equity can enforce it as a contract. Wherever *a valuable consideration* is paid, the contract will be executed as near to the intention of the parties as possible; as where for a valuable consideration a man executed a deed of land purporting to be under his hand and seal, but no seal was affixed, by reason of which defect the legal title did not pass, the court held that the defective deed might be used as a declaration of trust, and that the holder of the legal title should hold it in trust for the grantee in the deed, and that he should be ordered to convey;[3] and where a husband for a meritorious consideration conveyed personal property directly to his wife by deed, which could not operate, because a husband cannot convey directly to his wife, the court ordered the deed to stand as a declaration of trust for the wife, and the husband's representatives to hold the legal title in trust for her.[4] The authorities establish this proposition, that where there is a valuable consideration the court will enforce the trust, though it is not perfectly created, and though the instruments do not pass the title to the property, if from the documents

[1] Rachfield *v.* Careless, 2 P. Wms. 158; Langham *v.* Sandford, 17 Ves. 453; 19 Ves. 641; Golding *v.* Yapp, 5 Mad. 59; White *v.* Evans, 14 Ves. 21; Walton *v.* Walton, 14 Ves. 322; Read *v.* Stedman, 26 Beav. 495.

[2] Love *v.* Gaze, 8 Beav. 472; Juler *v.* Juler, 29 Beav. 34; Harrison *v.* Harrison, 2 Hem. & Mill. 237; Read *v.* Stedman, 26 Beav. 495; Hill *v.* Hill, 2 Hayw 298; Paup *v.* Mingo, 4 Leigh, 163; Hays *v.* Jackson, 6 Mass. 153; Wilson *v.* Wilson, 3 Bin. 559; Darrah *v.* McNair, 1 Ash. 240; 2 Story's Eq. Jur. § 1208–1210, and notes; Lewin on Trusts, 50.

[3] Wadsworth *v.* Wendell, 5 John. Ch. 224.

[4] Huntley *v.* Huntley, 8 Ired. Eq. 250; Livingston *v.* Livingston, 2 John. Ch. 537; Garner *v.* Garner, 1 Busb. Eq. 1; Jones *v.* Obinchain, 10 Grat. 259.

the court can clearly perceive the terms and conditions of the trust, and the parties to be benefited. In such cases, effect is given to the *consideration* to carry out the intentions of the parties, though informally expressed.

§ 96. And where there is *no valuable consideration*, yet if the settlor, by a clear and explicit declaration duly executed and intended to be final and binding upon him, makes himself a trustee, courts of equity will enforce the trust, whether the nature of the property be legal or equitable, and whether it be capable or incapable of transfer.[1] If it is a mere agreement, without consideration, to execute a declaration of trust, courts will not act upon it; but if a party has declared himself to be a trustee, the beneficial interest in the property becomes vested in the *cestui que trust* without further action, and the *cestui que trust* can enforce his rights.[2]

§ 97. If the donor or settlor does not propose to make himself a trustee, the trust is not *perfectly* created. As where there is a mere *intention* of creating a trust, or a mere voluntary agreement to do so, and the donor or settlor contemplates some further act to be done by him to give it effect, the trust is not completely instituted, and if it is voluntary, the settlor cannot be compelled to complete it.[3]

[1] *Ex parte* Pye, 18 Ves. 140; Thorpe *v.* Owen, 5 Beav. 224; Wilcocks *v.* Hannyngton, 5 Ir. Ch. 38; Drasier *v.* Brereton, 15 Beav. 221; Gray *v.* Gray, 2 Sim. (N. S.) 273; Vandenberg *v.* Palmer, 4 Kay & J. 204; Stapleton *v.* Stapleton, 14 Sim. 186; Searle *v.* Law, 15 Sim. 99; Bridge *v.* Bridge, 16 Beav. 315; Steele *v.* Waller, 28 Beav. 466; Paterson *v.* Murphy, 11 Hare, 88; Bentley *v.* MacKay, 15 Beav. 12; McFadden *v.* Jenkyns, 1 Hare, 471. In the last case, Sir J. Wigram said: "If the owner of property executes an instrument by which he declared himself a trustee, and had disclosed that instrument to the *cestui que trust*, and afterwards acted upon it, that might perhaps be sufficient, and a court of equity might not be bound to inquire further into an equitable title so established." Mr. Lewin says that this is "expressed with *unnecessary caution*." Lewin on Trusts, 57.

[2] *Ex parte* Pye, 18 Ves. 149.

[3] Cotteen *v.* Missing, 1 Mad. 176; Bayley *v.* Boulcott, 4 Rus. 345; Dipple *v.* Corles, 11 Hare, 133; Jones *v.* Lock, L. R. 1 Ch. 25; Caldwell *v.* Williams, 1 Bailey, Eq. 175; Crompton *v.* Vasser, 19 Ala. 259; Hayes *v.* Kershaw, 1 Sand. Ch. 258; Reid *v.* Vanarsdale, 2 Leigh, 560; Evans *v.* Battle, 19 Ala. 378; Pinkard *v.* Pinkard, 2 Ala. 649; Minturn *v.* Seymour, 4 John. Ch. 498; Acker *v.* Phœnix, 4 Paige, 305; Dawson *v.* Dawson, 1 Dev. Eq. 93; Banks *v.* May, 3 A. K. Marsh. 435; Bibb *v.* Smith, 1 Dana, 580; Darlington *v.* McCoole, 1 Leigh, 36; Tiernan *v.* Poor, 1 Gill & J. 217; Forward *v.* Armstead, 12 Ala. 124;

§ 98. But if the trust is *perfectly created*, so that the donor or settlor has nothing more to do, and the person seeking to enforce it has need of no further conveyances from the settlor, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed.[1]

Shaw *v.* Burney, 1 Ired. Eq. 148; Clarke *v.* Lott, 11 Ill. 105; Read *v.* Robinson, 6 W. & S. 338; Yarborough *v.* West, 10 Geo. 471; Colman *v.* Sarel, 3 Bro. Ch. 12; Antrobus *v.* Smith, 12 Ves. 39; Edwards *v.* Jones, 1 M. & Cr. 226; Jefferys *v.* Jefferys, 1 Cr. & Phil. 138; Dillon *v.* Coppin, 4 M. & Cr. 647.

[1] Stone *v.* Hackett, 12 Gray, 227; Ellison *v.* Ellison, 6 Ves. 662; Pulvertoft *v.* Pulvertoft, 18 Ves. 99; Sloan *v.* Cadogan, Sugd. Ven. & Pur. App. 26; Edwards *v.* Jones, 1 M. & Cr. 226; Wheatley *v.* Purr, 1 Keen, 551; Garrard *v.* Lauderdale, 3 Sim. 1; Collinson *v.* Patrick, 2 Keen, 123; Dillon *v.* Coppin, 4 M. & Cr. 647; Meek *v.* Kettlewell, 1 Hare, 469; Fletcher *v.* Fletcher, 4 Hare, 74; Price *v.* Price, 4 Beav. 598; Bridge *v.* Bridge, 16 Beav. 315; Beech *v.* Keep, 18 Beav. 285; Donaldson *v.* Donaldson, 1 Kay, 711; Scales *v.* Maude, 6 De G., M. & G. 43; Airey *v.* Hall, 3 Sm. & Gif. 315; Wright *v.* Miller, 4 Seld. 9; Andrews *v.* Hobson, 23 Ala. 219; Bunn *v.* Winthrop, 1 John. Ch. 329; Lechmere *v.* Carlisle, 3 P. Wms. 222; Minturn *v.* Seymour, 4 John. Ch. 498; Dennison *v.* Goehring, 7 Barr, 175; Tolar *v.* Tolar, 1 Dev. Eq. 456; Dawson *v.* Dawson, 1 Dev. Eq. 93, 396; Hardin *v.* Baird, 6 Litt. 340; Hayes *v.* Kershaw, 1 Sand. Ch. 261; Fogg *v.* Middleton, Riley, Ch. 193; Greenfield's Estate, 2 Harr. 489; Kirkpatrick *v.* McDonald, 1 Jones, 387; Graham *v.* Lambert, 5 Humph. 595; Henson *v.* Kinard, 3 Strob. Eq. 371; Dupre *v.* Thompson, 4 Barb. 280; Cox *v.* Sprigg, 6 Md. 274; Lane *v.* Ewing, 31 Mo. 75.

In Stone *v.* Hackett, 12 Gray, 227, the settlor had purchased stocks in various corporations in the name of H. P. K., and took from H. P. K. a declaration that she held the stocks upon certain trusts therein particularly specified. Afterwards the settlor caused H. P. K. to indorse and sign upon the backs of the certificates a transfer to the plaintiff and a power of attorney to the plaintiff to complete the transfer, and took from her a declaration of trust, stating the purposes for which she held the stock. The settlor died and a question arose as to the title to the stock. Chief-Justice Bigelow said: "The key to the solution of the question raised in this case is to be found in the equitable principle now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid and its provisions enforced and carried into effect against all persons except creditors and *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of the title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though

§ 99. Whether the trust is *perfectly created* or not, is a question of fact in each case; and the court, in determining the fact, will give effect to the situation and relation of the parties, the nature and situation of the property, and the purposes or objects which the settlor had in view in making the disposition.[1] A vast num-

made without consideration, will be enforced in chancery. The leading case in which the principle is declared and acted upon is Ellison *v.* Ellison, 6 Ves. 656, in which Lord Eldon decreed the enforcement of a trust which in its creation was wholly voluntary and without consideration. This has been followed by many other cases in which the same principle was recognized. Pulvertoft *v.* Pulvertoft, 18 Ves. 84; *Ex parte* Pye, ib. 140; Sloan *v.* Cadogan, Sugd. Ven. & Pur. (11 ed.) 1119; Fortescue *v.* Barnett, 3 My. & K. 36; Wheatley *v.* Purr, 1 Keen, 551; Blakely *v.* Brady, 2 Dru. & Wal. 311; Browne *v.* Cavendish, 1 Jon. & La. 637; Kekewich *v.* Manning, 1 De G., M. & G. 176. The last-named case contains a full discussion of all the authorities and a clear and accurate statement of the law upon the subject."

"The application of the principle established by these authorities is entirely decisive of the rights and duties of the parties to this suit. The conveyance or transfer of the shares to the plaintiff in her capacity of trustee was full and complete and vested in her the legal title to the property. No further act was to be done by the original owner of the shares to consummate the plaintiff's title. As between the parties the delivery of the certificates of stock, with the assignments of some of them and the power of attorney to transfer the others, was equivalent to a complete executed transfer of the shares. Nor is it at all material to the validity of the plaintiff's title that transfers of the shares had not been recorded in the books of the different corporations and new certificates of stock taken out by her. That was not necessary to the conveyance of the legal title, as between the donor and the plaintiff. This is well settled by the authorities in this State. Quinn *v.* Marblehead Social Ins. Co., 10 Mass. 476; Ellis *v.* Essex Merrimack Bridge, 2 Pick, 248; Sargent *v.* Franklin Ins. Co., 8 Pick. 96; Eames *v.* Wheeler, 19 Pick. 444. Such, too, is the plain import of the statute. . . . Nothing therefore was left *in fieri*. The transaction was a completely executed transfer of property, and fully created a trust which, according to the principles already stated, a court of equity is bound to recognize and enforce."

[1] Jones *v.* Lock, L. R., 1 Ch. 25. In this case a father put a check for £900 into the hands of his child, nine months old, with the strongest expression of an intent to give the check to the child. He afterwards took the check and locked it up, saying he should keep it for the child, and died the same day. A bill was brought in behalf of the child against his father's representatives to enforce his interest in the check as a trust. Lord Cranworth said: "No doubt a gift may be made by any person *sui juris* and *compos mentis*, by conveyance of real estate or by delivery of chattels; and there is no doubt also that by some decisions, unfortunate I must think them, a parol declaration of a trust of personalty may be perfectly valid even when voluntary. If I give any chattel, that of course passes by delivery, and if I say expressly, or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of

ber of cases have been decided involving the last three propositions. There is much seeming conflict in the decisions, and it would be an endless, perhaps useless, task to attempt to reconcile them. The proposition laid down by Lord Cranworth, that it is a question of fact in each case whether a perfect trust is created or not, goes far to reconcile the differences. Some judges give greater prominence to one element of fact in the case than other judges, and thus different judges might decide the same question upon the facts in a different manner; but so long as it is a question of fact in each case, the rule of law is the same, however the fact may be found.

§ 100. If the donor or settlor propose to make a stranger the trustee of his property, and the property is a legal estate, capable of legal transfer and delivery, the trust is not perfectly created, unless the legal interest is actually transferred to or vested in the trustee. It is not enough that the settlor executed a paper purporting to pass it, if in fact the paper does not have that effect. The intention of the settlor to divest himself of the legal title must be consummated and executed, or the court will not enforce the trust. As, for instance, if a settlor execute a deed in trust of scrip, stock, or shares in corporations, which scrip, stock, or shares can be transferred only by assignment upon the backs of the certificates, and upon the company's books, the deed, if voluntary, will not create a trust which the court will execute, unless the stocks are actually transferred in fact.[1] And so of mortgages, mortgage debts, and other securities. If any thing remains for

being enforced without consideration. I do not think it necessary to go into any of the authorities cited before me. *They all turn upon the question whether what has been said was a declaration of trust or an imperfect gift.* In the latter the parties would receive no aid from a court of equity, if they claimed as volunteers; but if there has been a declaration of trust, then it will be enforced whether there has been a consideration or not. *Therefore the question in each case is one of fact*, has there been a gift or not, or has there been a declaration of trust or not? This case turns on the very short question whether the father intended to make a declaration that he held the property in trust for the child, and I cannot come to any other conclusion than that he did not." His Lordship then comments upon the evidence and says, "that it was all very natural, but that the father would have been very much surprised if he had been told that he had parted with the £900, and could no longer dispose of it; and that the child, by his next friend, could have brought an action of trover for the check."

[1] Garrard *v.* Lauderdale, 2 R. & M. 451; 3 Sim. 1; Meek *v.* Kettlewell, 1 Hare, 469; Dillon *v.* Coppin, 4 M. & Cr. 647; Coningham *v.* Plunkett, 2 Y.

the donor to do to vest the legal title in the donee, the court cannot execute the trust, if it is voluntary. Lord Eldon stated the principle thus: "I take the distinction to be, that if you want the assistance of the court to constitute a *cestui que trust*, and the instrument is *voluntary*, you shall not have the assistance for the purpose of constituting a *cestui que trust*, as upon a covenant to transfer stock, &c.; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court.[1]

§ 101. But if the subject of the trust is a legal interest, that cannot be transferred or assigned at law, as a bond or any other *chose in action*, what then is the rule? On the one hand it has been argued that in equity the universal rule is, that a court will not enforce a voluntary agreement in favor of a volunteer, and as by the supposition the legal interest remains in the settlor (who, therefore, at law retains the full control and benefit of it), a court of equity will not, in the absence of a valuable or good consideration deprive him of that interest, with which he has not actually parted. And this reasoning has been sustained by numerous cases.[2] On the other hand, as the settlor cannot divest himself of the legal interest, to say that he shall not constitute another as trustee without passing the legal interest, would be to debar him from the creation of a trust at all in the hands of another, and that the rule, therefore, should be, that if the settlor make all the assignment of

& Col. Ch. 245; Searle *v.* Law, 15 Sim. 95; Price *v.* Price, 14 Beav. 598; Bridge *v.* Bridge, 16 Beav. 315; Beech *v.* Keep, 18 Beav. 285; Totham *v.* Vernon, 29 Beav. 604; Dillon *v.* Bone, 3 Gif. 238; Milroy *v.* Lord, 8 Jur. (N. S.) 806; Lonsdale's Estate, 29 Penn. St. 407; Parnell *v.* Hingston, 3 Sm. & Gif. 337; Kiddill *v.* Farnell, 3 Sm. & Gif. 428; Weale *v.* Ollive, 17 Beav. 252; Dening *v.* Ware, 22 Beav. 184; Roberts *v.* Roberts, 11 Jur. (N. S.) 992; Forest *v.* Forest, 34 L. J. Ch. 428; Peckham *v.* Taylor, 31 Beav. 250; Jones *v.* Obinchain, 10 Grat. 259; Henderson *v.* Henderson, 21 Mo. 379; Lane *v.* Ewing, 31 Mo. 75; Gilchrist *v.* Stevenson, 9 Barb. 9; Cressman's Appeal, 42 Penn. St. 147.

[1] Ellison *v.* Ellison, 6 Ves. 662; Antrobus *v.* Smith, 12 Ves. 39; Colman *v.* Sarel, 1 Ves. Jr. 50; 3 Bro. Ch. 12; Dening *v.* Ware, 22 Beav. 184; Airey *v.* Hall, 3 Sm. & Gif. 315; Kiddill *v.* Farnell, 3 Sm. & Gif. 428; Pulvertoft *v.* Pulvertoft, 18 Ves. 89.

[2] Edwards *v.* Jones, 1 My. & Cr. 226; Ward *v.* Audland, 8 Sm. 571; C. P. Coop. Cas. (1837, 1838), 146; 8 Beav. 201; Meek *v.* Kettlewell, 1 Hare, 464; Scales *v.* Maude, 6 De G., M. & G. 43; Sewell *v.* Moxsy, 2 Sim. (N. S.) 189; Bridge *v.* Bridge, 16 Beav. 315; Beech *v.* Keep, 18 Beav. 285.

the property in his power, and perfect the transaction as far as the law permits, the court should recognize the act and support the validity of the trust. And this reasoning has also been supported by many decided cases.[1] In a late leading case, Lord Justice K. Bruce made a thorough examination of all the authorities and established this proposition: "It is upon legal and equitable principles we apprehend, clear that a person *sui juris*, acting freely and fairly, and with sufficient knowledge, ought to have, and *has it in his power to make* in a binding and effectual manner a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession or reversionary or howsoever circumstanced*."[2] Mr. Lewin says, "that it is conceived that this principle will, for the future, prevail,"[3] and it has been followed in the later cases.[4] But if part of the property be capable of delivery and transfer, and part of it incapable of delivery, and that which might have been legally assigned and delivered is not so assigned and delivered, no trust is created.[5]

§ 102. It is well established, that, if the subject of the trust is an equitable interest, the *cestui que trust* may create a valid trust by executing an assignment of his interest to a new trustee, for the equitable interest can be transferred from one to another, and as the relation of trustee and *cestui que trust* already exists, the original settlor need not be called upon to do any act.[6] Lord Jus-

[1] Fortescue *v.* Barnett, 3 My. & K. 36; Roberts *v.* Lloyd, 2 Beav. 376; Blakely *v.* Brady, 2 Dru. & Wal. 311; Airey *v.* Hall, 3 Sm. & Gif. 315; Parnell *v.* Hingston, 3 Sm. & Gif. 337; Pearson *v.* Amicable Office, 27 Beav. 229; Sloan *v.* Cadogan, Sugd. Ven. & Pur. App.

[2] Kekewich *v.* Manning, 1 De G., M. & G. 187.

[3] Lewin on Trusts, 58.

[4] Wilcocks *v.* Hannyngton, 5 Ir. Ch. 45; Voyle *v.* Hughes, 2 Sm. & Gif. 18; Gilbert *v.* Overton, 33 L. J. Ch. 683; Way's Settlement, 10 Jur. (N. S.) 1166; 34 L. J. Ch. 49; Lambe *v.* Orton, 1 Dr. & Sm. 125; Donaldson *v.* Donaldson, Kay, 711; Appeal of Elliott's Ex'rs, 50 Penn. St. 75. And see Hill on Trustees, 140, 141 (4th Am. ed.).

[5] Woodford *v.* Charnley, 28 Beav. 96.

[6] Sloan *v.* Cadogan, Sugd. Ven. & Pur. App. This case was questioned in Beatson *v.* Beatson, 12 Sim. 281, but it has since been acted on. Voyle *v.* Hughes, 2 Sm. & Gif. 18; Lambe *v.* Orton, 1 Dr. & Sm. 125; Gilbert *v.* Overton, 2 Hem. & M. 110; Woodford *v.* Charnley, 28 Beav. 99; Way's Settlement, 2 De G., J. & Sm. 365, reversing 4 New R. 453. And see Reed *v.* O'Brien, 7 Beav. 32; Bridge *v.* Bridge, 16 Beav. 315; Gannon *v.* White, 2 Ir. Ch. 207; Donaldson *v.* Donaldson, 1 Kay, 711.

tice K. Bruce said: "Suppose stock or money to be legally vested in A. as a trustee for B. for life, and subject to B.'s life-interest for C. absolutely, surely it must be competent for C., in the lifetime of B., with or without the consent of A. to make an effectual gift of his interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D?"[1] So the *cestui que trust* can assign voluntarily his equitable interest to a stranger in trust for himself.[2] Or by a new declaration of trust the *cestui que trust* can direct the old trustees to hold his interest thereafter upon new trusts.[3] But it has been decided that a voluntary assignment of a *mere expectancy* in an equitable interest did not perfectly create a trust that the court would enforce, that any dealing with what a person only expects to have must in some sense be *in fieri*.[4] And if a settlor intend to make a voluntary settlement in a particular mode, as by conveying the legal title, and he fails to convey the title, the court will not lend its aid to give effect to the settlement in another and different mode, as by converting the attempted conveyance into a declaration of trust, for that would be to convert every imperfect voluntary instrument into a perfect trust.[5]

§ 103. In case of a sale of real estate for a valuable consideration, nothing passes by the deed, although it is signed and sealed, until the purchase-money is paid and the deed delivered to the vendee, or until so much is done that the law will construe the deed to be for the use, or under the control, of the vendee; but if a party execute a voluntary settlement and the deed recites that it is sealed and delivered, it will be binding upon the settlor, although he never parts with it, but keeps it in his possession until his death.[6] Still, if there are circumstances that show that

[1] Kekewich *v.* Manning, 1 De G., M. & G. 188.

[2] Sloan *v.* Cadogan, *ut supra;* Cotteen *v.* Missing, 1 Mad. 176; Collinson *v.* Patrick, 2 Keen, 123; Wilcocks *v.* Hannyngton, 5 Ir. Ch. 38; Godsall *v.* Webb, 2 Keen, 99.

[3] Rycroft *v.* Christy, 3 Beav. 238; McFadden *v.* Jenkins, 1 Hare, 458; 1 Phil. 153.

[4] Meek *v.* Kettlewell, 1 Hare, 464, by Sir J. Wigram, affirmed by Lord Lyndhurst in 1 Phil. 342.

[5] Milroy *v.* Lord, 8 Jur. (N. S.) 809.

[6] *Re* Way's Trust, 2 De G., J. & Sm. 375; Fletcher *v.* Fletcher, 4 Hare, 67; Hope *v.* Harman, 11 Jur. 1097; Bunn *v.* Winthrop, 1 John. Ch. 329; Jones *v.* Obinchain, 10 Grat. 259; Sear *v.* Ashwell, 3 Swanst. 411; Barlow *v.* Heneage,

the settlor never intended the deed, though executed to operate, the court will consider them, and if the deed was never delivered it will be one circumstance, and it may be a controlling circumstance to show that the trust was never perfectly created, or that it was revocable.[1]

§ 104. But if the voluntary trust is once perfectly created, and the relation of trustee and *cestui que trust* is once established, it will be enforced, though the settlor has destroyed the deed,[2] or has attempted to revoke it by making a second voluntary settlement of the same property,[3] or if the estate, by some accident, afterwards becomes revested in the settlor.[4] In all these cases the first perfectly created trust will be upheld with all its consequences, and the settlor will be declared to be a trustee.[5] But if the voluntary settlement be subject to a life-estate in the settlor, and also subject to such debts as he contracts during his life, he can defeat the trust by contracting debts to the full amount of the estate,[6] even if the debts are contracted by giving voluntary bonds for the purpose of defeating the settlement.[7]

§ 105. Nor is notice to the *cestui que trust* or to the trustee, and acceptance by him, essential to the validity of a voluntary trust as against the settlor, if it is otherwise perfectly created.[8] But the

Pr. Ch. 211; Clavering *v.* Clavering, 2 Vern. 474; Cecil *v.* Butcher, 2 J. & W. 573; Garnons *v.* Knight, 5 B. & C. 671; Exton *v.* Scott, 6 Sim. 31; Hall *v.* Palmer, 3 Hare, 532; Souverbye *v.* Arden, 1 John. Ch. 240; Boughton *v.* Boughton, 1 Atk. 625; Brackenbury *v.* Brackenbury, 2 J. & W. 391; Roberts *v.* Roberts, Daniel, 143. And see Cecil *v.* Butcher, 2 J. & W. 565.

[1] Uniacke *v.* Giles, 2 Moll. 257; Antrobus *v.* Smith, 12 Ves. 39; Birch *v.* Blagrave, Amb. 262; Dillon *v.* Coppin, 4 M. & Cr. 647; Platmone *v.* Staple, Coop. 250; Naldred *v.* Gilham, 1 P. Wms. 577; Cotton *v.* King, 2 P. Wms. 358, 674.

[2] Tolar *v.* Tolar, 1 Dev. Eq. 456; Dawson *v.* Dawson, 1 Dev. Eq. 93, 396; *In re* Way's Trust, 10 Jur. 837; 2 De G., J. & Sm. 365.

[3] Newton *v.* Askew, 11 Beav. 145; Rycroft *v.* Christy, 3 Beav. 238; Boughton *v.* Boughton, 1 Atk. 625; Brackenbury *v.* Brackenbury, 2 J. & W. 391; Clavering *v.* Clavering, 2 Vern. 473; Roberts *v.* Roberts, Daniel, 143; Cook *v.* Fountain, 3 Swans. 565; Young *v.* Peachy, 2 Atk. 254; Cecil *v.* Butcher, 2 J. & W. 565; Souverbye *v.* Arden, 1 John. Ch. 240.

[4] Ellison *v.* Ellison, 6 Ves. 656; Smith *v.* Lyne, 2 Y. & Col. 345; Paterson *v.* Murphy, 11 Hare, 88; Gilchrist *v.* Stevenson, 9 Barb. 9.

[5] Ibid.

[6] Markwell *v.* Markwell, 34 Beav. 12.

[7] Ibid.

[8] Tate *v.* Leithhead, Kay, 658; Donaldson *v.* Donaldson, Kay, 711; Roberts *v.* Lloyd, 2 Beav. 376; Burn *v.* Carvalho, 4 M. & Cr. 690; Sloper *v.* Cottrell, 6

absence of notice may become a fact of more or less importance in determining whether the trust is perfectly created or not.[1] As between purchasers for value, notice or no notice may have important effects, but a voluntary trust, as between the settlor, the trustee, and the *cestui que trust*, can be perfectly created without it.

§ 106. Under the statute of uses, uses could be raised either upon a valuable or pecuniary consideration, or upon what was called a good or meritorious consideration ; that is, a consideration arising out of blood, marriage, or family affection, and the moral obligation that every one is under to provide for his family or relations. Thus, a covenant to stand seised to the uses of a stranger, founded upon a valuable consideration, operated under the statute as a deed of bargain and sale to be enrolled, and conveyed the land to the stranger. But a covenant in consideration of blood or marriage to stand seised to the use of a wife or child or other relation created a use only in the *cestui que use*, and the deed need not be enrolled. In all cases the *consideration of this conveyance was the foundation of it.* Therefore, a covenant to stand seised to the use of a stranger in consideration of love or affection for him was inoperative for want of a consideration ; and a covenant in consideration of blood or marriage to stand seised to the use of a relative and a stranger vested the whole use in the relative, and was inoperative as to the stranger. From this brief statement can be seen the effect and meaning of what was called a good or meritorious consideration under the statute of uses.[2]

§ 107. In analogy to this doctrine, under the statute of uses it has been urged that a voluntary post-nuptial settlement in favor of a wife or child, executory in all its aspects, would be enforced in favor of such wife or child on the ground of a good or meritorious consideration for such settlement.[3] And in Ellis *v.* Nimmo, Lord

El. & Bl. 504; Gilbert *v.* Overton, 2 Hem. & Mill. 110; Kekewich *v.* Manning, 1 De G., M. & G. 176; Tierney *v.* Wood, 19 Beav. 330; Meux *v.* Bell, 1 Hare, 73.

[1] Beatson *v.* Beatson, 12 Sim. 281; Meek *v.* Kettlewell, 1 Hare, 476; 1 Phil. 342; Rycroft *v.* Christy, 3 Beav. 238; Godsall *v.* Webb, 2 Keen, 99; McFadden *v.* Jenkins, 1 Phil. 153; Bridge *v.* Bridge, 16 Beav. 315; Cecil *v.* Butcher, 2 J. & W. 573.

[2] Sand. Uses, 96-101; 2 Black. Com. 338.

[3] Bonham *v.* Newcomb, 2 Vent. 365; Leech *v.* Leech, 1 Ch. Cas. 249; Fothergill *v.* Fothergill, Freem. 256; Sear *v.* Ashwell, and Gordon *v.* Gordon, 3

Chancellor Sugden, after a most exhaustive examination of the authorities, decided that the meritorious consideration of providing for a child was sufficient to lead a court of equity to enforce an executory contract against the settlor.[1] This case met with considerable criticism, and several cases were decided, more or less in opposition to it.[2] In Moore *v.* Crofton, he allowed it to be overruled, declaring, however, at the same time, that he still thought it decided upon sound principles of equity,[3] so that now it may be considered as settled in England, that an executory agreement founded on a meritorious consideration only will not be executed against the settlor himself.[4]

§ 108. As to other parties claiming under the settlor, if he had sold the estate, or become indebted, the equity of a wife or child claiming as *cestui que trust* on the ground of a meritorious consideration, would not be enforced against a purchaser or creditors.[5] But if the settlor subsequently made a voluntary settlement, or died without disposing of the estate by some act *inter vivos*, there were authorities that the voluntary *cestui que trust* could enforce his equity as against other volunteers under another settlement,[6] or against devisees or legatees,[7] or against the heir-at-law or next of kin.[8] There was, however, this condition, that the persons against whom the settlement was sought to be enforced could not also plead a meritorious consideration; for, if they also were children of the settlor, the considerations would be equal. In such cases the court referred it to a master to report whether they

Swans. 411; Watts *v.* Bullas, 1 P. Wms. 60; Bolton *v.* Bolton, 3 Sev. 414; Goring *v.* Nash, 3 Atk. 186; Darley *v.* Darley, 3 Atk. 399; Hale *v.* Lamb, 2 Ed. 292; Evelyn *v.* Templar, 2 Bro. Ch. 148; Colman *v.* Sarel, 1 Ves. Jr. 50; 3 Bro. Ch. 12; Antrobus *v.* Smith, 12 Ves. 39; Rodgers *v.* Marshall, 17 Ves. 294; Ellison *v.* Ellison, 6 Ves. 656.

[1] Ellis *v.* Nimmo, Lloyd & Goold, 333.

[2] Holloway *v.* Headington, 8 Sim. 324; Dillon *v.* Coppin, 4 My. & Cr. 646; Jefferys *v.* Jefferys, 1 Cr. & Ph. 138.

[3] Moore *v.* Crofton, 3 Jon. & La. 442.

[4] Antrobus *v.* Smith, 12 Ves. 46; Holloway *v.* Headington, 8 Sim. 325; Walrand *v.* Walrand, 1 John. 25.

[5] Bolton *v.* Bolton, 3 Swans. 414, note; Goring *v.* Nash, 3 Atk. 186; Finch *v.* Winchelsea, 1 P. Wms. 277; Gerrard *v.* Lauderdale, 2 R. & M. 154, 453.

[6] Bolton *v.* Bolton, 3 Swans. 414.

[7] Ibid.

[8] Watts *v.* Bullas, 1 P. Wms. 60; Goring *v.* Nash, 3 Atk. 186; Rodgers *v.* Marshall, 17 Ves. 294.

had an adequate provision independent of the estate.[1] But at the present day in England, it would appear that even as against volunteers claiming under the settlor, with or without an adequate provision, a voluntary executory agreement, whether under seal or not, cannot be enforced on the mere ground of a meritorious consideration.[2]

[1] Goring *v.* Nash, 3 Atk. 186; Rodgers *v.* Marshall, 17 Ves. 294.

[2] Jefferys *v.* Jefferys, 1 Cr. & Ph. 138; Antrobus *v.* Smith, 12 Ves. 39; Evelyn *v.* Templar, 2 Bro. Ch. 148; Holloway *v.* Headington, 8 Sm. 334; Joyce *v.* Hutton, 11 Ir. Ch. 123; Moore *v.* Crofton, 3 Jon. & La. 442.

Mr. Lewin (p. 95 of his 3d ed.) has discussed this whole matter with a fulness that leaves little to be said. He says, "It has also been supposed that where the trust is imperfectly created the court without proof of valuable consideration will act upon a meritorious consideration, as the payment of debts or provision for wife or child. The covenant to stand seised to uses, and the jurisdiction of the court in supplying surrenders and aiding the defective execution of powers, have generally been referred to as establishing, or at least countenancing, this doctrine.

"As regards the covenant to stand seised to uses, it is evident that mere meritorious consideration was not a sufficient ground to attract the jurisdiction of the court; for no use would have arisen in favor of a wife or child unless there had been a covenant. 'There are several ways in the law,' said Lord Justice Holt, 'for declaring uses, whether upon transmutation of the possession or not. If a use be declared upon a transmutation of the possession as in a fine of feoffment, it is sufficient for the party on the transmutation to declare that the use shall be to such a party of such an estate; but if the use arise without transmutation of the possession, the use then does not arise by virtue of any declaration or appointment, but there must be some precedent obligation to oblige the party declaring the use, which must be founded on some consideration; for a use, having its foundation generally on grounds of equity, could not be relieved in chancery without transmutation of possession, or an agreement founded on a consideration; and therefore if bargain and sale were made of a man's lands, on the payment of the money, the use could have arisen without deed by parol; *but if the use was in consideration of blood, then it could not arise by parol agreement without a deed, because that agreement was not an obliging agreement: it wanted a consideration, and therefore, to make it an obliging agreement, there was necessity of a deed.*' Jones *v.* Morley, 12 Mod. 161.

"Thus, if equity be governed by the strict analogy of uses, the court cannot act upon meritorious consideration where the contract is by parol; and though, where the agreement is under seal, the argument of analogy applies, yet it follows not that equity will now raise a trust because formerly it would have created a use. A bargain and sale for 5*s.* consideration still operates by way of conveyance to transfer the estate; but should the bargain and sale be void as such for want of an indenture or an indenture duly enrolled, it could not be argued that the agreement at the present day would be specifically executed upon the basis of a trust. It may further be remarked, that if the covenant to stand seised to uses

§ 109. The tendency in the United States is to sustain and carry into effect an executory trust in favor of a wife or child founded

were now to regulate the administration of trusts, there would still be no ground for extending the relief to *creditors*, who, however, it is admitted on all hands, are equally entitled to the benefit of meritorious consideration. And the covenant to stand seised to uses extended, we must remember, not only to wife and child, but also to brothers, nephews, and cousins; but no one at the present day would think of admitting the same latitude in the execution of a trust.

"With respect to the jurisdiction of the court in supplying surrenders of copyholds, the principle upon which the relief is founded appears to be this, that as the heir was never meant by the law to take otherwise than in default of the ancestor's will, if the ancestor manifests any intention in favor of a meritorious object, the court will not suffer the mere want of form to carry a benefit to the representative. 'I have looked,' said Lord Alvanley, 'at all the cases I can find upon what principle this court goes in supplying the defect. It is this, — whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligation, shows an intention to execute such power, the court will operate upon the conscience of the *heir* to make him perfect this intention. This is not to be confounded with the case of the heirs being disinherited by a will of freeholds not duly executed: there is no will at all. The court cannot see that there is such an instrument; but whenever there is such a power, it has been executed.' Chapman *v.* Gibson, 3 Bro. Ch. 230. And see Ellis *v.* Nimmo, Lloyd & Goold, 341.

"The ground, upon which the courts aid *the defective execution of powers*, will be found upon examination to be precisely that upon which it supplies the surrender of copyholds. The power to the extent to which it may be exercised is regarded in equity as part of the dominion, — as a portion of the actual estate; and the donee of it is *pro tanto* the *bona fide* owner of the property, and the person taking in default of the donee's disposition is a *quasi* heir. Holmes *v.* Coghill, 12 Ves. 213; Coventry *v.* Coventry, at the end of Francis's Maxims in Equity. The only distinction between an actual heir and the person taking in default of the power is this, that the former is so constituted by course of law, while the latter is a *quasi* heir specially appointed by the settlor. Thus in aiding the defective execution of powers the court says, as in supplying surrenders: the donee of the power, who is the owner of the property to the extent of that power, has indicated an intention of providing for a meritorious object, and the person taking in default of the power, who is a kind of heir, shall not, through want of form, run away with the estate from those who are much better entitled.

"It is clear that an agreement founded on meritorious consideration will not be executed as against the settlor himself. Antrobus *v.* Smith, 12 Ves. 39. Indeed relief in such a case would offend against the security of property; for if a man improvidently bind himself by a complete alienation, the court will not unloose the fetters he hath put upon himself, but he must lie down under his own folly. Villers *v.* Beaumont, 1 Vern. 101; but if the court interpose where the act is left incomplete, what is it but to wrest property from a person who has not legally parted with it? Another observation that suggests itself is, that during the life of the settlor the ground of the meritorious consideration scarcely seems

upon a meritorious consideration, if the instrument is under seal,[1] though the rule is not fully established, and perhaps, upon thorough

to apply; for can it be thought to be the duty of a husband to endow his wife, during the coverture, with a separate and independent provision? or is a parent bound by any natural or moral obligation to impoverish himself (for such a case may be supposed) for the purpose of enriching a child? or has a court of equity the jurisdiction to appropriate a specific fund to creditors, when the debtor is still living? the presumption of law is that the creditor can obtain satisfaction of his debt by the usual legal process. It is after the *decease* of the settlor that meritorious consideration becomes such a powerful plea in a court of equity. The wife and children have then lost the personal support of the husband and parent, and who can have a juster claim to the inheritance of the property? The creditor is then barred, by act of God, of his remedy against the debtor; and, should the assets prove insufficient, how but by the assistance of equity can he hope to be satisfied in his demand? Another objection to the execution of a voluntary contract against the settlor himself, at least in respect of land, is the principle expressed by Lord Cowper, that equity, like nature, will do nothing in vain. Seeley *v.* Jago, 1 P. Wms. 389; Billingham *v.* Lawthen, 1 Ch. Ca. 243; Pulvertoft *v.* Pulvertoft, 18 Ves. 99; as if money be directed to be converted into land, or land into money, the devisee or legatee may elect to take the property in the original state, for should the court direct an actual conversion, the devisee or legatee might immediately annul the order by resorting to a reconversion; and so, should the court decree a specific performance of a contract regarding realty for meritorious consideration, the property the next moment might be disposed of to a *bona fide* purchaser, and the settlement become nugatory. Again, if the imperfect gift can be enforced against the settlor himself, then the equitable right must form a *lien* upon the property; and, upon the death of the settlor, his heir would, *in all events*, be bound to convey: but even in aiding the defective execution of powers and supplying surrenders of copyholds, a previous inquiry by the master is invariably directed whether the heir of the settlor has any other adequate provision."

[1] Shepherd *v.* Bevin, 4 Md. Ch. 133; 9 Gill, 32; Harris *v.* Haines, 6 Md. 435; McIntire *v.* Hughes, 4 Bibb, 186; Mahan *v.* Mahan, 7 B. Mon. 579; Bright *v.* Bright, 8 B. Mon. 194; Dennison *v.* Goehring, 7 Barr, 175; Hayes *v.* Kershaw, 1 Sand. 258; Taylor *v.* James, 4 Des. 5; Caldwell *v.* Williams, 1 Bai. Eq. 175; Garner *v.* Garner, 1 Busb. Eq. 1; Jones *v.* Obinchain, 10 Grat. 259; Harvey *v.* Alexander, 1 Rand. 219; Blackely *v.* Holton, 5 Dana, 520; 2 Spence, Eq. Jur. 58; Pennington *v.* Gitting, 2 Gill & J. 208; Tolar *v.* Tolar, Dev. Ch. 451; Thompson *v.* Thompson, 2 How. (Miss.) 737; Woodson *v.* McClelland, 4 Miss. 495. But see Taylor *v.* Taylor, 2 Humph. 597; Martin *v.* Ramsey, 5 Humph. 349; Campbell's Estate, 7 Barr, 101; Kennedy *v.* Ware, 1 Barr, 445; Cressman's Appeal, 42 Penn. St. 155; Bunn *v.* Winthrop, 1 John. Ch. 329. The above cases of M'Intire *v.* Hughes, Mahan *v.* Mahan, and Bright *v.* Bright are direct decisions upon the point, and fully establish the rule for the State of Kentucky, while the cases of Bunn *v.* Winthrop, Dennison *v.* Goehring, Jones *v.* Obinchain, and most of the other cases, presented a completely executed trust for enforcement, and the court was not

consideration, would not be acted upon. But the rule would be strictly confined to a wife and child, and would not be extended to brothers, sisters, nephews, or parents,[1] and probably not to grandchildren,[2] nor to illegitimate children.[3]

§ 110. Marriage is a valuable consideration, therefore executory agreements, made in contemplation of marriage, will be enforced if the marriage actually takes place.[4]

§ 111. A contract under seal imports a consideration, and an action at law can be maintained upon such a contract. And it has sometimes been supposed that a court of equity would enforce a contract in favor of a volunteer whenever an action of law could be sustained upon the instrument.[5] But equity never enforced a voluntary covenant, though under seal, to stand seised to the uses of a stranger; and it is now settled, in England, that equity will not enforce a voluntary contract, although under seal.[6] Equity will not decree the specific performance of a contract, where a court of law would

called upon to decide whether a meritorious consideration alone would support an executory trust. In Hayes *v.* Kershaw, the settlement was for a collateral relative, and the Vice-Chancellor declined to support it, but intimated in strong language that an executory trust for a wife or child would be supported upon meritorious consideration merely. The cases are very fully commented upon by the learned editors to 1 Lead. Cas. in Eq. 330–333, with a strong leaning to the opinion that voluntary executory trusts for a wife or child would be supported. The learned editors also express strong doubts whether the case of Ellis *v.* Nimmo, 1 Lloyd & Goold, 333, is overruled by the cases which are usually thought to overrule it; and their criticism is ingenious and acute. They do not, however, advert to the case of Moore *v.* Crofton, 3 Jones & La. 442. See Cox *v.* Sprigg, 6 Md. 274.

[1] Downing *v.* Townsend, Amb. 592; Buford's Heirs *v.* M'Kee, 1 Dana, 107; Hayes *v.* Kershaw, 1 Sand. Ch. 258.

[2] Buford's Heirs *v.* M'Kee, 1 Dana, 107.

[3] Fursaker *v.* Robinson, Pr. Ch. 475; but see Bunn *v.* Winthrop, 1 John. Ch. 329.

[4] Duval *v.* Getting, Gill, 38; Gough *v.* Crane, 3 Md. Ch. 119; Crane *v.* Gough, 4 Md. Ch. 316; Hale *v.* Lamb, 2 Ed. 271.

[5] Beard *v.* Nutthall, 1 Vern. 427; Williamson *v.* Coddrington, 1 Ves. 511; Hervey *v.* Audland, 14 Sim. 531; Husband *v.* Pollard and Randal *v.* Randal, 2 P. Wms. 467; Vernon *v.* Vernon, 2 P. Wms. 594; Goring *v.* Nash, 3 Atk. 186; Stephens *v.* Trueman, 1 Ves. 73; Wiseman *v.* Roper, 1 Ch. R. 158.

[6] Hale *v.* Lamb, 2 Ed. 294; Fursaker *v.* Robinson, Pr. Ch. 475; Evelyn *v.* Templar, 2 Bro. Ch. 148; Colman *v.* Sarel, 3 Bro. Ch. 12; Jefferys *v.* Jefferys, Cr. & Ph. 138; Meek *v.* Kettlewell, 1 Hare, 475; Fletcher *v.* Fletcher, 4 Hare, 74; Newton *v.* Askew, 11 Beav. 145; Dillon *v.* Coppin, 4 Mr. & Cr. 647; Kekewich *v.* Manning, 1 De G., M. & G. 188; Dening *v.* Ware, 22 Beav. 184.

give only nominal damages. In the United States, however, considerable stress is laid upon the solemnity of a seal. The courts say that they will not execute a voluntary executory agreement unless it is under seal,[1] thereby implying, that an executory contract under seal will be executed though voluntary. And in Kentucky, where the distinction between sealed and unsealed instruments is now abolished, a voluntary executory contract not under seal has been upheld.[2] But there is the same uncertainty whether a seal would render a voluntary executory contract binding in equity, as there is, whether a mere meritorious consideration will enable the court to enforce the settlement. Generally, in America, very little regard is paid to mere formalities, and a seal is regarded in most States as a mere formality. A mere scratch or scroll of the pen passes for a seal, and in some States they are abolished altogether. Why any effect should be given to a form that has ceased to be a solemnity would be hard to explain on principle, and is equally uncertain upon the authorities.

[1] Kennedy *v.* Ware, 1 Barr, 445; Caldwell *v.* Williams, 1 Bailey, Eq. 175; Dennison *v.* Goehring, 7 Barr, 175; M'Intire *v.* Hughes, 4 Bibb, 186.

[2] Mahan *v.* Mahan, 7 B. Mon. 579.

CHAPTER IV.

IMPLIED TRUSTS.

§ 112. IMPLIED trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts, from the whole transaction and the words used, *imply* or infer that it was the intention of the parties to create a trust. Courts seek for the intention of the parties, however informal or obscure the language may be, and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed through the medium of a trust. Implied trusts may arise out of agreements and settlements *inter vivos* [1] where there is a sufficient consideration; but they more frequently arise from the construction of wills where a consideration is implied. Thus, if a testator make an absolute gift to one person in his will, and accompany the gift with words expressing a "belief," [2] "desire," [3] "will," [4] "request," [5] "will and desire;" [6] or, if he "will and declare," [7] "wish and

[1] Liddard *v.* Liddard, 28 Beav. 266.

[2] Cary *v.* Cary, 2 Sch. & Le. 189; Paul *v.* Compton, 8 Ves. 380.

[3] Harding *v.* Glyn, 1 Atk. 469; Mason *v.* Limburg and Vernon *v.* Vernon, Amb. 4; Trot *v.* Vernon, 8 Vin. Abr. 72; Pushman *v.* Filliter, 3 Ves. 7; Brest *v.* Offley, 1 Ch. R. 246; Bonser *v.* Kinnear, 2 Gif. 195; Cruwys *v.* Colman, 9 Ves. 319; Shaw *v.* Lawless, Lloyd & Goold, 154, 5 Cl. & Fin. 129; Lloyd & Goold, Tem. Plunket, 559.

[4] Eales *v.* England, Pr. Ch. 200; Clowdsley *v.* Pelham, 1 Vern. 411.

[5] Pierson *v.* Garnet, 2 Bro. Ch. 38, 226; Eade *v.* Eade, 5 Mad. 118; Moriarty *v.* Martin, 3 Ir. Ch. 26; Bernard *v.* Minshull, 1 John. 276.

[6] Birch *v.* Wade, 3 Ves. & B. 198; Forbes *v.* Ball, 3 Mer. 437.

[7] Gray *v.* Gray, 11 Ir. Ch. 218.

request,"[1] "wish and desire,"[2] "entreat,"[3] "most heartily beseech,"[4] "order and direct,"[5] "authorize and empower,"[6] "recommend,"[7] "hope,"[8] "do not doubt,"[9] "be well assured,"[10] "confide,"[11] "have the fullest confidence,"[12] "trust and confide,"[13] "have full assurance and confident hope;"[14] or, if he make the gift "under the firm conviction,"[15] or "well knowing;"[16] or, if he use the expressions, "of course the legatee will give,"[17] or, "in consideration that the legatee has promised to give,"[18] in these and similar cases, courts will consider the intention of the testator as manifestly implied, and they will carry the intention into effect by declaring the donee or first taker to be a trustee for those

[1] Foley *v.* Parry, 5 Sim. 138; 2 M. & K. 138.

[2] Liddard *v.* Liddard, 28 Beav. 266.

[3] Prevost *v.* Clarke, 2 Mad. 458; Meredith *v.* Heneage, 1 Sim. 553; Taylor *v.* George, 2 Ves. & B. 378.

[4] Meredith *v.* Heneage, 1 Sim. 553.

[5] Cary *v.* Cary, 2 Sch. & Le. 189; White *v.* Briggs, 2 Phil. 583.

[6] Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192.

[7] Tibbits *v.* Tibbits, Jac. 317; 19 Ves. 656; Harwood *v.* West, 1 Sim. & S. 387; Paul *v.* Compton, 8 Ves. 380; Malim *v.* Keighley, 2 Ves. Jr. 333, 529; Malim *v.* Barker, 3 Ves. 150; Meredith *v.* Heneage, 1 Sim. 553; Kingston *v.* Lorton, 2 Hog. 166; Cholmondeley *v.* Cholmondeley, 14 Sim. 590; Hart *v.* Tribe, 18 Beav. 215; Meggison *v.* Moore, 2 Ves. Jr. 630; Sale *v.* Moore, 1 Sim. 534; *Ex parte* Payne, 2 Y. & Coll. 636; Randal *v.* Hearle, 1 Anst. 124; Lefroy *v.* Flood, 4 Ir. Ch. 1; Cunliffe *v.* Cunliffe, Amb. 686, distinguished in Pierson *v.* Garnet, 2 Bro. Ch. 46; Malim *v.* Keighley, 2 Ves. Jr. 532; Pushman *v.* Filliter, 3 Ves. 9.

[8] Harland *v.* Trigg, 1 Bro. Ch. 142; Paul *v.* Compton, 8 Ves. 380.

[9] Parsons *v.* Baker, 18 Ves. 476; Taylor *v.* George, 2 Ves. & B. 378; Malone *v.* O'Connor, Ll. & Goold, 465; Sale *v.* Moore, 1 Sim. 534.

[10] Macey *v.* Shumer, 1 Atk. 389; Anst. 520; Ray *v.* Adams, 3 My. & K. 237.

[11] Griffiths *v.* Evans, 5 Beav. 241; Shepherd *v.* Nottige, 2 John. & H. 766.

[12] Shovelton *v.* Shovelton, 32 Beav. 143; Wright *v.* Atkyns, 17 Ves. 255; 19 Ves. 229; G. Cooper, 111; T. & R. 143; Webb *v.* Wools, 2 Sim. (N. S.) 267; Palmer *v.* Simmonds, 2 Dr. 225.

[13] Wood *v.* Cox, 1 Keen, 317; 2 My. & Cr. 684; Pilkington *v.* Boughey, 12 Sim. 114.

[14] Macnab *v.* Whitbread, 17 Beav. 299.

[15] Barnes *v.* Grant, 2 Jur. (N. S.) 1127.

[16] Bardswell *v.* Bardswell, 9 Sim. 323; Nowland *v.* Nelligan, 1 Bro. Ch. 489; Briggs *v.* Penny, 3 Mac. & G. 546; 3 De G. & Sm. 525.

[17] Robinson *v.* Smith, 6 Mad. 194; Lechmere *v.* Lavie, 2 M. & K. 197.

[18] Clifton *v.* Lombe, Amb. 519.

whom the donor intended to benefit. And so the words, "it is my wish,"[1] "it is my wish and will,"[2] "having confidence,"[3] "I desire that the donee should appropriate $50 per year,"[4] to be disposed of and divided among my children,"[5] "with full confidence that they will dispose of such residue among our brothers and sisters according to their best discretion,"[6] "intrusting to her the education and maintenance of his children out of the profits of the estate,"[7] "I also *allow* my son to give her a support off my plantation during her life,"[8] were held to create trusts in favor of the parties to be benefited. And, so where a testator gave a sum of money to trustees "to pay the income yearly to his son for the support of himself and family, and the education of his children," it was held that the income was taken in trust by the son, and that the wife and children could enforce its appropriation in part for their support.[9]

[1] Brunson *v.* Hunter, 2 Hill, Ch. 490.

[2] McRee's Ad'r *v.* Means, 34 Ala. 349.

[3] Dresser *v.* Dresser, 46 Maine, 48; Reid's Ad'r *v.* Blackstone, 14 Grat. 363.

[4] Erickson *v.* Willard, 1 N. H. 217.

[5] Collins *v.* Carlisle, 7 B. Mon. 14.

[6] Bull *v.* Bull, 8 Conn. 47.

[7] Lucas *v.* Lockhart, 10 Sm. & Mar. 466.

[8] Hunter *v.* Stembridge, 12 Ga. 192. In this case the court construed the word *allow* as expressive of an *intention*, the testator being an illiterate man, that the son should support his mother out of the property given him, and that an absolute charge or trust was implied.

[9] Whiting *v.* Whiting, 4 Gray, 240; Chase *v.* Chase, 2 Allen, 101. In this case Chief-Justice Bigelow said: "The intent of the testator to give the benefit of the income of the trust fund created by his will to the wife and children of his son Phillip, as well as to his son, is clear and unequivocal. It was intended for their joint support, and for the education of the children. The only question arising on the construction of the will is, whether the income of the trust fund when received by the son is held absolutely by him to be disposed of at his discretion, or whether he takes it in trust so that the wife and children can seek to enforce its due appropriation, in part for their benefit in a court of equity. We cannot doubt that the latter is the true construction; otherwise it would be in the power of the son to defeat the purpose of the testator, by depriving his family of the support and education which was expressly provided for by the will. The adjudicated cases recognize the rule that where income arising from property is left to a person for the maintenance of children, he will be entitled to receive it for that purpose only so long as he continues properly to maintain them. It can make no difference in the application of the principle, that the person who is to receive the income also takes a beneficial interest in it for his own support. He is not thereby authorized to appropriate the whole of it to his

§ 113. On the other hand, it has been held that no trust was implied when property was given to a donee with a hope that "he would continue it in the family;"[1] or, with a request "to distribute it among such members of the donee's family" as he should deem most deserving;[2] or, "in full confidence that the donee would devise it to such heirs of the testator's father as she might think best deserved a preference;"[3] or with a recommendation, that the donee "would consider the testator's relations;"[4] or, where the recommendation was "to consider certain persons,"[5] "to be kind to them,"[6] "to remember them,"[7] "to do justice to them,"[8] "to make ample provision for them,"[9] "to use the property for herself and her children, and to remember the church of God and the poor,"[10] "to give what should remain at his death, or what he should die seised or possessed of,"[11] or, "to finally appropriate as he pleases;" with a recommendation to divide among certain persons,"[12] or, "to divide and dispose of the savings,[13] or the bulk

own use, and deprive the other beneficiaries of the share to which they are entitled. Hadow v. Hadow, 9 Sim. 438; Jubber v. Jubber, 9 Sim. 503; Longmore v. Elcum, 2 Y. & Col. Ch. 363; Leach v. Leach, 13 Sim. 304; Hart v. Tribe, 19 Beav. 149; Raikes v. Ward, 1 Hare, 445; Crockett v. Crockett, 2 Phil. 553."

[1] Harland v. Trigg, 1 Bro. Ch. 142; Wright v. Atkyns, G. Coop. 121; Woods v. Woods, 1 M. & Cr. 401; Parkinson's Trust, 1 Sim. (N. S.) 242; Williams v. Williams, ib. 358. See, also, White v. Briggs, 2 Phil. 583; Liley v. Hey, 1 Hare, 580.

[2] Green v. Marsden, 1 Drew, 646.

[3] Meredith v. Heneage, 1 Sim. 542; and see Wright v. Atkyns, G. Coop. 119.

[4] Sale v. Moore, 1 Sim. 534; Macnab v. Whitbread, 17 Beav. 209; Wright v. Atkyns, G. Coop. 119.

[5] Ibid.; Hoy v. Master, 6 Sim. 568.

[6] Buggins v. Yates, 9 Mod. 122.

[7] Bardswell v. Bardswell, 9 Sim. 319.

[8] Le Maitre v. Bannister, Pr. Ch. 200 and note; Pope v. Pope, 10 Sim. 1.

[9] Winch v. Brutton, 14 Sim. 379; Fox v. Fox, 27 Beav. 301.

[10] Curtis v. Rippon, 5 Mad. 434.

[11] Sprange v. Barnard, 2 Bro. Ch. 585; Green v. Marsden, 1 Drew. 646; Pushman v. Filliter, 3 Ves. 7; Wilson v. Major, 11 Ves. 205; Eade v. Eade, 5 Mad. 118; Wynne v. Hawkins, 1 Bro. Ch. 179; Lechmere v. Lavie, 2 M. & K. 197; Bland v. Bland, 2 Cox, 349; Att'y-Gen. v. Hall, Fitzg. 314; and see Meredith v. Heneage, 1 Sim. 556; Tibbits v. Tibbits, 19 Ves. 664; Pope v. Pope, 10 Sim. 1.

[12] White v. Briggs, 15 Sim. 33.

[13] Cowman v. Harrison, 10 Hare, 234.

of the property;"[1] or, where the testator "recommends, but does not absolutely enjoin;"[2] or, where a testator gave all his property to his wife absolutely, and by a codicil, in the form of a letter to her, said it was his wish "that she should have every thing, using her judgment when to dispose of it among her children, but that he should be unhappy if he thought that any one not of her family should be the better for what he felt confidence she would so well dispose of;"[3] or, where every thing was given to a "wife in the fullest trust and confidence reposed in her that she will dispose of the same for the joint benefit of herself and my children,"[4] or where an estate was given to a wife, "being fully satisfied that she will dispose of the same, by will or otherwise, in a fair and equitable manner to our united relatives, bearing in mind that my relatives are in better circumstances than hers;"[5] or, where all the testator's estate was given to his wife, recommending her "to give the same to his children, at such time and in such manner as she should think best;"[6] or, where a bequest of a house and an annuity was made to a niece for the support of herself and her nephews and nieces whom she then had under her care, "and of such other persons as she from time to time might wish and request to be members of her family;"[7] or, where property was given to a daughter, "to be hers for ever, to be disposed of as she may think proper among her children and grandchildren by will or otherwise;"[8] or a devise to a wife of all a testator's property, recommending her "to make some small allowance at her convenience to each of his brothers and sisters: say, $1000 to each;"[9] or, a devise "of the use, benefit, and profits, to a wife absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among her children;"[10] or, where the testator expressed an "earnest hope" and "particular request," that "the

[1] Palmer v. Simmonds, 2 Drew. 221.
[2] Young v. Martin, 2 Y. & C. Ch. 582.
[3] Williams v. Williams, 1 Sim. (N. S.) 358.
[4] Webb v. Wools, 2 Sim. (N. S.) 267; Byne v. Blackburn, 26 Beav. 41.
[5] Reeves v. Baker, 18 Beav. 372.
[6] Gilbert v. Chapin, 19 Conn. 351.
[7] Harper v. Phelps, 21 Conn. 257.
[8] Thompson v. McKisick, 3 Humph. 631.
[9] Ellis v. Ellis, 15 Ala. 296.
[10] Pennock's Estate, 2 Penn. St. 268; reversing Coate's Appeal, 2 Barr, 129, and McKonkey's Appeal, 1 Harris, 253.

donee would give the property to some one bearing the family name."[1]

§ 114. It is an easy task to enumerate cases where trusts have been implied and where they have not been implied; but it is difficult to reconcile all the decisions. The words "will," "wish," "request," "hope," "desire," "trust," "have confidence," "recommend," "not doubting," and other similar words, found so often in wills, express a state of mind in the testator, and they generally operate as a direct gift, devise, or bequest; but they are frequently so used that it is doubtful whether they are absolute directions, or mere suggestions to be acted on or not according to the discretion of the donee. Every case must depend upon the construction of the particular will under consideration.[2] The point really to be determined in all these cases is whether, looking at the whole context of the will, the testator intended to impose an obligation on his legatee to carry his wishes into effect, or whether having expressed his wishes he intended to leave it to the legatee to act on them or not at his discretion. It is doubtful if there exist any formula for bringing to a direct test the question, whether words of "request," "hope," or "recommendation," are or are not to be considered obligatory.[3] The most that can be done is to

[1] Hood *v.* Oglander, 34 Beav. 513.

[2] Negroes *v.* Palmer, 18 Md. 165; Meggison *v.* Moore, 2 Ves. Jr. 633.

[3] Williams *v.* Williams, 1 Sim. (N. S.) 358, by Sir Knight Bruce. In Wright *v.* Atkyns, 1 T. & R. 157, Lord Eldon said that in order to determine whether the words create a trust or not, it is matter of observation: first, that the words should be imperative; secondly, that the subject must be certain; and, thirdly, that the object must be as certain as the subject. See Wood *v.* Cox, 2 My. & Cr. 684; Pope *v.* Pope, 10 Sim. 1. In Knight *v.* Knight, 3 Beav. 148, Lord Langdale said, "It is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed and enforced as a trust, and in the infinite variety of expressions employed, and of cases which arise, there is often the greatest difficulty in determining whether the act desired or recommended is an act which the testator intended to be executed as a trust. In the construction of wills it is the duty of the court to give effect to the intention of the testator whenever it can be ascertained." Then after stating that in decreeing trusts wills have been made rather than executed, and that caution is necessary, his lordship goes on to say "that as a general rule it has been laid down that when property is given absolutely to any person, and the same person is by the giver, who has power to command, recommended or entreated or wished to dispose of the property in favor of another, the recommendation or entreaty or wish shall be held to create a trust: first, if the words are so used that, upon the whole, they ought to be con-

state a few general rules that lead to the construction of particular wills.

§ 115. However strong the language of recommendation or request may be, a trust will not be implied if the testator declare that such is not his intention, as if he declares that the gift shall be "unfettered or unlimited," or if he "recommends but does not enjoin."[1] And so a trust will not be implied if such a construction of the precatory words would render them repugnant to, or inconsistent with, other parts of the same instrument.[2] If construing a recommendation or the expression of a wish into a trust would contradict in terms the preceding bequest, a trust will not be implied.[3] As if the gift is absolute, and of all the testator's property, and of both the legal and equitable interest in it, words of recommendation will not cut it down into a trust, or in the words of Kindersley, V. C., "where the later words of a sentence in a will go to cut down an absolute gift contained in the first part of a sentence, and are inconsistent with such gift, the court will, if

strued as imperative; secondly, if the subject of the wish be certain, and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain." Same case under the name of Knight *v.* Boughton, 11 Cl. & Fin. 548.

The learned editors to Hill on Trustees, p. 73 (4th Am. ed.), have examined the American and English cases and state the following rules which seem to be fairly deducible from the adjudged cases: —

1. Precatory words in a will equally with direct fiduciary expressions will create a trust; the wish of a testator, like the request of a sovereign, is equivalent to a command.

2. Discretionary expressions which leave the application or non-application of the subject of the devise to the objects contemplated by the testator entirely to the caprice of the devisee, will prevent a trust from attaching; but a mere discretion in regard to the method of application of the subject, or the selection of the object will not be inconsistent with a trust.

3. Precatory words will not be construed to confer an absolute gift on the first taker, merely because of failure or uncertainty in the object or subject of the devise.

4. But failure or uncertainty will be an element to guide the court in construing words of doubtful significancy adversely to a trust.

[1] Meredith *v.* Heneage, 1 Sim. 542; 10 Price, 230; Hoy *v.* Master, 6 Sim. 568; Young *v.* Martin, 2 Y. & Col. 582; Huskisson *v.* Bridge, 4 De G. & Sm. 245.

[2] Brunson *v.* Hunter, 2 Hill, Ch. 490; Knott *v.* Cottee, 2 Phill. 192.

[3] Webb *v.* Wools, 2 Sim. (N. S.) 267; Bardswell *v.* Bardswell, 9 Sim. 319.

it can, give effect to the absolute gift."[1] The same rule was stated by Lord Cottenham thus: "Though 'recommendation' may in some cases amount to a direction and create a trust, yet that being a *flexible* term, if such a construction of it be inconsistent with any *positive* provision in the will, it is to be considered as a recommendation and nothing more."[2] The flexible term must give way to the inflexible, if the two cannot stand together as they are expressed.

§ 116. Again a trust will not be implied from precatory words where it would be impracticable for a court to deal with, and execute it; as if a testator should devise a house to his wife, and express a wish that his sister should live with her, for the sister takes no interest in the house, and a court cannot decree two persons to live together.[3] So where a testator devised a dwelling-house and an annuity to a niece for the support of herself and her nephews and nieces then living with her, and of such other persons as she, from time to time, might request to be members of her family.[4] Nor will a trust be implied, if there is uncertainty as to the property to be subjected to the trust,[5] or as to the persons to be benefited by the trust,[6] or as to the manner in which the property is to be applied. Lord Alvanley stated the rule to be "that a trust would be implied only where the testator points out the objects, the property, and the way in which it shall go."[7] If the

[1] Webb *v.* Wools, 2 Sim. (N. S.) 267.

[2] Knott *v.* Cottee, 2 Phill. 192.

[3] Graves *v.* Graves, 13 Ir. Ch. 182; Hood *v.* Oglander, 34 Beav. 513.

[4] Harper *v.* Phelps, 21 Conn. 257.

[5] Lechmere *v.* Lavie, 2 M. & K. 197; Knight *v.* Knight, 3 Beav. 148; Meredith *v.* Heneage, 1 Sim. 556; Buggins *v.* Yates, 9 Mad. 122; Sale *v.* Moore, 1 Sim. 534; Anon. 8 Vin. 72; Tibbits *v.* Tibbits, 19 Ves. 664; Wynne *v.* Hawkins, 1 Bro. Ch. 179; Pierson *v.* Garnet, 2 Bro. Ch. 45, 230; Bland *v.* Bland, 2 Cox, 349; Le Maitre *v.* Bannister, and Eales *v.* England, Pr. Ch. 200; Sprange *v.* Barnard, 2 Bro. Ch. 585; Pushman *v.* Filliter, 3 Ves. 7; Attorney-General *v.* Hall, Fitzg. 314; Wilson *v.* Major, 11 Ves. 205; Eade *v.* Eade, 5 Mad. 118; Curtis *v.* Rippon, 5 Mad. 434; Russell *v.* Jackson, 10 Hare, 213; Knight *v.* Boughton, 11 Cl. & Fin. 513; Flint *v.* Hughes, 6 Beav. 342; Lines *v.* Darden, 5 Fla. 51.

[6] Harland *v.* Trigg, 1 Bro. Ch. 142; Wynne *v.* Hawkins, ib. 179; Tibbits *v.* Tibbits, 19 Ves. 664; Richardson *v.* Chapman, 1 Burns, Ecc. L. 245; Pierson *v.* Garnet, 2 Bro. Ch. 45, 230; Knight *v.* Knight, 173; Sale *v.* Moore, 1 Sim. 534; Cary *v.* Cary, 2 Sch. & Le. 189; Meredith *v.* Heneage, 1 Sim. 542; *Ex parte* Payne, 2 Y. & Co. 636; Knight *v.* Boughton, 11 Cl. & Fin. 513; Lines *v.* Darden, 5 Fla. 51.

[7] Malim *v.* Keighley, 2 Ves. Jr. 335; Knight *v.* Boughton, 11 Cl. & Fin. 548.

subjects and objects of the supposed trust are left uncertain by a testator, the court will infer that no obligation was intended to be imposed upon the donee, but that the whole disposition was left to his discretion.[1] So if a mere *power* to appoint is given to the first taker to be exercised or not at his discretion, no trust will be implied.[2] And no trust will be implied, if, taking the whole instrument and all the circumstances together, it is more probable than otherwise that the testator intended to communicate a discretion and not an obligation.[3]

§ 117. There is another variety of cases, where trusts are sometimes implied from the words used, though an express trust is not declared, as where property is given to a parent or other person standing in the relation of parent, and some directions or expressions are used in regard to the maintenance of children. The question to be decided in this class of cases is, as in the others, did the settlor intend to create a trust and impose an obligation, or did he merely state incidentally the motive which led to an absolute gift? In the following cases a trust was clearly implied by the court; where property was given, that "he may dispose thereof for the benefit of himself and children,"[4] or "for his own use and benefit, and the maintenance and education of his children,"[5] "for the maintenance of himself and family,"[6] "at the disposal of the legatee for herself and her children,"[7] or "all overplus towards her support and her family,"[8] or "to A. for the education and advancing in life of her children."[9] In Byne *v.* Blackburn, it was held, that the fact that the property was given to a trustee instead of to the parent, was sufficient to show that no sub-trust

[1] Morice *v.* Bishop of Durham, 10 Ves. 536.

[2] Brook *v.* Brook, 3 Sm. & Gif. 280; Paul *v.* Compton, 8 Ves. 380; Howorth *v.* Dewell, 29 Beav. 18; Lines *v.* Darden, 5 Fla. 51.

[3] Bull *v.* Hardy, 1 Ves. Jr. 270; Knott *v.* Cottee, 2 Phill. 192; Knight *v.* Knight, 3 Beav. 174; 11 Cl. & Fin. 513; Meggison *v.* Moore, 2 Ves. Jr. 630; Hill *v.* Bishop, &c., 1 Atk. 618; Paul *v.* Compton, 8 Ves. 380; Lefroy *v.* Flood, 4 Ir. Ch. 1; Shepherd *v.* Nottige, 2 John. & Hem. 766.

[4] Raikes *v.* Ward, 1 Hare, 445; Whiting *v.* Whiting, 4 Gray, 240.

[5] Longman *v.* Elcum, 2 Y. &. C. Ch. 369; Carr *v.* Living, 28 Beav. 644; Berry *v.* Briant, 2 Dr. & Sm. 1; Bird *v.* Maybury, 33 Beav. 351.

[6] *In re* Robertson's Trust, 6 W. R. 405.

[7] Crockett *v.* Crockett, 1 Hare, 451; 2 Phill. 461; Bibby *v.* Thompson, 32 Beav. 646.

[8] Woods *v.* Woods, 1 M. & Cr. 401.

[9] Gilbert *v.* Bennett, 10 Sim. 371.

was intended;[1] but this case is in conflict with other cases,[2] and in Chase v. Chase, where property was given to trustees "to pay the income yearly to a son for the support of himself and family and the education of his children," it was held that the income was taken in trust by the son as sub-trustee, and that the wife and children could in equity enforce its appropriation in part for their support.[3] Where a testator gave his wife the entire profit of his estate for life, "intrusting to her the education and maintenance of his children," and also providing for the education and maintenance of the children "out of the profits" of the estate, it was held, that the widow was charged with the trust of educating and supporting the children,[4] and where a legacy was given to a wife to be applied to the maintenance of certain persons in such proportions and at such times as she should think proper, it was held to be an imperative trust.[5]

§ 118. In cases where a trust for the maintenance of children is implied, the person bound by the trust is regarded in the same light as the guardian of a lunatic or of a minor:[6] he is entitled to receive the fund, and can give a valid receipt for it;[7] and, so long as he discharges the trust imposed upon him, he is entitled to the surplus for his own benefit, nor is he obliged to account for the past application of the fund.[8] And the future application is very much according to his discretion, provided he educates and supports the children reasonably, according to their position in the world, and the intention of the testator.[9] The court, in cases where a question is raised, will order payment to be made to him,

[1] Byne v. Blackburn, 26 Beav. 41.

[2] Gilbert v. Bennett, 10 Sim. 371; Longman v. Elcum, 2 Y. & Col. Ch. 363; Carr v. Living, 28 Beav. 644.

[3] Chase v. Chase, 2 Allen, 101. See Ch. J. Bigelow's opinion quoted, *ante*, note, § 112.

[4] Lucas v. Lockhart, 10 Sm. & Mar. 466. See also Hunter v. Stembridge, 12 Ga. 192; Withers v. Yeadon, 1 Rich. Eq. 524.

[5] Hawley v. James, 5 Paige, 318.

[6] Jodrell v. Jodrell, 14 Beav. 411.

[7] Woods v. Woods, 1 M. & Cr. 409; Raikes v. Ward, 1 Hare, 449; Cooper v. Thornton, 3 Bro. Ch. 186; Robinson v. Tickell, 8 Ves. 142; Crockett v. Crockett, 1 Hare, 451; 2 Phil. 553; Webb v. Wools, 2 Sim. (N. S.) 272.

[8] Leach v. Leach, 13 Sim. 304; Brown v. Paul, 1 Sim. (N. S.) 92; Carr v. Living, 28 Beav. 644; Hora v. Hora, 33 Beav. 88.

[9] Raikes v. Ward, 1 Hare, 450.

with liberty to the wife and children to apply for further orders;[1] if he becomes unfit to educate the children, the court can apportion the fund, and prevent him from receiving the portion necessary for the children and family;[2] and if he assigns his interest in the fund, the court can apportion it, and set apart what is needed for the support and education of the children, and give the remainder to his assignee.[3] Of course, if there be no children, or if they die, the person bound by the trust takes the whole benefit of the fund.[4] The trust also ceases as to children who become *forisfamiliated*, or cease to be members of the trustee's family, and by marriage or otherwise, become members of another home or establishment; for it would not generally be implied, that a testator intended[5] an income for the support and education of his family to be divided up into as many families as he left children.[6] Whether a child's right to maintenance under such a will ceases by the fact of his attaining twenty-one years of age is in many cases an open question.[7] On the one side it may be said that the trust ought not to continue after the child is of age, and is educated and prepared to acquire a livelihood for himself.[8] On the other hand, if the child is willing to remain at home, and there is no reasonable objection to his so remaining, or if it is a female with no other protection and means of support, it would seem that the trust ought not to cease on the mere ground that the child has attained twenty-one.[9] The great majority of cases will, of course, depend upon the particular words used in the particular will, and they will be so construed by the court, as to carry out the intentions of the testator.[10] If a trust is to a widow for life for the support of herself and the sup-

[1] Hadow v. Hadow, 9 Sim. 438; Crockett v. Crockett, 1 Hare, 451.

[2] Chase v. Chase, 2 Allen, 101; Castle v. Castle, 1 De G. & Jon. 352.

[3] Chase v. Chase, 2 Allen, 101; Carr v. Living, 2 Beav. 644.

[4] Hammond v. Neame, 1 Swans. 35; Cape v. Cape, 2 Y. & Co. Ex. 543; Bushnell v. Parsons, Pr. Ch. 219; Bowditch v. Andrew, 8 Allen, 339.

[5] Bowden v. Laing, 14 Sim. 113; Carr v. Living, 28 Beav. 644; 33 Beav. 464; Thorp v. Owen, 2 Hare, 612; Longmore v. Elcum, 2 Y. & C. Ch. 370; Manning v. Wopp, 2 Dev. & Bat. Ch. 11.

[6] Ibid.; Baker v. Reel, 4 Dana, 158.

[7] Ibid.

[8] McDonnell v. Black, Riley, Ch. 152.

[9] Ibid.; Cloud v. Martin, 2 Dev. & Batt. Ch. 274; Carr v. Living, 33 Beav. 464.

[10] Gardner v. Barker, 18 Jur. 508; Bowditch v. Andrew, 8 Allen, 339; Sargent v. Bourne, 6 Met. 32.

port and education of her children, and the property is to go to them absolutely upon her death, one of them, on coming of age, cannot call for his proportion, even with the concurrence of the widow, if such transfer would so diminish the fund as to endanger the rights of the other children to support and education during the life of the widow. In such case the court has ordered a part of such child's share to be paid over on his undertaking to account for the income if needed, and on the footing that the residue should be retained for security, that the income should be paid over if required.[1]

§ 119. But no trust is implied where the words simply state the motive leading to the gift, as where the gift is to a person "to enable him to maintain the children,"[2] or an absolute gift is made, and the motive stated "that he may support himself and children,"[3] or a gift is made absolutely for her own use and benefit, "having full confidence in her sufficient and judicious provision for the children."[4] When a testator gave to his wife "the use, benefit, and profits of his real estate for life, and all his personal estate, absolutely having full confidence that she will leave the surplus to be divided justly among my children," it was held that the widow took the personal estate absolutely subject to no trust, and that the word "surplus" meant what was left unconsumed or undisposed of by her.[5]

§ 120. If a trust is implied, it is governed in some respects by rules entirely different from the rules that govern a direct trust. Generally in a direct trust the trustee takes no beneficial interest in himself, but in an implied trust the trustee may take the whole beneficial interest for life, with a right even to expend some part of the principal fund. Thus, where an estate was devised to A. and her heirs in the fullest confidence that at her decease she would devise the property to the heirs of the testator, Lord Eldon held, that A. had all the rights in the estate of a tenant for life, and so it was also held in the House of Lords.[6] But where a tes-

[1] Berry v. Briant, 2 Dr. & Sm. 1.

[2] Benson v. Whittam, 5 Sim. 22; Leach v. Leach, 13 Sim. 304.

[3] Thorp v. Owen, 2 Hare, 607.

[4] Fox v. Fox, 27 Beav. 301.

[5] Pennock's Estate, 20 Penn. St. 268, overruling the opinions in Coate's Appeal, 2 Barr, 129, and in McKonkey's Appeal, 1 Harris, 253. Cases upon the same will under other names.

[6] Wright v. Atkyns, T. & R. 157; Lawless v. Shaw, Ll. & Goo., Sugden, 154; Shovelton v. Shovelton, 32 Beav. 143.

tator devised an estate to his wife and her heirs, under the firm conviction that she would dispose of and manage the same for the benefit of her children, it was held that the widow was not entitled to a beneficial interest as tenant for life.[1]

§ 121. Trusts sometimes arise by implication from the provisions of a will, in order to carry out the testator's intention. As where a testator gave his wife an annuity of $1000 a year, to be paid her by a trustee named, to enable her to live comfortably and to support and educate her children, and if in any year said sum were insufficient, the trustee was to pay her an additional sum not exceeding $1000. The testator gave a few legacies, and then gave the remainder of his estate to his daughters, and gave nothing to the trustee in words, but he authorized the trustee to sell certain of his real estate, and also to sell the personal property not specifically devised. The personal property was only sufficient to pay the debts of the testator, and the trustee had no funds from which to pay the annuity to the wife. It was held by the court that the trustee took the real estate in trust by implication, that the daughters took the remainder after the trusts were executed, and that the widow could enforce the payment of the annuity by bill in equity against the trustee.[2] So if a testator direct his real estate to be sold, or if he charge it with the payment of debts or legacies, it may descend to an heir, or pass to a devisee, but the court will consider the direction as an implied declaration of trust, and enforce its execution in the hands of those to whom it has come.[3] So a condition annexed to a devise which, being broken, might work a forfeiture of the estate, has in equity been construed into an implied trust, and enforced as such; as where a house was devised to A. for life, "he keeping the same in repair," or where

[1] Barnes *v.* Grant, 2 Jur. (N. S.) 1127.

[2] Walker *v.* Whiting, 23 Pick. 313; Braman *v.* Stiles, 2 Pick. 460; Fay *v.* Taft, 12 Cush. 448; Watson *v.* Mayrant, 1 Rich. Ch. 449; Baker *v.* Reel, 4 Dana, 158.

[3] Pitt *v.* Pelham, 2 Freem. 134; 1 Ch. R. 283; Locton *v.* Locton, 2 Freem. 136; Auby *v.* Doyl, 1 Ch. Ca. 180; Tennant *v.* Brown, 1 Ch. Ca. 180; Garfoot *v.* Garfoot, 1 Ch. Ca. 35; 2 Freem. 176; Gwilliams *v.* Rowell, Hard. 204; Blatch *v.* Wilder, 1 Atk. 420; Carvill *v.* Carvill, 2 Ch. R. 301: Cook *v.* Fountain, 3 Swans. 529; Bennett *v.* Davis, 2 P. Wms. 318; Wigg *v.* Wigg, 1 Atk. 382; Hoxie *v.* Hoxie, 7 Paige, 187; Withers *v.* Yeadon, 1 Rich. Ch. 324; McIntire Poor School *v.* Zan. Canal Co., 9 Ham. 203.

an estate is given to one in fee, "he paying the testator's debts within a year."[1]

§ 122. Again, courts of equity will imply a trust from the contracts of parties, although there are no words of trust in the instrument; as, if a person for a valuable consideration, agree to settle a particular estate upon another,[2] or if he agrees to sell an estate to another,[3] the settlor or vendor becomes a trustee of the fee for the purposes of the settlement, or for the purchaser.

§ 123. A direction to trustees that a certain person shall be employed, as agent and manager for the trustees, if there should be occasion for such services, gives no interest in the estate to such person, nor will any kind of trust be implied which equity can enforce,[4] and so when the trustees were recommended to employ a receiver.[5]

[1] Wright *v.* Wilkin, 2 B. & Sm. 232; *Re* Shingley, 3 M. & Gor. 221; Gregg *v.* Coates, 23 Beav. 33. And see Kingham *v.* Lee, 15 Sim. 396.

[2] Finch *v.* Winchelsea, 1 P. Wms. 277; Freemoult *v.* Dedire, 1 P. Wms. 429; Kennedy *v.* Daley, 1 Sch. & Lef. 355; Legard *v.* Hodges, 1 Ves. Jr. 477; 3 Bro. Ch. 531; 4 Bro. Ch. 421; Ravenshaw *v.* Hollier, 7 Sim. 3; Wellesley *v.* Wellesley, 4 M. & C. 561; Mornington *v.* Keane, 2 De G. & J. 293; Lyster *v.* Burroughs, 1 Dr. & W. 149; Stock *v.* Moyse, 12 Ir. Ch. 246; Lewis *v.* Madocks, 8 Ves. 150; 17 Ves. 48; Rowan *v.* Chute, 13 Ir. Ch. 169; *Re* McKenna, 13 Ir. Ch. 239.

[3] Ackland *v.* Gaisford, 3 Mad. 32; Wilson *v.* Clapham, 1 J. & W. 38; Ferguson *v.* Tadman, 1 Sim. 530; Foster *v.* Deacon, 3 Mad. 394; Paine *v.* Miller, 6 Ves. 349; Harford *v.* Purrier, 1 Mad. 539; Stent *v.* Bailis, 2 P. Wms. 220; Minchin *v.* Nance, 4 Beav. 332; Robertson *v.* Skelton, 12 Beav. 260; Paramore *v.* Greenslade, 1 Sm. & Gif. 541; Revell *v.* Hussey, 2 B. & B. 287; Spurrier *v.* Hancock, 4 Ves. 667; White *v.* Nutts, 1 P. Wms. 61; Wall *v.* Bright, 1 J. & W. 494; Tasker *v.* Small, 3 M. & Cr. 70.

[4] Finden *v.* Stephens, 2 Phill. 142.

[5] Shaw *v.* Lawless, Ll. & Goo., Sugden, 154; 5 Cl. & Fin. 129; Ll. & Goo., Plunket, 559.

CHAPTER V.

RESULTING TRUSTS.

§ 124. It has been seen from the preceding chapters that trusts are created by the express dispositions of parties, or they are implied by courts from the words used in such express dispositions. There is another class of trusts *which result in law*, from the acts of parties whether they intended to create a trust or not, and they are aptly designated as resulting trusts. They are sometimes called presumptive trusts, because the law presumes them to be intended by the parties from the nature and character of their transactions with each other, although the general foundation of this kind of trusts is the natural equity that arises when parties do certain things. Thus, if one pays the purchase-money of an estate, and takes the title-deed in the name of another, in the absence of all evidence of intention, the law presumes a trust, from the natural equity that he who pays the money for property ought to enjoy the beneficial interest. The statute of frauds does not affect the creation of these trusts, for the reason that, where there is no evidence of intention, it could not be expected that a declaration of intention in writing, properly signed, would be made or could be produced.

§ 125. Lord Chancellor Hardwicke said, that a resulting trust arising by operation of law existed: (1) when an estate was purchased in the name of one person and the consideration came from another; (2) when a trust was declared only as to part, and nothing was said as to the residue, that residue remaining undisposed of, remained to the heir-at-law; and he observed that he did not know of any other instances, unless in case of fraud.[1] In this chapter

[1] Lloyd *v.* Spillett, 2 Atk. 150. In 2 Lomax, Dig. 200, resulting trusts are considered under the name of implied trusts, as arising: (1) out of the equitable conversion of land into money or money into land; (2) where an estate is purchased in the name of one person and the consideration is paid by another; (3) where there is a conveyance of land without any consideration or declaration of uses; (4) where a conveyance of land is made in trust as to part and the conveyance is silent as to the residue; (5) where a conveyance is made upon such trusts as shall be appointed, and there is default of appointment; (6) where a conveyance is made upon particular trusts which fail of taking effect; (7) where a purchase is made by a trustee with trust money; (8) where a purchase of real estate is made by a partner in his own name with partnership funds; (9) where a renewal of a lease is obtained by a trustee or other person standing in a fiduciary relation; (10) where purchases are made of outstanding claims upon an estate by trustees or some of the tenants thereof connected by privity of estate with others having an interest therein; (11) where fraud has been committed in obtaining the conveyance; (12) where a purchase has been made without a satis-

resulting trusts will be examined under five heads: (1) when the purchaser of an estate pays the purchase-money and takes the title in the name of a third person; (2) where a person standing in a fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name; (3) where an estate is conveyed upon trusts, which fail, or are not declared, or are illegal; (4) when the legal title to property is conveyed, and there is no reason to infer that it was the intention to convey the beneficial interest, and (5) where voluntary conveyances are made, or conveyances without consideration.

§ 126. Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.[1] The clear

faction of the purchase-money to the vendor; (13) where a joint purchase has been made by several and payments of the purchase-money to the vendor has been made beyond their proportion.

[1] Willis *v.* Willis, 2 Atk. 71; Lloyd *v.* Spillett, 2 Atk. 150; Rider *v.* Kidder, 10 Ves. 360; *Ex parte* Houghton, 17 Ves. 251; Trench *v.* Harrison, 17 Sim. 111; Redington *v.* Redington, 3 Ridg. 177; Crop *v.* Norton, 9 Mod. 235; Barn. 184; 2 Atk. 75; Hungate *v.* Hungate, Toth. 120; *Ex parte* Vernon, 2 P. Wms. 549; Ambrose *v.* Ambrose, 1 P. Wms. 321; Woodman *v.* Morrel, 2 Freem. 33, 123; Murless *v.* Franklin, 1 Swans. 17; Finch *v.* Finch, 15 Ves. 50; Grey *v.* Grey, 2 Swans. 597; Finch, 340; Groves *v.* Groves, 3 Y. & J. 170; Lade *v.* Lade, 1 Wils. 21; May *v.* Steele, 2 V. & B. 390; Lever *v.* Andrews, 7 Bro. P. C. 288; Pelly *v.* Maddin, 21 Vin. Ab. 498; Smith *v.* Camelford, 2 Ves. Jr. 712; Anon. 2 Vent. 361; Withers *v.* Withers, Amb. 151; Prankerd *v.* Prankerd, 1 S. & S. 1; Howe *v.* Howe, 1 Vern. 415; Clarke *v.* Danvers, 1 Ch. Ca. 310; Goodright *v.* Hodges, 1 Watk. Cop. 227, Lofft, 230; Smith *v.* Baker, 1 Atk. 385; Bartlett *v.* Pickersgill, 1 Eden, 515; Rothwell *v.* Dewees, 2 Black, 613; Buck *v.* Pike, 11 Me. 9; Baker *v.* Vining, 30 Me. 126; Kelley *v.* Jenness, 50 Me. 455; Page *v.* Page, 8 N. H. 187; Hall *v.* Young, 37 N. H. 134; Pembroke *v.* Allenstown, 21 N. H. 107; Tebbetts *v.* Tilton, 31 N. H. 283; Dow *v.* Jewell, 18 N. H. 340; Tyford *v.* Thurston, 16 N. H. 399; Hopkinson *v.* Dumas, 42 N. H. 296; Pinney *v.* Fellows, 15 Vt. 525; Dewey *v.* Long, 25 Vt. 564; Peabody *v.* Tarbell, 2 Cush. 232; Livermore *v.* Aldrich, 5 Cush. 435; Root *v.* Blake, 14 Pick. 271; McGowan *v.* McGowan, 14 Gray, 121; Kendall *v.* Mann, 11 Allen, 15; Powell *v.* Monson & Brimfield Manuf. Co., 3 Mason, 362; Hoxie *v.* Carr, 1 Sumn. 187; Dean *v.* Dean, 6 Conn. 285; Jackson *v.* Sternberg, 1 John. Ca. 153; 1 John. 45; Jackson *v.* Matsdorf, 11 John. 91; Boyd *v.* McLean, 1 John. Ch. 582; Botsford *v.* Burr, 2 ib. 408; Steere *v.* Steere, 5 ib. 1; White *v.* Carpenter, 2 Paige, 218; Kellogg *v.* Wood, 4 Paige, 579; Foote *v.* Colvin, 3 John. 218;

result of all the cases without exception is, that a trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the name of others, without that of the purchaser, whether in one or several, whether jointly or successively, results to the person who advanced the purchase-money.[1] This rule has its foundation in the natural

Jackson v. Morse, 16 John. 197; Guthrie v. Gardner, 19 Wend. 414; Forsyth v. Clark, 3 Wend. 638; Partridge v. Havens, 10 Paige, 618; Jackson v. Mills, 13 John. 463; Lounsbury v. Purdy, 16 Barb. 376; Jackson v. Woods, 1 John. Ca. 163; Gomez v. Tradesman's Bank, 4 Sandf. S. C. 106; Hempstead v. Hempstead, 2 Wend. 109; Hopk. 288; Harder v. Harder, 2 Sand. Ch. 17; Depeyster v. Gould, 2 Green, Ch. 480; Howell v. Howell, 15 N. J. Ch. 75; Stratton v. Dialogue, 16 N. J. Ch. 70; Johnson v. Dougherty, 18 N. J. Ch. 406; Stevens v. Wilson, 18 N. J. Ch. 447; Stewart v. Brown, 2 Ser. & R. 461; Jackman v. Ringland, 4 Watts & S. 149; Strimpfler v. Roberts, 18 Penn. St. 283; Wallace v. Duffield, 2 Ser. & R. 521; Edwards v. Edwards, 39 Penn. St. 369; Lloyd v. Carter, 5 Harris, 216; Beck v. Graybill, 4 Casey, 66; Kisler v. Kisler, 2 Watts, 323; Lynch v. Cox, 11 Harris, 265; Newells v. Morgan, 2 Harr. 225; Hollis v. Hollis, 1 Md. Ch. 479; Dorsey v. Clarke, 4 Har. & J. 551; Glenn v. Randall, 2 Md. Ch. 221; Farringer v. Ramsey, 2 Md. 365; Neale v. Haythrop, 3 Bland, 551; Bank of U. S. v. Carrington, 7 Leigh, 566; Henderson v. Hoke, 1 Dev. & Bat. Eq. 119; McGuire v. McGowen, 4 Des. 491; Dillard v. Crocker, Speers's Eq. 20; Williams v. Hollingsworth, 1 Strob. Eq. 103; Garrett v. Garrett, 1 Strob. Eq. 96; Kirkpatrick v. Davidson, 2 Kelley, 297; Taliaferro v. Taliaferro, 6 Ala. 404; Foster v. Trustees of the Athenæum, 3 Ala. 302; Caple v. McCollum, 27 Ala. 461; Anderson v. Jones, 10 Ala. 401; Mahorner v. Harrison, 13 Sm. & M. 65; Walker v. Burngood, ib. 764; Powell v. Powell, 1 Freem. Ch. 134; Leiper v. Hoffman, 26 Miss. 615; Runnells v. Jackson, 1 How. (Miss.) 358; Hall v. Sprigg, 7 Mar. (La.) 243; Gaines v. Chew, 2 How. 619; McDonough Ex'rs v. Murdock, 15 How. 367; Tarpley v. Poaze, 2 Tex. 139; Long v. Seirger, 8 Tex. 460; McGuire v. Ramsey, 4 Eng. 519; Ensley v. Balentine, 4 Humph. 233; Thomas v. Walker, 5 Humph. 93; Smitheal v. Gray, 1 Humph. 491; Perry v. Head, 1 A. K. Marsh. 47; Letcher v. Letcher, 4 J. J. Marsh. 592; Doyle v. Sleeper, 1 Dana, 536; Stark v. Canady, 3 Litt. 399; Chaplin v. McAfee, 3 J. J. Marsh. 513; Creed v. Lancaster Bank, 1 Ohio, St. 1; Williams v. Van Tuyl, 2 Ohio St. 336; Elliott v. Armstrong, 2 Blackf. 198; Jenison v. Graves, ib. 444; Smith v. Sackett, 5 Gilm. 534; Prevo v. Walters, 4 Scam. 33; Bruce v. Roney, 18 Ill. 67; Seaman v. Cook, 14 Ill. 501; Williams v. Brown, 14 Ill. 200; Nickols v. Thornton, 16 Ill. 113; Rankin v. Harper, 23 Mo. 579; Paul v. Chouteau, 14 Mo. 580; Kelly v. Johnson, 28 Mo. 249; Baumgartner v. Guessfeld, 38 Mo. 36; Russell v. Lode, 1 Io. 566; McLennan v. Sullivan, 13 Io. 521; Ragan v. Walker, 1 Wis. 527; Millard v. Hathaway, 27 Cal. 119; Boyles v. Baxter, 22 Cal. 575; Phillips v. Cramond, 2 Wash. C. C. 441. In Michigan the transaction or trust must appear upon the face of the deed, otherwise no trust results to payer of the purchase-money. Groesbeck v. Seeley, 13 Mich. 329.

[1] By Lord Ch. B. Eyre in Dyer v. Dyer, 2 Cox, 92.

presumption, in the absence of all rebutting circumstances, that he who supplies the purchase-money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another, is a matter of convenience and arrangement between the parties for collateral purposes,[1] and this rule is vindicated by the experience of mankind.[2]

§ 127. And so if a person having a fiduciary character purchase property with the fiduciary funds in his hands, and take the title in his own name, a trust in the property will result to the *cestui que trust*, or other person entitled to the beneficial interest in the fund with which the property was paid for. As if a trustee purchase with the trust fund and take the title in his own name, the trust results to the *cestui que trust;*[3] if a guardian purchase with the money of his ward, a trust will result to the ward;[4] and if an executor or administrator purchase property in his own name with money belonging to the estate, a trust in the property will result to the heirs, legatees, or other persons entitled to the beneficial interest in the estate.[5] If the trustees of a corporation purchase lands in their own names, with the corporate funds, a trust will result to the corporation;[6] or if a committee, guardians, or trustees of an insane person purchase property in their own names, with the lunatic's money, a trust results to the lunatic;[7] or if an

[1] 2 Story's Eq. Jur. § 1201.

[2] Edwards *v.* Edwards, 39 Penn St. 369.

[3] Freeman *v.* Kelly, 1 Hoff. 90; Harrisburgh Bank *v.* Tyler, 3 Watts & S. 373; Martin *v.* Greer, 1 Geo. Dec. 109; Moffitt *v.* McDonald, 11 Humph. 457; Kirkpatrick *v.* McDonald, 11 Penn. St. 387; Wilhelm *v.* Folmer, 6 Penn. St. 296; Day *v.* Roth, 18 N. Y. 448; Lathrop *v.* Gilbert, 2 Stockt. 344; McLarren *v.* Brewer, 51 Me. 402; Thompson's App. 22 Penn. St. 16; Pugh *v.* Pugh, 9 Ind. 132; Valle *v.* Bryan, 19 Mo. 423; Neill *v.* Keese, 13 Tex. 187.

[4] Caplinger *v.* Stokes, Meigs, 175; Lee *v.* Fox, 6 Dana, 171; Pugh *v.* Pugh, 9 Ind. 132. But if the guardian buy for the ward, but use his own money in payment, the ward cannot claim a trust in the land, for it is within the statute of frauds. Kisler *v.* Kisler, 2 Watts, 323; Johnson *v.* Dougherty, 18 N. J. Ch. 406.

[5] Wallace *v.* Duffield, 2 Ser. & R. 521; Buck *v.* Uhrich, 16 Penn. St. 499; Claussen *v.* Le Franz, 1 Clarke, 226: McCrory *v.* Foster, 1 Clarke, Io. 271; Harper *v.* Archer, 28 Miss. 212; Schaffner *v.* Grutzmacher, 6 Clark, 137; Seaman *v.* Cook, 14 Ill. 501; Garrett *v.* Garrett, 1 Strob. Eq. 96; Williams *v.* Hollingsworth, 1 Strob. Eq. 103.

[6] Church *v.* Sterling, 16 Conn. 388; Church *v.* Wood, 5 Ham. 283.

[7] Reid *v.* Fitch, 11 Barb. 399; Turner *v.* Pettigrew, 6 Humph. 438.

agent, with the money of his principal, purchase lands and take the deeds to himself, a trust will result to the principal;[1] or if a partner purchase lands with partnership funds, and take the title to himself, a trust will result to the partnership;[2] or if a husband purchase lands with the separate estate of his wife in his hands, and take the title in his own name, a trust results to the wife;[3] and the rule is the same if purchases are made out of the savings of the wife's separate property, but if the purchase is made from savings out of an allowance made by the husband, or out of the wife's earnings, no trust will result.[4]

§ 128. In all these cases the transaction is looked upon as a purchase paid for by the *cestui que trust*, as the beneficial interest in the money paid belonged to him,[5] and the identity of the money does not consist in the specific pieces of money or bills, but in the general character of the fund out of which the payment is made, and the fund may be followed so long as its general character can be identified.[6] But when the means of identification fail, as when an executor converts an estate into money, and mixes it with the

[1] Church *v.* Sterling, 16 Conn. 388; Bank of America *v.* Pollock, 4 Edw. 215; Eshleman *v.* Lewis, 49 Penn. St. 410; Day *v.* Roth, 18 N. Y. 448; Bridenbecker *v.* Lowell, 32 Barb. 10; Moffitt *v.* McDonald, 11 Humph. 457; Hutchinson *v.* Hutchinson, 4 Des. 77; Follansbe *v.* Kilbreth, 17 Ill. 522; Chastain *v.* Smith, 30 Ga. 96.

[2] Phillips *v.* Cramond, 2 Wash. C. C. 441; Baldwin *v.* Johnston, Saxt. 441; Freeman *v.* Kelly, Hoff. 90; Turner *v.* Pettigrew, 6 Humph. 438, 441; Edgar *v.* Donnally, 2 Munf. 387; Smith *v.* Burnham, 3 Sumner, 435; Piatt *v.* Oliver, 2 McLean, 267; Coder *v.* Haling, 27 Penn. St. 84; Smith *v.* Ramsey, 1 Gil. Ill. 373; Pugh *v.* Currie, 5 Ala. 446; Oliver *v.* Piatt, 3 How. 401; Evans *v.* Gibson, 29 Mo. 223.

[3] Church *v.* Jaques, 1 John. Ch. 450; 3 ib. 77; Brooks *v.* Dent, 1 John. Md. Ch. 523; Dickinson *v.* Codwise, 1 Sandf. Ch. 214; Pinney *v.* Fellows, 15 Vt. 525; Barron *v.* Barron, 24 Vt. 375; Lathrop *v.* Gilbert, 2 Stockt. 344; Kline's App. 39 Penn St. 463; Raybold *v.* Raybold, 20 Penn. St. 308; Darkin *v.* Darkin, 23 L. J. Ch. 890; Wallace *v.* McCullough, 1 Rich. Eq. 426; Fillman *v.* Divers, 31 Penn. St. 429; Pritchard *v.* Wallace, 4 Sneed, 405; Resor *v.* Resor, 9 Ind. 347; Lench *v.* Lench, 10 Ves. 511.

[4] Raybold *v.* Raybold, 20 Penn. St. 308; Merrill *v.* Smith, 37 Me. 394; Henderson *v.* Warmack, 27 Miss. 830; Farley *v.* Blood, 10 Foster, 354.

[5] Lench *v.* Lench, 10 Ves. 517; Trench *v.* Harrison, 17 Sim. 111.

[6] United States *v.* Waterborough, Davies, 154; Goepp's App. 3 Harris, 428; Thompson's App. 32 Penn. St. 16; McLarren *v.* Brewer, 51 Me. 402; De Bevoise *v.* Sandford, Hoff. 194; Campbell *v.* Walker, 15 Ves. 678; Downes *v.* Grazebrook, 3 Mer. 200; Sanderson *v.* Walker, 13 Ves. 601; Overseers of the Poor *v.* Bank of Virginia, 2 Grat. 544.

general mass of his own money, and there is no identifying the particular money of the trust, the distributees or legatees have no preference over his other creditors, but they must prove their claims.[1] If, however, a trustee purchase an estate with trust funds, and add funds of his own to the purchase-money, a trust will result to the *cestui que trust;* and the burden will be on the trustee to show the amount of his own funds in the purchase, otherwise the *cestui que trust* will take the whole.[2] It has been said, however, in some cases that the *cestui que trust* has no interest in the property purchased with the trust fund in the name of the trustee, but only a lien on the property in the nature of a vendor's lien for the purchase-money, with a right to a decree for a sale to reimburse the trust fund.[3] This is certainly one of the rights of the *cestui que trust,* if he elects to proceed in that manner, and he may hold the trustee responsible, if there is a loss on such sale. On the other hand, the trustee can make no profit to himself by dealing with the trust fund; and, if he makes a purchase with it, the *cestui que trust* can elect to treat the property as a part of the trust property, and he is entitled to all the advantages of the speculation or investment thus made with the property in the name of the trustee.[4] But if one who stands in no fiduciary relation to another appropriates the other's money, and invests it in real estate or other property, no trust results to the owner of the money.[5] There is no doubt of this principle upon all the cases, but there is some question in the books, as to what is a fiduciary relation, as where a clerk pilfered money from the store of his employer and invested it in real estate, it was held that there was no such resulting trust, that the employer could compel a conveyance of the land.[6] But where a clerk in a bank embezzled money, and invested it in stocks in the names of his sisters as mere volunteers, it was held that a trust resulted to the owners of the money,

[1] Thompson's Appeal, 22 Penn. St. 16.

[2] Russell *v.* Jackson, 10 Hare, 209; McLarren *v.* Brewer, 51 Me. 402; Seaman *v.* Cook, 14 Ill. 505.

[3] Wallace *v.* Duffield, 2 Ser. & R. 529; Wallace *v.* McCullough, 1 Rich. Ch. 426.

[4] Hill on Trustees, 534; Lewin on Trusts, 227 (5th Lon. ed.); Lench *v.* Lench, 10 Ves. 511; 19 Ves. 58.

[5] Hawthorne *v.* Brown, 3 Sneed, 462; Ensley *v.* Ballentine, 4 Humph. 233.

[6] Campbell *v.* Drake, 4 Ired. 94; Pascoag Bank *v.* Hunt, 3 Edw. 583.

and that equity would execute it by compelling a conveyance;[1] and this would seem to be the better opinion, as a clerk certainly holds a confidential relation to his employer. It may depend, however, upon the extent to which the clerk is trusted.

§ 129. If a person standing in a fiduciary relation makes use of his position to purchase an interest in the trust property with his own funds, as a reversion, a junior or senior mortgage, or other interest from a third person; or if he purchase other property so immediately connected with the trust estate that it must be used with the trust estate, and the independent ownership of which would seriously affect the use and value of the trust property, he cannot retain the same for his own benefit, but he must hold it upon a resulting trust for his beneficiary.[2] But a mere agent, who purchases a reversion in the lands of his principal at a public sale from third persons with his own money, will not be held as a trustee, unless he purchase under some agreement to that effect.[3]

§ 130. The rule embraces personal property as well as real estate, and if a man purchase a bond,[4] annuity,[5] stock,[6] mortgage, or other personal interest,[7] in the name of a third person, the equitable ownership results to the person from whom the consideration moves; but it is said, that a resulting trust cannot be set up in personal property perishable in its nature.[8]

§ 131. Nor can a resulting trust be set up if it would break in upon the policy of the law, or a public statute;[9] as, if an alien

[1] Bank of America *v.* Pollock, 4 Edw. 215.

[2] Holt *v.* Holt, 1 Ch. Ca. 190; Nesbitt *v.* Tredennick, 1 Ball & B. 46; Greenlaw *v.* King, 3 Beav. 9; 10 L. J. (N. S.) Ch. 129; Van Epps *v.* Van Epps, 9 Paige, 237; Torrey *v.* Bank of Orleans, 9 Paige, 649; Tanner *v.* Elworthy, 4 Beav. 487; Waters *v.* Bailey, 2 Y. & C. (N. C.) Ch. 219; Geddings *v.* Geddings, 3 Russ. 241; Dickinson *v.* Codwise, 1 Sandf. Ch. 226.

[3] Kennedy *v.* Keating, 34 Mo. 25.

[4] Ebrand *v.* Dancer, 2 Ch. Ca. 26; 1 Eq. Ab. 382.

[5] Rider *v.* Rider, 10 Ves. 363, and cases cited; 2 Mad. Ch. Pr. 101.

[6] Ibid.; Lloyd *v.* Read, 1 P. Wms. 607; Sidmouth *v.* Sidmouth, 2 Beav. 447; Garrick *v.* Taylor, 29 Beav. 79; Beecher *v.* Major, 2 Dr. & Sm. 431; *Ex parte* Houghton, 17 Ves. 253; Creed *v.* Lancaster Bank, 1 Ohio St. 1.

[7] Ibid.

[8] Union Bank *v.* Baker, 8 Humph. 447.

[9] *Ex parte* Yallop, 15 Ves. 60; *Ex parte* Houghton, 17 Ves. 251; Reddington *v.* Reddington, 3 Ridg. 181; Groves *v.* Groves, 3 Y. & J. 163; Camden *v.* Anderson, 5 T. R. 709; Proseus *v.* McIntire, 5 Barb. 425; Ford *v.* Lewis, 10 B. Mon. 127; Baldwin *v.* Campfield, 4 Halst. Ch. 891.

forbidden to hold land should pay the purchase-money, and take the deed to a stranger, a resulting trust in his favor would not be enforced by the courts.[1] But a slave, who could not acquire property, purchased land in the name of a free person with the assent of his master, and afterwards becoming free the resulting trust was enforced in his favor;[2] and, so if the disability of the alien is removed by naturalization or otherwise, he may enforce a trust created while he was under disability.[3]

§ 132. Lord Hardwicke doubted whether the application of the rule was not confined to a single purchaser,[4] but it has been expressly decided and long acted upon, that if several make the purchase, pay the consideration, but take the title in the name of a stranger, the trust will result to them jointly.[5] The same rule applies if several pay the consideration, and take the title to one of their number. If the parties contribute unequally to the payment of the consideration, the trust results to each of them in proportion to the amount paid by each.[6] In these cases, it is settled that a general contribution towards a purchase is

[1] Leggett v. Dubois, 5 Paige, 114; Hubbard v. Goodwin, 3 Leigh, 492; Phillips v. Cramond, 2 Wash. C. C. 441; Taylor v. Benham, 5 How. U. S. 270; Farley v. Shippen, Wythe, 135; Alsworth v. Cordby, 3 Mis. 32; Childers v. Childers, 1 De G. & J. 482; Phillpotts v. Phillpotts, 10 C. B. 85. But if such conveyance is not intended as a fraud upon the law, but is taken by an agent or attorney of the alien in his own name without authority, equity will protect the rights of the alien. Austin v Brown, 6 Paige, 448; McCow v. Galbrath, 7 Rich. Law, 74.

[2] Leiper v. Hoffman, 26 Miss. 615.

[3] Osterman v. Baldwin, 6 Wallace, 116.

[4] Crop v. Norton, Barn. 179; 9 Mod. 233; 2 Atk. 74.

[5] Baumgarten v. Guessfeld, 38 Mo. 36; Wray v. Steele, 2 V. & B. 388; Ross v. Hegeman, 2 Edw. 373; Larkins v. Rhoades, 5 Porter, 196; Powell v. Monson and Brim. Manufacturing Co., 3 Mason, 590; Letcher v. Letcher, 4 J. J. Marsh. 590; Keaton v. Cobb, 1 Dev. Ch. 439.

[6] Rigden v. Walker, 3 Atk. 735; Lake v. Gibson, 1 Eq. Ca. Ab. 291; Botsford v. Burr, 2 John. Ch. 405; Quackenbush v. Leonard, 9 Paige, 334; Jackson v. Moore, 6 Cow. 706; Stewart v. Brown, 2 Serg. & R. 461; Morey v. Herrick, 18 Penn. St. 129; Buck v. Swazey, 35 Me. 41; Powell v. Monson and Brim. Manufacturing Co., 3 Mason, 347; Pierce v. Pierce, 7 B. Mon. 433; Letcher v. Letcher, 4 J. J. Marsh. 590; Shoemaker v. Smith, 11 Humph. 81; Bernard v. Bongard, Harr. Ch. 130; Purdy v. Purdy, 3 Md. Ch. 547; Seaman v. Cook, 14 Ill. 505; Hall v. Young, 37 N. H. 134; Pinney v. Fellows, 15 Vt. 525; Brothers v. Porter, 6 B. Mon. 106; Bogert v. Perry, 17 John. 351; Jackson v. Bateman, 2 Wend. 570; Cloud v. Ivie, 28 Mo. 578; Baumgarten v. Guessfeld, 28 Mo. 36.

not sufficient; but the person claiming a resulting trust must show that he paid some specific sum, for some distinct interest in, or aliquot part of, the estate, as for a specific share, as one-half or one-quarter, or other particular fraction of the whole; or for a particular interest, as for an estate for life or years, or in remainder in the whole estate.[1] Where two contribute funds and the proportions do not appear, the presumption is that the proportions are equal.[2]

§ 133. The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself.[3] Thus, if two agree to purchase, and one furnishes all the money and takes the title to himself, no trust results to the other.[4] And so if two agree to purchase, and one pays the whole consideration money, and the title is taken to the two, no trust results to the one who paid the whole, he can only enforce repayment of one-half the consideration money.[5] There must be an actual payment from a man's own money, or what is equivalent to payment from his own money, to create a resulting trust.[6] And the money must be advanced and paid in the char-

[1] McGowan *v.* McGowan, 14 Gray, 119; Buck *v.* Warren, ib. 122, n.; Baker *v.* Vining, 30 Me. 121; Sayre *v.* Townsends, 15 Wend. 647; White *v.* Carpenter, 2 Paige, 217; Perry *v.* McHenry, 13 Ill. 227; Crop *v.* Norton, 2 Atk. 74; Reynolds *v.* Morris, 17 Ohio St. 510.

[2] Shoemaker *v.* Smith, 11 Humph. 81.

[3] Rogers *v.* Murray, 3 Paige, 390; Dudley *v.* Batchelder, 53 Me. 403; Connor *v.* Lewis, 16 Me. 275; Pinnoch *v.* Clough, 16 Vt. 500; Taliaferro *v.* Taliaferro, 6 Ala. 404; McGowan *v.* McGowan, 14 Gray, 119; Barnard *v.* Jewett, 98 Mass. 87; Freeman *v.* Kelly, 1 Hoff. 90; Foster *v.* Trustees, &c., 3 Ala. 302; Forsyth *v.* Clark, 3 Wend. 637; Steere *v.* Steere, 5 John. Ch. 1; Botsford *v.* Burr, 2 John. Ch. 408; Jackson *v.* Moore, 6 Cow. 706; White *v.* Carpenter, 2 Paige, 218; Page *v.* Page, 8 N. H. 187; Buck *v.* Pike, 2 Fairf. 9; Graves *v.* Dugan, 6 Dana, 331; Wallace *v.* Marshall, 9 B. Mon. 148; Gee *v.* Gee, 2 Sneed, 395; Kelley *v.* Johnson, 28 Mo. 249; Williard *v.* Williard, 56 Penn. St. 119.

[4] Brooks *v.* Fowle, 14 N. H. 248; Tebbetts *v.* Tilton, 31 N. H. 273; Edwards *v.* Edwards, 39 Penn. St. 369; Coppage *v.* Barnett, 34 Mis. 621; Cook *v.* Bronaugh, 8 Eng. 183; Fowke *v.* Slaughter, 3 A. K. Marsh. 56.

[5] 2 Sugd. V. & P. 575 (13th ed.).

[6] Page *v.* Page, 8 N. H. 187; Gomez *v.* Tradesman's Bank, 4 Sandf. S. C. 106; Coates *v.* Woodworth, 13 Ill. 634; Beck *v.* Graybill, 4 Casey, 66; Reeve

acter of a purchaser; for if one pay the purchase-money by way of *loan* for another, and the conveyance is taken to the other, no trust will result to the one who thus pays the purchase-money;[1] on the other hand, if one should advance the purchase-money and take the title to himself, but should do this wholly upon the account and credit of the other, he would hold the estate upon a resulting trust for the other.[2]

§ 134. A trust results from the acts, and not from the agreements of the parties, or rather from the acts accompanied by the agreements; but no trust can be set up by mere parol agreements, or, as has been said, no trust results from the breach of a mere parol contract; as, if one agrees to purchase land and give another an interest in it, and he purchases and pays his own money, and takes the title in his own name, no trust can result.[3] And so if a party makes no payment, and none is made on his account, either actually or constructively, he cannot claim a resulting trust.[4] And so a mere parol declaration by one that he is buying land for another is not sufficient to establish a resulting trust; there must be some proof of an actual or constructive payment by the person claiming such a trust.[5]

v. Strawn, 14 Ill. 94; Ferguson *v.* Sutphen, 3 Gil. 547; Lounsbury *v.* Purdy, 16 Barb. 380; Runnells *v.* Jackson, 1 How. (Miss.) 358; Harrisburg Bank *v.* Tyler, 3 Watts & S. 373; Mory *v.* Herrick, 18 Penn. St. 123; Smith *v.* Sackett, 5 Gilm. 534; Kelly *v.* Johnson, 28 Mo. 249; Botsford *v.* Burr, 2 John. Ch. 405; Getman *v.* Getman, 1 Barb. Ch. 499; Wright *v.* King, Harr. Ch. 12; Bernard *v.* Bongard, Harr. Ch. 130; Dudley *v.* Batchelder, 53 Me. 403; Russell *v.* Allen, 10 Paige, 249; Kirkpatrick *v.* McDonald, 1 Jones, 393; Smith *v.* Burnham, 3 Sumner, 435.

[1] Bartlett *v.* Pickersgill, 1 Eden, 516; Crop *v.* Norton, 9 Mod. 235; White *v.* Carpenter, 2 Paige, 217; Henderson *v.* Hoke, 1 Dev. & Bat. Ch. 119; Dudley *v.* Batchelder, 53 Me. 403.

[2] Aveling *v.* Knipe, 19 Ves. 441; Page *v.* Page, 8 N. H. 187; Runnells *v.* Jackson, 1 How. (Miss.) 358; Lounsbury *v.* Purdy, 18 N. Y. 515; 16 Barb. 380; Buck *v.* Pike, 2 Fairf. 9; Mory *v.* Herrick, 18 Penn. St. 123; Kelly *v.* Johnson, 28 Mo. 249.

[3] Kisler *v.* Kisler, 2 Watts, 323; Williard *v.* Williard, 56 Penn. St. 119.

[4] Jackson *v.* Ringland, 4 Watts & S. 149; Botsford *v.* Burr, 2 John. Ch. 408; Lathrop *v.* Hoyt, 7 Barb. 60; Dorsey *v.* Clark, 4 Har. & J. 551; Smith *v.* Smith, 3 Casey, 180; Fischili *v.* Dumaresly, 3 Marsh, 23; Sharp *v.* Long, 4 Casey, 434; Thompson *v.* Branch, Meigs, 390; Walker *v.* Brungard, 13 S. & M. 723; Ensley *v.* Ballentine, 4 Humph. 233; Lynn *v.* Lynn, 5 Gil. 602; Sample *v.* Coulson, 9 Watts & Ser. 62; Peebles *v.* Reading, 8 Ser. & R. 484.

[5] Ibid.; Kisler *v.* Kisler, 2 Watts, 323; Williard *v.* Williard, 56 Penn. St. 119.

§ 135. Again, parol proof cannot be received to establish a resulting trust in lands purchased by an agent and paid for by his own funds, no money of the principal being used for the payment; for the relation of principal and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement, and not from the transaction, and where a trust arises from an agreement, it is within the statute of frauds, and must be in writing.[1] This rule is so inflexible, that though the agent may be indicted, and convicted of perjury in denying his character as agent in his answer under oath, the court cannot decree and establish the trust.[2] But if an agent invest his principal's money in real estate without his knowledge, or if, investing the money with his knowledge, he take the deed in his own name without his consent, there will be a resulting trust.[3] But if one standing in no fiduciary relation obtains another's property wrongfully and invests it in land in his own name, or if a clerk appropriates his master's money and buys real estate in his own name, there is no resulting trust.[4]

§ 136. In England, if two persons join in a purchase and contribute equally, and take the title in their own names, there is no reason to presume a resulting trust, and the two are joint tenants,

[1] Kennedy *v.* Keating, 34 Mo. 25; Woodhull *v.* Osborne, 2 Edw. Ch. 615; Lathrop *v.* Hoyt, 7 Barb. 60; 2 Story, Eq. Jur. § 1201 a; Bartlett *v.* Pickersgill, 1 Ed. 515; 4 Burr, 22; 1 Cox, 15; 4 East, 577; Rastel *v.* Hutchinson, 1 Dick. 44; Lamas *v.* Bayly, 2 Vern. 627; Atkins *v.* Rowe, Mose, 39; O'Hara *v.* O'Neil, 2 Bro. P. C. 39; Jackman *v.* Ringland, 4 Watts & S. 149; Peebles *v.* Reading, 8 Ser. & R. 492; Pennock *v.* Clough, 16 Vt. 507; Flagg *v.* Mann, 2 Sum. 546; Walker *v.* Brungard, 13 Sm. & M. 765; Taliaferro *v.* Taliaferro, 6 Ala. 406; Moore *v.* Green, 3 B. Mon. 407; Fowke *v.* Slaughter, 3 A. K. Marsh. 57; Dorsey *v.* Clarke, 4 Har. & J. 551. But where an attorney purchased property sold upon an execution in favor of his client at a grossly inadequate price, it was held that he was a trustee for his principal. Howell *v.* Baker, 4 John. Ch. 118. See Wade *v.* Pettibone, 11 Ohio, 57; 14 Ohio, 557.

[2] Bartlett *v.* Pickersgill, 1 Ed. 515; King *v.* Boston, 4 East, 572.

[3] Day *v.* Roth, 18 N. Y. 448; Bridenbecker *v.* Lowell, 32 Barb. 9; Pugh *v.* Pugh, 9 Ind. 132; Rothwell *v.* Dewees, 2 Black, 613; Bruce *v.* Ronly, 18 Ill. 67; Follansbe *v.* Kilbreth, 17 Ill. 522.

[4] Ensley *v.* Ballentine, 4 Humph. 233; Campbell *v.* Drake, 4 Ired. Eq. 94. But where A. embezzled B.'s money and invested it in stock in the name of C., a mere volunteer, a resulting trust was enforced against C. in favor of B. Bank of America *v.* Pollock, 4 Edw. Ch. 415; and see Pascoag Bank *v.* Hunt, 3 Edw. 215; *ante*, § 128.

the survivor taking the whole *jure accrescendi.*[1] And so if two contract for a purchase to them and their heirs, paying equal proportions, and one dies, the court will order a specific performance by a conveyance to the survivor alone.[2] But the court lays hold of every circumstance to defeat the joint tenancy and convert it into a tenancy in common.[3] Thus, where two tenants in common of a joint mortgage term purchase the equity of redemption,[4] or several engage in a joint undertaking or partnership, or trade, or speculation,[5] or several purchase an estate and pay equally, but one improves the estate at his own cost,[6] equity will construe them to be tenants in common and not joint tenants. In this country, title by joint tenancy is very much reduced in extent, and the incident of survivorship is almost entirely destroyed by statutes, except in the case of trustees, executors, and others, in whom such a tenancy is necessary for the execution of their trusts.[7]

§ 137. The transaction out of which a trust results may be proved by parol.[8] The statute of frauds extends to and embraces only trusts

[1] Robinson *v.* Preston, 4 K. & J. 505; Bone *v.* Pollard, 24 Beav. 288; Moyse *v.* Gyles, 2 Vern. 385; Hayes *v.* Kingdome, 1 Vern. 33; York *v.* Eaton, 2 Freem. 23; Aveling *v.* Knipe, 19 Ves. 441; Rigden *v.* Vallier, 3 Atk. 735; Lake *v.* Gibson, 1 Eq. Ca. Ab. 291; Anon., Carth. 15; Rea *v.* Williams, V. & P. (11th ed.); Thicknesse *v.* Vernon, 2 Freem. 84.

[2] Aveling *v.* Knipe, 19 Ves. 441.

[3] Robinson *v.* Preston, 4 K. & J. 505; Tompkins *v.* Mitchell, 2 Rand. 428; Brothers *v.* Porter, 6 B. Mon. 106; Barribeau *v.* Brant, 17 How. 43.

[4] Edwards *v.* Fashion, Pr. Ch. 332; Morly *v.* Bird, 3 Ves. 631; Rigden *v.* Vallier, 3 Atk. 734; Vickers *v.* Cowell, 1 Beav. 529; Partridge *v.* Pawlett, 1 Atk. 467; Anon., Carth. 16; Petty *v.* Styward, 1 Ch. R. 57; Randall *v.* Phillips, 3 Mason, 378.

[5] Lake *v.* Gibson, Eq. Ca. Ab. 290; 3 P. Wms. 158; York *v.* Eaton, 2 Freem. 23; Jackson *v.* Jackson, 9 Ves. 597 n.; Lyster *v.* Dolland, 1 Ves. Jr. 434; Jeffreys *v.* Small, 1 Vern. 217; Caines *v.* Grant, 5 Binn. 119; Duncan *v.* Forrer, 6 Binn. 193; Sigourney *v.* Munn, 7 Conn. 11; Overton *v.* Lacy, 6 Monroe, 13; Deloney *v.* Hutcheson, 2 Rand. 183; Cuyler *v.* Bradt, 2 Ca. C. E. 326; Pugh *v.* Currie, 5 Ala. 446; McAllister *v.* Montgomery, 3 Hayw. 94; Farley *v.* Shippen, Wythe, 135. See Appleton *v.* Boyd, 7 Mass. 131; Kinsley *v.* Abbott, 19 Me. 430.

[6] Lake *v.* Gibson, 1 Eq. Ca. 291.

[7] See 4 Kent, Com. 396 (11th ed.).

[8] Livermore *v.* Aldrich, 5 Cush. 435; Boyd *v.* McLean, 1 John. Ch. 582; Botsford *v.* Burr, 2 John. Ch. 405; Verplank *v.* Caines, 1 John. Ch. 57; Page *v.* Page, 8 N. H. 187; Scoby *v.* Blanchard, 3 N. H. 170; Pritchard *v.* Brown, 4 N. H. 397; Gardner Bank *v.* Wheaton, 8 Greenl. 373; Powell *v.* Monson & Brim. Manuf. Co., 3 Mason, 347; Elliott *v.* Armstrong, 3 Blackf. 199; Jennison *v.* Graves, ib. 441; Blair *v.* Bass, 4 Blackf. 540; Snelling *v.* Utterback, 1 Bibb, 609.

created or declared by the parties, and does not affect trusts arising by operation of law.[1] Indeed, such trusts are specially excepted in the statute of frauds of most States. The exception, however, was omitted in the statute of Rhode Island ; but Mr. Justice Story held that the omission was immaterial, as such trusts were excepted in the nature of things.[2] It follows that a party setting up a resulting trust may prove by parol the agreements under which the estate was purchased, and he may prove by parol the actual payment of the purchase-money by himself, or in his behalf, although the deed states it to have been paid by the grantee in the conveyance.[3] And although the trust, and all the circumstances out of which it arises, may be denied under oath in the answer, yet the facts may all be proved by parol in opposition to the answer.[4] In such case the trust must be clearly alleged in the bill, not only in terms, but all the facts must be set out from which the trust is claimed to result.[5] And the facts in all cases

[1] Ibid.; Ross *v.* Hegeman, 2 Edw. Ch. 373; Larkin *v.* Rhodes, 5 Porter, 196; Enos *v.* Hunter, 4 Gil. 211; Smith *v.* Sackett, 5 Gilm. 544.

[2] Hoxie *v.* Carr, 1 Sum. 187.

[3] De Peyster *v.* Gould, 2 Green, Ch. 474; Dismukes *v.* Terry, Walk. 197; Peabody *v.* Tarbell, 2 Cush. 232; Barron *v.* Barron, 24 Vt. 375; Smith *v.* Burnham, 3 Sum. 438; Malin *v.* Malin, 1 Wend. 626; Harder *v.* Harder, 2 Sandf. Ch. 17; Peirce *v.* McKeehan, 3 Barr, 136; Lloyd *v.* Carter, 17 Penn. St. 216; Peebles *v.* Reading, 8 Serg. & R. 484. In Kirk *v.* Webb, Pr. Ch. 84, the court refused to admit parol evidence to control the recitals of the deed as to the payment of the consideration, and this decision was followed in Heron *v.* Heron, Pr. Ch. 163; Freem. 248; Skitt *v.* Whitmore, Freem. 280; Kinder *v.* Miller, Pr. Ch. 172; Hooper *v.* Eyles, 2 Vern. 480; Newton *v.* Preston, Pr. Ch. 103; Cox *v.* Bateman, 2 Ves. 19; Ambrose *v.* Ambrose, 1 P. Wms. 321; Deg *v.* Deg, 2 P. Wms. 414; but the rule has been changed, and the doctrine stated in the text is now established beyond controversy. Bartlett *v.* Pickersgill, 1 Eden, 515; Lench *v.* Lench, 10 Ves. 17; Groves *v.* Groves, 3 Y. & J. 163. See 2 Story, Eq. Jur. § 1201, and notes; Livermore *v.* Aldrich, 5 Cush. 435.

[4] Cooth *v.* Jackson, 6 Ves. 39; Buck *v.* Pike, 2 Fairf. 24; Baker *v.* Vining, 30 Me. 121; Page *v.* Page, 8 N. H. 187; Moore *v.* Moore, 38 N. H. 382; Boyd *v.* McLean, 1 John. Ch. 582; Botsford *v.* Burr, 2 John. Ch. 405; Swinburne *v.* Swinburne, 28 N. Y. 568; Snelling *v.* Utterback, 1 Bibb, 609; Lloyd *v.* Lynch, 28 Penn. St. 419; Letcher *v.* Letcher, 4 J. J. Marsh. 590; Miller *v.* Stokely, 5 Ohio St. 194; Elliot *v.* Armstrong, 2 Blackf. 198; Jenison *v.* Graves, ib. 440; Blair *v.* Bass, 4 ib. 540; Larkins *v.* Rhodes, 5 Porter, 196; Farringer *v.* Ramsey, 2 Md. 365; Greer *v.* Baughman, 13 Md. 257; Ensley *v.* Ballentine, 4 Humph. 233; Paine *v.* Wilcox, 16 Wis. 202; Olive *v.* Dougherty, 3 Io. 371; Vandever *v.* Freeman, 20 Tex. 333; Pugh *v.* Bell, 1 J. J. Marsh. 399.

[5] Rowell *v.* Freese, 23 Me. 182; Hickey *v.* Young, 1 J. J. Marsh. 1; Gas-

must be proved with great clearness and certainty.[1] For this purpose all competent evidence is admissible, as the admissions of the nominal purchaser and grantee in the deed, recitals in the deed and other proper documents, and even circumstantial evidence, as that the means of the nominal purchaser were so limited that it was impossible for him to pay the purchase-money.[2] But loose and equivocal facts ought not to control the evidence of deeds; and two witnesses, or one witness with corroborating circumstances, are required to control an answer under oath. And proof of mere admissions of one that he purchased for another, without proof of some previous arrangement or advance of money by such other, is insufficient to create a resulting trust.[3]

§ 138. It has been stated by some writers that *after the death of the supposed nominal* purchaser, parol proof alone could not be admitted to control the express declaration of the deed;[4] but the cases relied upon are the cases before cited to the point that parol proof is inadmissible, both before and after the death of the supposed nominal purchaser. These cases are overruled; and it would seem upon principle that the death of the nominal purchaser cannot affect the admissibility of parol testimony, whatever effect it may have upon its weight.[5] Analogous to this matter is the ques-

coigne *v.* Thwing, 1 Vern. 366; Rider *v.* Kidder, 10 Ves. 364; Groves *v.* Groves, 3 Y. & J. 163; Halcott *v.* Morkant, Pr. Ch. 168; Goodright *v.* Hodges, 1 Watk. Corp. 229; Willis *v.* Willis, 2 Atk. 71.

[1] Ibid.; Slocumb *v.* Marshall, 2 Wash. C. C. 397; Newton *v.* Preston, Pr. Ch. 103; Wright *v.* King, Harr. Ch. 12; Enos *v.* Hunter, 4 Gilm. 211; Carey *v.* Callan, 6 B. Mon. 44; O'Hara *v.* O'Neil, 2 Eq. Ca. Ab. 475; Cottington *v.* Fletcher, 2 Atk. 155; Ambrose *v.* Ambrose, 1 P. Wms. 321. As to what facts are competent and necessary to be proved, see Hunter *v.* Marlboro, 2 Wood. & M. 168; Morey *v.* Herrick, 18 Penn. St. 128; Blyholder *v.* Gibson, 18 Penn. St. 134; Farringer *v.* Ramsey, 4 Md. Ch. 33; Malin *v.* Malin, 1 Wend. 626; Harder *v.* Harder, 1 Sandf. 17; Snelling *v.* Utterback, 1 Bibb, 609; Freeman *v.* Kelly, 1 Hoff. 90; Baker *v.* Vining, 30 Me. 128.

[2] Willis *v.* Willis, 2 Atk. 71; Wilkins *v.* Stevens, 1 Y. & C. Ch. Ca. 431; Lench *v.* Lench, 10 Ves. 518; Benger *v.* Drew, 1 P. Wms. 780; Strimpfler *v.* Roberts, 18 Penn. St. 283; Baumgarten *v.* Guessfeld, 38 Mo. 36.

[3] Sidle *v.* Walter, 5 Watts, 389; and see Sample *v.* Coulson, 9 W. & S. 62. The admissions of a trustee that he purchased certain property with the trust fund is competent evidence to raise a resulting trust for the *cestui que trust* in that property. Harrisburg Bank *v.* Tyler, 3 Watts & S. 373.

[4] Sanders on Uses and Trusts, 259; note to Lloyd *v.* Spillett, 2 Atk. 150; Roberts on Statute of Frauds, 99.

[5] Lewin on Trusts, 138 (5th Lond. ed.), 2 Mad. Ch. Pr. 141; Sugd. V. &

tion whether *trust money* can be followed into land by parol evidence; and it is clearly established that it may, on the ground that a purchase with trust money is virtually a purchase paid for by the *cestui que trust*, and such a purchase is a trust by operation of law, and not within the statute of frauds.[1] And if a trustee pay for property out of the trust fund, and take the deed in the name of another, the trust results to the *cestui que trust*, and not to the trustee.[2]

§ 139. It follows that as a resulting trust may be shown by parol proof, as a presumption of law arising out of the transaction, so the presumption may be rebutted by parol proof, showing that no trust was intended by the parties, and that it was the intention to confer the beneficial interest upon the supposed nominal purchaser. As the resulting trust is mere matter of equitable presumption, it may be rebutted by facts that negative the presumption; and whatever facts appear tending to prove that it was intended that the nominal purchaser should take the beneficial interest as well as the legal title, negatives the presumption.[3] The presumption may be negatived as to part of the estate, and prevail in part.[4] The presumption, however, is in favor of the trust resulting to the party paying the consideration, and the

P. 136 (9th ed.); Lench *v.* Lench, 10 Ves. 117; 2 Story, Eq. Jur. § 1201 n.; Livermore *v.* Aldrich, 5 Cush. 435; Unitarian So. *v.* Woodbury, 14 Me. 281; De Peyster *v.* Gould, 2 Green, Ch. 474; Harrisburg Bank *v.* Tyler, 3 W. & S. 373; Harder *v.* Harder, 2 Sand. Ch. 17; McCammon *v.* Petitt, 3 Sneed, 242; Fausler *v.* Jones, 7 Ind. 277; Neill *v.* Keese, 5 Tex. 23; Freeman *v.* Kelly, 1 Hoff. 90.

[1] Lench *v.* Lench, 10 Ves. 517; Trench *v.* Harrison, 17 Sim. 111; *ante*, § 127, 128.

[2] Russell *v.* Allen, 10 Paige, 249.

[3] Rider *v.* Kidder, 10 Ves. 364; Benbow *v.* Townsend, 1 M. & K. 508; Goodright *v.* Hodges, 1 Watk. Cop. 227; Lofft, 230; Rundle *v.* Rundle, 2 Vern. 252; Taylor *v.* Taylor, 1 Atk. 386; Redington *v.* Redington, 3 Ridg. 106; Beecher *v.* Major, 2 Drew. & Sm. 431; Garrick *v.* Taylor, 29 Beav. 79; Bellasis *v.* Compton, 2 Vern. 294; Maddison *v.* Andrew, 1 Ves. 58; Baker *v.* Vining, 30 Me. 126; Page *v.* Page, 8 N. H. 189; Botsford *v.* Burr, 2 John. Ch. 405; White *v.* Carpenter, 2 Paige, 217; Jackson *v.* Feller, 2 Wend. 465; Steere *v.* Steere, 5 John. Ch. 18; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Sewell *v.* Baxter, 2 John. Md. Ch. 448; Hays *v.* Hollis, 8 Gill, 369; McGuire *v.* McGowen, 4 Des. 487; Elliott *v.* Armstrong, 2 Blackf. 199; Phillips *v.* Cramond, 2 Wash. C. C. 441; Myers *v.* Myers, 1 Casey, 100; Squire *v.* Harder, 1 Paige, 494; Ledge *v.* Morse, 16 John. 199.

[4] Benbow *v.* Townsend, 1 M. & K. 506; Rider *v.* Kidder, 10 Ves. 360; Lane *v.* Dighton, Amb. 409; Pinney *v.* Fellows, 15 Vt. 525.

burden of proof is upon the mere nominal purchaser to show that he was intended to have some beneficial interest.[1]

§ 140. And when a clear understanding is had at the time the purchase is made, the money paid, and the deed taken, by which understanding the nominal purchaser was to have both the legal and the beneficial interest, it is incompetent for the person who paid the purchase-money to put a different construction upon the transaction at a subsequent time, and claim a resulting trust in the estate contrary to the understanding and intention at the time.[2] And if the nominal purchaser, under such circumstances, should afterwards agree to hold in trust for, or to execute a conveyance to the person who paid the money, courts would not enforce the agreement, if it was without a new consideration or voluntary.[3] So if the trust is declared in writing at the time of the transaction, there can be no resulting trust, as the one precludes the other;[4] or if the nominal purchaser stipulates for something out of the transaction inconsistent with a trust.[5]

§ 141. Courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed *cestui que trust*, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate.[6]

§ 142. The legislature of New York has abolished trusts resulting from the payment of the consideration by one and the taking the title in the name of another, except in cases where the nominal grantee has taken the deed against the knowledge and consent of the party paying the money, or except the purchase is made with another's money in violation of some duty or trust. But the statute

[1] Dudley *v.* Bosworth, 10 Humph. 12; 2 Sugd. V. & P. 139 (9th ed.).

[2] Groves *v.* Groves, 3 Y. & J. 172; Hunt *v.* Moore, 6 Cush. 1.

[3] Ibid.

[4] Clark *v.* Burnham, 2 Story, 1; Austin *v.* Brown, 6; Paige, 448; Leggett *v.* Dubois, 5 Paige, 114; Alexander *v.* Warrance, 17 Mo. 230; Mercer *v.* Stork, 1 Sm. & M. 479; Dennison *v.* Goehring, 7 Barr, 175; Mercer *v.* Stark, 1 S. & M. 479.

[5] Dow *v.* Jewell, 21 N. H. 470.

[6] Delane *v.* Delane, 7 Bro. P. C. 279; Clegg *v.* Edmonson, 8 De G., M. & G. 787; Groves *v.* Groves, 3 Y. & J. 172; Peebles *v.* Reading, 8 Ser. & R. 484; Graham *v.* Donaldson, 5 Watts, 471; Haines *v.* O'Conner, 10 Watts, 315; Lewis *v.* Robinson, 10 Watts, 338; Buckford *v.* Wade, 17 Ves. 97; Robertson *v.* Macklin, 3 Hayw. 70; Strimpfler *v.* Roberts, 18 Penn. St. 283; Sunderland *v.* Sunderland, 19 Io. 325.

saves the rights of creditors of the party paying the purchase-money and taking the title in the name of another.[1] If such a purchase is a fraud upon creditors, they may enforce the trust in equity, though the original purchaser and payer of the money would have no remedy.[2] In Massachusetts, the creditors of such a purchaser, taking the title in the name of a third person, may levy their execution upon the land, in the same manner as if the purchaser had taken the title directly to himself.[3] The statute of New York has been strictly construed, and therefore if A. makes a purchase, and pays the money, and takes the title in the name of B., upon a parol trust for C., it is not within the statute; and C. may enforce the trust as against B.[4] Statutes similar to the statute of New York have been passed in Michigan[5] and Wisconsin.[6] In Louisiana, express trusts have been abolished; but trusts arising from the nature of transactions, or by implication of law, are still enforced by the courts.[7]

§ 143. As before stated, if a purchaser of an estate pays the consideration money, and takes the title in the name of a stranger, the presumption is that he intended some benefit for himself, and a resulting trust arises for him;[8] but if the purchaser take the conveyance in the name of a wife or child, or other person, for whom he is under some natural, moral, or legal obligation to provide, the presumption of a resulting trust is rebutted, and the contrary presumption arises, that the purchase and conveyance were intended to be an advancement for the nominal purchaser.[9]

[1] Rev. Stat. 1859, part II. (Vol. III., p. 15), c. 1, art. 6, §§ 52, 53, 57; Bodine *v.* Edwards, 10 Paige 504; Brewster *v.* Power, 10 Paige, 562; Willink *v.* Vanderveer, 1 Barb. 599; Norton *v.* Storer, 8 Paige, 222; Reid *v.* Fitch, 11 Barb. 399; Loundsbury *v.* Purdy, 16 Barb. 376; 18 N. Y. 515; Jencks *v.* Alexander, 11 Paige, 619; Watson *v.* Le Row, 6 Barb. 481; Russell *v.* Allen, 10 Paige, 250; Gilbert *v.* Gilbert, 1 Keyes (N. Y.), 159.

[2] Ibid.; Jackson *v.* Forrest, 2 Barb. Ch. 576.

[3] Gen. Stat. 1860, c. 103, § 1; Stat. 1844, c. 107. Foster *v.* Durant, 2 Gray, 538; amending the law as ruled in How *v.* Bishop, 3 Met. 26.

[4] Sieman *v.* Austin, 33 Barb. 9; Sieman *v.* Schunck, 29 N. Y. 598.

[5] R. S. 1846, c. 63, § 4; Groesbeck *v.* Seeley, 13 Mich. 329.

[6] R. S. 1858, c. 84, §§ 7–9,

[7] Gaines *v.* Chew, 2 How. 619; McDonough's Ex's *v.* Murdock, 15 How. 367.

[8] *Ante*, § 126.

[9] Murless *v.* Franklin, 1 Swans. 17; Grey *v.* Grey, 2 Swans. 597; Finch, 340; Dyer *v.* Dyer, 2 Cox, 93; 1 Watk. Cop. 219; Redington *v.* Redington, 2 Ridg. 176; Elliot *v.* Elliot, 2 Ch. Ca. 231; Sidmouth *v.* Sidmouth, 2 Beav. 454; Christy *v.* Courtenay, 13 Beav. 96; Lamplugh *v.* Lamplugh, 1 P.

The transaction will be regarded *prima facie* as a settlement upon the nominal grantee, and if the payer of the money claims a resulting trust he must rebut this presumption by proper evidence.[1] Lord Ch. B. Eyre stated the doctrine thus: "The circumstance of one or more of the nominees being a child or children of the purchaser is held to operate by *rebutting the resulting trust;* and it has been determined in so many cases that the nominee being a child shall have such operation, as a *circumstance of evidence,* that it would be disturbing landmarks if we suffered either of these propositions to be called into question; viz., that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. It would have been a more simple doctrine, if children had been considered as *purchasers for valuable consideration.* That way of considering it would have shut out all the circumstances of evidence which have found their way into the cases, and would have prevented some very nice distinctions, not very easily understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. *Thus the question is resolved into one of intent,* which was getting into a very wide sea, without very certain guides."[2] And Lord Nottingham pointed out, that the law of resulting trusts, in this respect, was analogous to uses before the statute, "for the feoffment of a stranger, before the statute, without consideration, raised a use in

Wms. 111; Goodright *v.* Hodges, 1 Watk. Cop. 228; Pole *v.* Pole, 1 Ves. 76; Woodman *v.* Morrell, 2 Freem. 33; Finch *v.* Finch, 15 Ves. 50; Mumma *v.* Mumma, 2 Vern. 19; Skeats *v.* Skeats, 2 N. C. C. 9; Wait *v.* Day, 4 Denio, 439; Reid *v.* Fitch, 11 Barb. 399; Page *v.* Page, 8 N. H. 187; Astreen *v.* Flanagan, 3 Edw. Ch. 279; Jackson *v.* Matsdorf, 11 John. 91; Partridge *v.* Havens, 10 Paige, 618; Bodine *v.* Edwards, ib. 504; Dennison *v.* Goehring, 7 Barr, 182 n.; Knouff *v.* Thompson, 16 Penn. St. 357; Fleming *v.* Donahoe, 5 Ohio, 255; Tremper *v.* Burton, 18 Ohio, 418; Stanley *v.* Brannon, 6 Blackf. 193; Whitten *v.* Whitten, 3 Cush. 194; Fatheree *v.* Fletcher, 31 Miss. 265; Walton *v.* Devine, 20 Barb. 9; Proseus *v.* McIntire, 5 Barb. 425; Butler *v.* Ins. Co. 14 Ala. 777; Douglass *v.* Price, 4 Rich. Eq. 322; Taylor *v.* James, 4 Des. 6; Thompson *v.* Thompson, 1 Yerg. 97; Dudley *v.* Bosworth, 10 Humph. 12; Alexander *v.* Warrance, 2 Bennett, 230; Cartwright *v.* Wise, 14 Ill. 417; Shepherd *v.* White, 10 Tex. 72; Baker *v.* Leathers, 3 Ind. 557; Guthrie *v.* Gardner, 19 Wend. 414; Hill *v.* Pine River Bank, 45 N. H. 300.

[1] Jackson *v.* Matsdorf, 11 John. 91; Shepherd *v.* White, 10 Texas, 72; Proseus *v.* McIntire, 5 Barb. 425; Butler *v.* Ins. Co. 14 Ala. 777; Hill *v.* Pine River Bank, 45 N. H. 300.

[2] Dyer *v.* Dyer, 2 Cox, 94.

the feoffor; but a feoffment by a father to a son, without other consideration, raised no use by implication in the father, for the consideration of blood settled the use in the son, and made it an advancement."[1]

§ 144. This rule embraces all persons for whom the purchaser is under any obligation, legal or moral, to provide. It embraces daughters as well as sons,[2] although a distinction was once attempted, on the ground that it is not so common to settle lands upon daughters as upon sons.[3] It embraces estates bought in the name of a wife,[4] and in the joint names of the wife and the purchaser;[5] also, in the names of the wife and children.[6] So, in the names of a son and a stranger, in which case, the moiety to the son will be an advancement,[7] but the moiety in the name of the stranger, will be presumed to be in trust for the purchaser.[8] And, if a grandparent purchase in the name of a grandchild, whether the father is or is not dead, it will be presumed to be an advancement, and not a trust;[9] and so, a purchase by a person who has placed himself *in loco parentis* to the nominal grantee, will be presumed to

[1] Grey *v.* Grey, 2 Swans. 598.

[2] Gorge's Case, Cro. Car. 550; 2 Swans. 600; Clarke *v.* Danvers, 1 Ch. Ca. 310; Woodman *v.* Morrell, 2 Freem. 33; Jennings *v.* Selleck, 1 Vern. 467; Bedwell *v.* Froome, 2 Cox, 97; Back *v.* Andrew, 2 Vern. 120; Baker *v.* Leathers, 3 Ind. 558; Murphy *v.* Nathans, 46 Penn. St. 508; Astreen *v.* Flanagan, 3 Edw. Ch. 279.

[3] Gilb. Lex Præt. 272.

[4] Glaister *v.* Hewer, 8 Ves. 199; Dummer *v.* Pitcher, 2 M. & K. 262; Kingdom *v.* Bridges, 2 Vern. 67; Christ's Hosptl. *v.* Budgin, 2 Vern. 683; Back *v.* Andrew, ib. 120; Benger *v.* Drew, 1 P. Wms. 780; Wallace *v.* Bowers, 28 Vt. 138; Guthrie *v.* Gardner, 19 Wend. 414; Walton *v.* Devine, 20 Barb. 9; Garfield *v.* Hatmaker, 15 N. Y. 475; Jencks *v.* Alexander, 11 Paige, 619; Astreen *v.* Flanagan, 3 Edw. Ch. 279; Kline's App. 39 Penn. St. 463; Alexander *v.* Warrance, 2 Bennett, 230; Drew *v.* Martin, 32 L. J. Ch. 367. But if there is no legal marriage, the conveyance will be presumed to be a trust, and not an advancement. Soar *v.* Foster, 4 K. & J. 152.

[5] Ibid.

[6] Dummer *v.* Pitcher, 2 M. & K. 262, 5 Sim. 35; Kingdom *v.* Bridges, 2 Vern. 67; Back *v.* Andrew, ib. 120.

[7] Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Kingdom *v.* Bridges, 2 Vern. 67; Rumboll *v.* Rumboll, 1 Ed. 17.

[8] Ibid.

[9] Ebrand *v.* Dancer, 2 Ch. Ca. 26; Lloyd *v.* Read, 1 P. Wms. 607; Currant *v.* Jago, 1 Coll. 265 n. (c); Tucker *v.* Burrow, 2 Hem. & M. 525; Kilpin *v.* Kilpin, 1 M. & K. 520.

be a settlement, and not a trust, for the purchaser.[1] And if the nominal grantee is an illegitimate child of the purchaser, the same presumption will arise;[2] or, if the nominal grantee be an idiot,[3] or a son-in-law.[4] But, if the nominal grantee be a brother of the purchaser, the law will presume a trust and not an advancement, on the ground that there is no such obligation on one brother to support or provide for another, that the purchase can be presumed to be made for such a purpose,[5] so, if one sister pay the money, and take the conveyance in the name of another sister.[6] And, where the nominal grantee stands in the relation of *mother* or *nephew* to the real purchaser, no presumption of an advancement or settlement will arise, but it will be presumed to be a trust, unless the purchaser stands *in loco parentis* to the nominal grantee.[7] And if the son stands in the relation of solicitor to his mother, a purchase made by her, in his name, will be presumed to be a trust, as the relation of solicitor and client rebuts the presumption of an advancement,[8] and so, it is said, the rule does not apply to any purchase made by a mother, in the name of a child.[9] The rule applies to personal as well as real property.[10]

§ 145. The general principle is, that a purchase by the parent, in the name of a child, is presumed to be an advancement, and not a trust. This presumption is one of fact, and may be rebutted

[1] Ibid. But it is said that such purchase will not be presumed to be an advancement if the conveyance is taken to a remote relative, or to a stranger, although the real purchaser may have placed himself *in loco parentis*. Tucker *v.* Burrow, 2 Hem. & Mill. 515; Powys *v.* Mansfield, 3 My. & Cr. 359.

[2] Beckford *v.* Beckford, Loft. 490; Kilpin *v.* Kilpin, 1 M. & K. 556; Anon., 1 Wal. Jr. 107; Kimmel *v.* McRight, 2 Barr, 38; Soar *v.* Foster, 4 K. & J. 160. But it is said that this rule will not apply to the illegitimate child of a legitimate child. Tucker *v.* Burrow, 2 Hem. & Mill. 525.

[3] Cartwright *v.* Wise, 14 Ill. 417.

[4] Baker *v.* Leathers, 3 Porter, 558.

[5] Maddison *v.* Andrew, 1 Ves. 58; Edwards *v.* Edwards, 39 Penn. St. 369; Foster *v.* Foster, 34 L. J. Ch. 428.

[6] Keaton *v.* Cobb, 1 Dev. Ch. 439; Field *v.* Lonsdale, 14 Jur. 995; 13 Beav. 78.

[7] Currant *v.* Jago, 1 Coll. N. C. 263; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Taylor *v.* Alston, 2 Cox, 97; Edwards *v.* Field, 3 Mad. 237; Jackson *v.* Feller, 2 Wend. 465.

[8] Garrett *v.* Wilkinson, 2 De G. & Sm. 244.

[9] *In re* De Visme, 2 De G., J. & Sm. 17.

[10] Devoy *v.* Devoy, 3 Sm. & Gif. 403; Dummer *v.* Pitcher, 2 M. & K. 262; Bone *v.* Pollard, 24 Beav. 283; Sidmouth *v.* Sidmouth, 2 Beav. 447; Fox *v.* Fox, 15 Ir. Ch. 89.

by evidence, or circumstances; and some courts have been astute in finding circumstances and subtile distinctions, to rebut this presumption. Thus, if the child was an infant, it was thought that a parent would not confer upon it an absolute property, which it was incapable of managing,[1] and so, if the interest was reversionary, and not capable of present enjoyment, it was said that the father could not have intended it as a provision and settlement, or advancement.[2] Again, if a father took the conveyance in his own name jointly with his son, it was supposed that the presumption of an advancement was rebutted, on the ground that the father had some interest in one half, and might have the whole by survivorship, while the son could not sever the joint tenancy till he arrived at age.[3] And, if a father took a grant to himself and sons, upon *successive* lives, it was thought that as the father must use some names beside his own, those of his sons' being used from prudential and family reasons, rebutted the presumption of an advancement, and raised the presumption of a trust,[4] and so the circumstance that a child was already provided for was held to rebut the presumption of a further advancement.[5] Again, if a father purchased in the name of an adult son, and kept the actual possession of the estate, and received the rents and profits, the presumption of an advance was supposed to be rebutted, and the presumption of a trust created.[6]

§ 146. But these objections have all been overruled, and from the manner these distinctions are disposed of, a general principle applicable to every case may be stated, "that reasons which partake of too great a degree of refinement should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout,"[7] and Lord Eldon added, that this principle of law, that a purchase is presumed *prima facie* to be an advancement is

[1] Binion *v.* Stone, 2 Freem. 169; Nels. 68; 2 Freem. 128, c. 151.

[2] Rumboll *v.* Rumboll, 2 Ed. 17; Finch *v.* Finch, 15 Ves. 43; Murless *v.* Franklin, 1 Swans. 13.

[3] Stileman *v.* Ashdown, 2 Atk. 480; Pole *v.* Pole, 1 Ves. 76.

[4] Dyer *v.* Dyer, 2 Cox, 95; 1 Watk. Cop. 221; Dickinson *v.* Shaw, 2 Cox, 95.

[5] Elliot *v.* Elliot, 2 Ch. Ca. 231; Pole *v.* Pole, 1 Ves. 76; Grey *v.* Grey, 2 Swans. 600; Finch, 341; Lloyd *v.* Read, 1 P. Wms. 608; Redington *v.* Redington, 3 Ridg. 190.

[6] Gilb. Lex Præt. 271.

[7] By Ch. B. Eyre, Dyer *v.* Dyer, 2 Cox, 98.

not to be frittered away by mere refinements.[1] Therefore it is now established that a purchase in the name of an infant child is *prima facie* an advancement,[2] and the purchase of a reversionary interest in the name of a child falls within the same rule,[3] so a purchase by a father, in the joint names of himself and son,[4] or in the joint names of a son and a stranger,[5] and so if a father take an estate for successive lives, as his own and his sons'.[6] If a child in whose name the purchase is made is already provided for, it will be a circumstance to be considered with other evidence; but it will not of itself rebut the presumption of an advancement. Lord Loughborough said, "that a purchase under such circumstances by a father in the name of a son *was not*, but *might* be a trust for the father."[7] If a father purchase in the name of a son, whether an infant or an adult, and keep the actual possession of the estate, and receive the profits, it will be presumed that the purchase was an advancement,[8] for if the son was an infant, the father would be its natural guardian, or *quasi* guardian, and protector, and thus receive the rents of the estate.[9] And if the son was an adult, the natural reverence and submission due from children to their parents would account for the circumstances.[10] But any contem-

[1] Finch *v.* Finch, 15 Ves. 50.

[2] Finch *v.* Finch, 15 Ves. 43; Mumma *v.* Mumma, 2 Vern. 19; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Gorge's Case, 2 Swans. 600; Collinson *v.* Collinson, 3 De G., M. & G. 403; Skeats *v.* Skeats, 2 Y. & C. Ch. Ca. 9; Christy *v.* Courtenay, 13 Beav. 19.

[3] Rumboll *v.* Rumboll, 2 Ed. 17; Murless *v.* Franklin, 1 Swans. 13; Finch *v.* Finch, 15 Ves. 43.

[4] Dummer *v.* Pitcher, 2 M. & K. 272; Grey *v.* Grey, 2 Swans. 599; Back *v.* Andrews, 2 Vern. 120; Scroope *v.* Scroope, 1 Ch. Ca. 27; Thompson *v.* Thompson, 1 Yerg. 97.

[5] Hayes *v.* Kingdom, 1 Vern. 34; Kingdom *v.* Bridges, 2 Vern. 67; Lamplugh *v.* Lamplugh, 1 P. Wms. 111.

[6] Dyer *v.* Dyer, 2 Cox, 95.

[7] Dyer *v.* Dyer, 2 Cox, 93; Redington *v.* Redington, 3 Ridg. 190; Sidmouth *v.* Sidmouth, 2 Beav. 456; Kilpin *v.* Kilpin, 1 M. & K. 542.

[8] Grey *v.* Grey, 2 Swans. 600; Redington *v.* Redington, 3 Ridg. 190; Lamplugh *v.* Lamplugh, 1 P. Wms. 111.

[9] Mumma *v.* Mumma, 2 Vern. 19; Fox *v.* Fox, 15 Ir. Ch. 89; Taylor *v.* Taylor, 1 Atk. 386; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Lloyd *v.* Read, ib. 608; Gorge's Case, Cro. Car. 550; 2 Swans. 600; Stileman *v.* Ashdown, 2 Atk. 480; Christy *v.* Courtenay, 13 Beav. 96.

[10] Grey *v.* Grey, 2 Swans. 600; Dyer *v.* Dyer, 2 Cox, 95; Woodman *v.* Morrell, 2 Freem. 32, note by Hovenden; Shales *v.* Shales, ib. 252; Scawen *v.*

poraneous acts wholly inconsistent with the intention of an advancement to the child will make him a trustee for the father. Thus, if there is any circumstance accompanying the purchase which explains why it was taken in the child's name, and shows that it was not intended to be an advancement, but was intended to be a trust for the father, the presumption of an advancement will be rebutted, and the inference of a trust will be established.[1]

§ 147. Whether a purchase in the name of wife or child is an advancement or not, is a question of pure intention, though presumed in the first instance to be a provision and settlement; therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption,[2] and any acts or facts so immediately after the purchase, as to be fairly considered a part of the transaction, may be received for the same purpose.[3] And so the declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust.[4] Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time. They are parts of the transaction, or words accompanying an act.[5] The real purchaser, if otherwise competent, may be a witness to state what

Scawen, 1 Y. & C. Ch. Ca. 65; Murless v. Franklin, 1 Swans. 17; Redington v. Redington, 3 Ridg. 190; Sidmouth v. Sidmouth, 2 Beav. 447; Elliot v. Elliot, 2 Ch. Ca. 231; Williams v. Williams, 32 Beav. 370; Lloyd v. Read, 1 P. Wms. 607.

[1] Prankerd v. Prankerd, 1 S. & S. 1; Baylis v. Newton, 1 Vern. 28; Birch v. Blagrave, Amb. 264; Farr v. Davis, 8 East, 354.

[2] Christy v. Courtenay, 13 Beav. 96; Baylis v. Newton, 2 Vern. 28; Shales v. Shales, 2 Freem. 252; Tucker v. Burrow, 2 Hem. & M. 524; Collinson v. Collinson, 3 De G., M. & G. 409; Murless v. Franklin, 1 Swans. 19; Lloyd v. Read, 1 P. Wms. 607; Taylor v. Alston, cited 2 Cox, 96; Grey v. Grey, 2 Swans. 600; Williams v. Williams, 32 Beav. 370; Redington v. Redington, 3 Ridg. 177; Rawleigh's Case, cited Hard. 497; Prankerd v. Prankerd, 1 S. & S. 1; Swift v. Davis, 8 East, 354, n. (a); Hall v. Hall, 1 Connor & Law. 120; Taylor v. Taylor, 4 Gilm. 303; Slack v. Slack, 26 Miss. 290; Johnson v. Matsdorf, 11 John. 91; Butler v. M. Ins. Co. 14 Ala. 777; Dudley v. Bosworth, 10 Humph. 12; Hayes v. Kindersley, 2 Sm. & Gif. 194.

[3] Jeans v. Cooke, 24 Beav. 521; Redington v. Redington, 3 Ridg. 196; Prankerd v. Prankerd, 1 S. & S. 1; Murless v. Franklin, 1 Swans. 17; Swift v. Davis, 8 East, 354, n. (a).

[4] Devoy v. Devoy, 3 Sm. & Gif. 403; Grey v. Grey, 2 Swans. 594; Kilpin v. Kilpin, 1 M. & K. 520; Sidmouth v. Sidmouth, 2 Beav. 455; Scawen v. Scawen, 1 N. C. C. 65.

[5] Ibid.; Baker v. Leathers, 3 Ind. 558.

his objects, purposes, and intentions were in making the purchase and in taking the title in the name of his wife or child.[1] Of course, declarations made by the husband or father after the purchase are incompetent to control the effect of the prior transaction.[2] But such declarations may be used by the wife or child against the purchaser to show that it was a settlement and not a trust.[3] And the after declarations of the nominal grantee may be used against him, but not in his favor.[4] But the declarations must be direct and certain, and where possible should be corroborated by other facts and circumstances; for courts will not act upon mere declarations, if they are conflicting, vague, or inconsistent with themselves.[5]

§ 148. If a father pays the purchase-money, and the wife or child, by fraud, or any wrongful act, and against the intention of the real purchaser, obtains the conveyance in her or its name, the presumption of an advancement would be rebutted, and the presumption of a trust would arise for the father.[6]

§ 149. If a purchaser and payer of the money take the conveyance in the name of a wife or child, for the purpose of delaying, hindering, or defrauding his creditors, the conveyance is void or a trust results which creditors can enforce to the extent of their debts.[7]

[1] Devoy *v.* Devoy, 3 Sm. & Gif. 403; Stone *v.* Stone, 3 Jur. (N. S.) 708.

[2] Tremper *v.* Burton, 18 Ohio, 418; Christy *v.* Courtenay, 13 Beav. 96; Williams *v.* Williams, 32 Beav. 32; Sidmouth *v.* Sidmouth, 2 Beav. 456; Elliot *v.* Elliot, 2 Ch. Ca. 221; Woodman *v.* Morrel, 2 Freem. 33; Finch *v.* Finch, 15 Ves. 51; Birch *v.* Blagrave, Amb. 266; Skeats *v.* Skeats, 2 Y. & C. Ch. Ca. 9; Gilb. Lex Præt. 271; Murless *v.* Franklin, 1 Swans. 13; Crabb *v.* Crabb, 1 M. & K. 519; Prankerd *v.* Prankerd, 1 S. & S. 1.

[3] Redington *v.* Redington, Ridg. 195; Sidmouth *v.* Sidmouth, 2 Beav. 455.

[4] Scawen *v.* Scawen, 1 N. C. C. 65; Jeans *v.* Cook, 24 Beav. 521; Sidmouth *v.* Sidmouth, 2 Beav. 455; Pole *v.* Pole, 1 Ves. 76; Murless *v.* Franklin, 1 Swans. 20.

[5] Grey *v.* Grey, 2 Swans. 597; Scawen *v.* Scawen, 1 N. C. C. 65; Cartwright *v.* Wise, 14 Ill. 417.

[6] Peer *v.* Peer, 3 Stoct. 432; Hall *v.* Doran, 13 Iowa, 368.

[7] Christ's Hospital *v.* Budgin, 2 Vern. 684; Lush *v.* Wilkinson, 5 Ves. 384; Townshend *v.* Westacott, 2 Beav. 340; Stileman *v.* Ashdown, 2 Atk. 477; Guthrie *v.* Gardner, 19 Wend. 414; Jencks *v.* Alexander, 11 Paige, 619; Watson *v.* Le Row, 6 Barb. 487; Newell *v.* Morgan, 2 Harr. 225; Bell *v.* Hallenback, Wright, 751; Edgington *v.* Williams, Wright, 439; Parrish *v.* Rhodes, Wright, 339; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Demaree *v.* Driskill, 3 Blackf. 115; Doyle *v.* Sleeper, 1 Dana, 531; Rucker *v.* Abell, 8 B. Mon. 566; Crozier *v.* Young, 3 Mon. 158; Gowing *v.* Rich, 1 Ired. 553; Croft *v.* Arthur,

If, however, the parent was not indebted at the time, subsequent creditors could not defeat the title, nor enforce the trust,[1] unless the settlement or conveyance was made for the purpose of afterwards running in debt and defrauding creditors. In some States, as in Pennsylvania and Massachusetts, an execution against the debtor can be levied directly upon the land in the hands of the trustee, in other States the lands can only be reached in equity.

§ 150. A very common case of a resulting trust is where the owner of both the legal and equitable estate conveys the legal title only, without conveying the equitable interest.[2] The general rule in such case is, that wherever it appears upon a conveyance, devise, or bequest, that it was intended that the grantee, devisee, or legatee, should take the legal estate only, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the settlor's realty, to himself or his heirs, if out of his personal estate, to himself, his executors or administrators.[3] Whether the conveyance was intended to convey the beneficial as well as the legal estate is sometimes a matter of presumption by the court from all the circumstances of the case, and sometimes it is expressed upon the instrument itself in such manner that no doubts can arise. When it is matter of presumption, parol evidence may be received to rebut or sustain the presumption.[4] But where the trust results by force of the written instrument, it cannot be controlled, rebutted, or defeated by parol evidence of any kind.[5]

3 Des. 223; Elliott *v.* Hart, 10 Ala. 348; Abney *v.* Kingsland, 10 Ala. 355; Cutter *v.* Griswold, Walk. Ch. 437; Kimmel *v.* McRight, 2 Barr, 38.

[1] Creed *v.* Lancaster Bank, 1 Ohio St. 1; Knouff *v.* Thompson, 16 Penn. St. 357; Dillard *v.* Dillard, 3 Humph. 41.

[2] Morice *v.* Bishop of Durham, 10 Ves. 537; Paice *v.* Canterbury, 14 Ves. 370.

[3] Lewin on Trusts, 115 (5th ed. Lon.); Levet *v.* Needham, 2 Vern. 138; Wych *v.* Packington, 3 Bro. B. C. 44; Sewell *v.* Denny, 10 Beav. 315; Halford *v.* Stains, 16 Sim. 488; Barrett *v.* Buck, 12 Jur. 771; Cooke *v.* Dealy, 22 Beav. 196; Fletcher *v.* Ashburner, 1 Bro. Ch. 501; *Re* Cross's Estate, 1 Sim. (N. S.) 260.

[4] Cook *v.* Hutchinson, 1 Keen, 50; Docksey *v.* Docksey, 2 Eq. Ca. Ab. 506; 3 Bro. P. C. 39; North *v.* Crompton, 1 Ch. Ca. 196; 2 Vern. 253; Mallabar *v.* Mallabar, Cas. t. Tal. 78; Petit *v.* Smith, 1 P. Wms. 7; Nourse *v.* Finch, 1 Ves. Jr. 344; Walton *v.* Walton, 14 Ves. 318; Langham *v.* Sanford, 2 Nev. 6; Gladding *v.* Yapp, 5 Mod. 56; Lake *v.* Lake, 1 Wils. 313; Amb. 126; Trimmer *v.* Bayne, 7 Ves. 520; Williams *v.* Jones, 10 Ves. 77.

[5] Langham *v.* Sanford, 17 Ves. 442; 19 Ves. 643; Rachfield *v.* Careless, 2

§ 151. No general rule can be stated, that will determine when a conveyance will carry with it a beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument.[1] A conveyance to a wife or child will be presumed to carry a beneficial interest,[2] but such consideration is only a circumstance of evidence.[3] It has been said, that if a man transfer property to another, it must be presumed that it proceeded from an intention to benefit the other by making a gift and conferring the beneficial interest;[4] but if such intention cannot be inferred consistently with all the circumstances attending the transaction a trust will result.[5] The heir is not to be excluded from a resulting trust upon bare conjecture;[6] there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that none was intended for the heir; for the beneficial interest results to the heir, not from the intention of the ancestor, but because he has expressed no intention.[7] Thus, a trust may result upon a legacy given to the heir;[8] but the circumstance of being heir, with other circumstances, will be strong evidence that no

P. Wms. 158; Gladding *v.* Yapp, 5 Mad. 59; White *v.* Evans, 4 Ves. 21; Walton *v.* Walton, 14 Ves. 322; Petit *v.* Smith, 1 P. Wms. 7; Nourse *v.* Finch, 1 Ves. Jr. 344; Ralston *v.* Telfair, 2 Dev. Eq. 255; Hughes *v.* Evans, 13 Sim. 496; White *v.* Williams, 3 V. & B. 72; Love *v.* Gaze, 8 Beav. 472.

[1] Hill *v.* Bishop of London, 1 Atk. 620; Walton *v.* Walton, 14 Ves. 322; Starkey *v.* Brooks, 1 P. Wms. 391; King *v.* Dennison, 1 Ves. & B. 279; Ellis *v.* Selby, 1 M. & K. 298.

[2] Christ's Hospital *v.* Budgin, 2 Vern. 683; Jennings *v.* Selleck, 1 Vern. 467; Grey *v.* Grey, 2 Swans. 598; Elliott *v.* Elliott, 2 Ch. Ca. 232; Hayes *v.* Kingdom, 1 Vern. 33; Baylis *v.* Newton, 2 Vern. 28; Cook *v.* Hutchinson, 1 Keen, 42; Cripps *v.* Jee, 4 Bro. Ch. 472; Rogers *v.* Rogers, 3 P. Wms. 193; Lloyd *v.* Spillett, 2 Atk. 566; Robinson *v.* Taylor, 2 Bro. Ch. 594; Smith *v.* King, 16 East, 283; Coningham *v.* Mellish, Pr. Ch. 31.

[3] Buggins *v.* Yates, 9 Mod. 122; Wych *v.* Packington, 2 Eq. Ca. Ab. 507; King *v.* Dennison, 1 Ves. & B. 474.

[4] George *v.* Howard, 7 Price, 651.

[5] Custance *v.* Cunningham, 13 Beav. 363.

[6] Halliday *v.* Hudson, 3 Ves. 211; Kellett *v.* Kellett, 3 Dow, 248; Amphlett *v.* Parke, 2 R. & M. 227; Phillips *v.* Phillips, 1 M. & K. 661; Salter *v.* Cavanagh, 1 Dru. & Walsh, 668.

[7] Hopkins *v.* Hopkins, Cas. t. Talbot, 44; Tregomwell *v.* Sydenham, 3 Dow, 211; Lloyd *v.* Spillett, 2 Atk. 151; Habergham *v.* Vincent, 2 Ves. Jr. 225.

[8] Randall *v.* Bookey, 2 Vern. 425; Pr. Ch. 162; Starkey *v.* Brooks, 1 P. Wms. 390; overruling North *v.* Crompton, 1 Ch. Ca. 196; Killett *v.* Killett, 1 Ball & B. 543; 3 Dow, P. C. 248.

trust was intended.[1] But in no case will the court permit the grantee to retain the beneficial interest, if there was any mistake on the part of the grantor,[2] or any fraud on the part of the grantee.[3] If the grantor intended a fraud upon the law, there can be no resulting trust;[4] however, even in this case, if the grantee admits the trust, the court will enforce it.[5] If a conveyance has been made upon a valuable consideration, there can be no resulting trust to the grantor, as the payment of a valuable consideration imports an intention to benefit the grantee in case the trusts declared fail, or are imperfectly declared, or do not take effect for any other reason.[6]

§ 152. Thus, if upon a conveyance, devise, or bequest, a trust is declared of a part of the estate only, or the purposes of the trust do not exhaust the whole beneficial interest, the trust in the remaining part or interest will result to the settlor or his heirs;[7] for the reason that a declaration of trust as to part is considered sufficient evidence that the settlor did not intend the donee to take the beneficial interest in the whole, and that the creation of the trust was the sole object of the transaction. But a distinction must be observed between a devise to a person for a particular purpose, with no intention of conferring upon him any beneficial interest, and a devise with a view of conferring the beneficial interest,

[1] Rogers *v.* Rogers, 5 P. Wms. 193; Sel. Ch. Ca. 81; Mallabar *v.* Mallabar, Cas. t. Talb. 78; and others cases above cited.

[2] Birch *v.* Blagrave, Amb. 264; Woodman *v.* Morrell, 2 Freem. 33; Childers *v.* Childers, 1 De G. & Jon. 482; Atty-Gen. *v.* Poulden, 8 Sim. 472.

[3] Lloyd *v.* Spillett, 2 Atk. 150; Barn. 388; Hutchins *v.* Lee, 1 Atk. 488; Young *v.* Peachy, 2 Atk. 254–257; 2 Vern. 307.

[4] Cottington *v.* Fletcher, 2 Atk. 156; Chaplin *v.* Chaplin, 3 P. Wms. 233; Muckleston *v.* Brown, 6 Ves. 68.

[5] Ibid.

[6] Kerlin *v.* Campbell, 15 Penn. St. 500; Gibson *v.* Armstrong, 7 B. Mon. 481; Brown *v.* Jones, 1 Atk. 158; Ridout *v.* Dowding, 1 Atk. 419.

[7] Northen *v.* Carnegie, 4 Drew. 587; Lloyd *v.* Spillett, 2 Atk. 150; Barn. 388; Cottington *v.* Fletcher, 2 Atk. 155; Culpepper *v.* Aston, 2 Ch. Ca. 115; Cook *v.* Gwavas, cited Roper *v.* Radcliffe, 9 Mod. 187; Sherrard *v.* Harborough, Amb. 165; Hobart *v.* Suffolk, 2 Vern. 644; Halliday *v.* Hudson, 3 Ves. 210 a; Killett *v.* Killett, 3 Dow, 248; Davidson *v.* Foley, 2 Bro. Ch. 203; Levet *v.* Needham, 2 Vern. 138; Kiricke *v.* Bransbey, 2 Eq. Ca. Ab. 508; Robinson *v.* Taylor, 2 Bro. Ch. 589; Mapp *v.* Elcock, 2 Phil. 793; 3 H. L. Ca. 492; Read *v.* Stedman, 26 Beav. 495; Dawson *v.* Clarke, 18 Ves. 254; Wych *v.* Packington, 3 Bro. Ch. 44; Bristol *v.* Hungerford, 2 Vern. 645; Hill *v.* Cook, 1 V. & B. 173; Mullen *v.* Bowman, 1 Coll. N. C. 197.

but subject to a particular charge, wish, or desire. Thus, if a gift be made to one and his heirs, charged with the payment of debts, it is a gift for a particular purpose, but not for that purpose only; and if it is the intention to confer upon the donee of the legal estate a beneficial interest after the particular purpose is satisfied without exhausting the whole estate, the surplus goes to the donee and does not result.[1] But if the gift is *upon a trust to pay debts*, that is a gift for a particular purpose and nothing more. If the whole estate is given for that one purpose, and that purpose does not exhaust the whole estate, the remainder results to the donor or his heirs.[2] Or as Vice-Chancellor Wood stated the rule: (1) where there is a gift to one to enable him to do something, where he has a choice whether he will do it or not, then the gift is for his own benefit, the motive why it is given to him being stated; (2) where you find the gift is for the general purposes of the will, then the person who takes the estate cannot take the surplus after satisfying the trust for his own benefit; (3) where a charge is created by the will, the devisee takes the surplus for his own benefit, and no trust is implied.[3]

§ 153. If from the whole instrument there can be gathered an intention to benefit the donee, no trust in the remainder will result, as where a man made *his dearly beloved wife his sole heiress and executrix* to pay his debts and legacies, and there was a residue after paying debts and legacies, there was no resulting trust, for the expressions in the will indicated an intention to benefit the donee.[4] So any other expressions, that indicate an intention that the donee shall be benefited after the particular purposes are satisfied, will prevent a trust from resulting.[5] So expressions of affection or relationship will be evidence upon the question, whether a trust was intended to result after the par-

[1] Hill *v.* London, 1 Atk. 619; King *v.* Dennison, 1 V. & B. 260; Southouse *v.* Bate, 2 V. & B. 396; Mullen *v.* Bowman, 1 Coll. N. C. 197; Dawson *v.* Clarke, 18 Ves. 247; Walton *v.* Walton, 14 Ves. 313; Wood *v.* Cox, 1 Keen, 317; 2 M. & Cr. 684.

[2] King *v.* Dennison, 1 V. & B. 272.

[3] Barrs *v.* Feweke, 2 Hem. & M. 60; 11 Jur. (N. S.) 669; Sanderson's Trust, 3 K. & J. 497; Saltmarsh *v.* Barrett, 29 Beav. 474; 3 De G., F. & J. 279; Pollard's Trusts, 32 L. J. Ch. 657; Henderson *v.* Cross, 17 Jur. (N. S.) 177.

[4] Rogers *v.* Rogers, 3 P. Wms. 193; Cook *v.* Hutchinson, 1 Keen, 42.

[5] Meredith *v.* Heneage, 1 Sim. 555; Wood *v.* Cox, 2 M. & Cr. 692; Cook *v.* Hutchinson, 1 Keen, 42.

ticular trusts are satisfied.[1] If the donee is an infant incapable of executing a trust, or a married woman, it will be evidence upon the same question.[2] But if from the whole will it is apparent that the donee shall not take a beneficial interest, all such circumstances go for nothing.[3]

§ 154. If the donee, to whom an estate is given upon a trust declared as to part, is also the heir, or other person to whom the trust for the remainder would result, or if he is one of a class, such gift to him will not prevent him from taking by the resulting trust the part that may come to him.[4] So a legacy or other beneficial gift to him will not exclude him from the resulting interest,[5] even if the interest given him is to arise out of the declared trust.[6]

§ 155. The doctrine of resulting trusts, where a trust is declared as to part only, was formerly much discussed in cases of gifts to executors for the payment of debts and legacies. In such cases at common law the appointment of the executor entitled him, both at law and equity, to all the remainder of the personal property after the payment of debts and legacies, unless it was specially disposed of by the testator in the will. Courts were always astute to find circumstances to repel the beneficial interest in the executor, and to raise a resulting trust for the next of kin, or heir-at-law, and it was finally enacted, 1 Will. IV., c. 40, that such executors should be trustees of any residue, unless it plainly appeared by the will that they were intended to take the residue beneficially.[7] In the United States the rule never prevailed, but executors always took as trustees for those entitled to the distribution of the personal estate, unless it was expressly disposed of to some other persons, or unless it was expressly given to the executor beneficially.[8]

[1] Rogers *v.* Rogers, 3 P. Wms. 193; Coningham *v.* Mellish, Pr. Ch. 31; King *v.* Dennison, 1 V. & B. 274; Hobart *v.* Suffolk, 2 Vern. 644.

[2] Williams *v.* Jones, 10 Ves. 77; Blinkhorn *v.* Feast, 2 Ves. Sr. 27.

[3] King *v.* Mitchell, 8 Pet. 349; King *v.* Dennison, 1 V. & B. 275.

[4] Hennershotz's Estate, 16 Penn. St. 435.

[5] Farrington *v.* Knightly, 1 P. Wms. 545; Rutland *v.* Rutland, 2 P. Wms. 213; Andrews *v.* Clark, 2 Ves. Sr. 162; North *v.* Pardon, 2 Ves. Sr. 495.

[6] Starkey *v.* Brooks, 1 P. Wms. 390; Randal *v.* Bookey, 2 Vern. 425; Pr. Ch. 162; Killett *v.* Killett, 1 B. & B. 543; 3 Dow, P. C. 248.

[7] See 2 Story, Eq. Jur. § 1208, and the elaborate note cited from Fon. Eq. B. 2, c. 5, § 3, note (k).

[8] Hill on Trustees, 1234 (Am. ed.); 2 Story, Eq. Jur. §§ 1208, 1209; as the

§ 156. In this connection an important exception to the general doctrine of resulting trusts should be stated. If property is given to trustees by grant or devise for charitable uses *generally*, and the particular purpose is not declared at all, or, if declared, does not exhaust the whole estate, there will be no resulting trust for the donor, his heirs, or next of kin, in either case ; nor will the donees take any beneficial interest, but the court will direct the trustees to administer the whole estate under some scheme for charitable purposes.[1]

§ 157. If a gift is made by deed or will upon *trust*, and no trust is declared,[2] or a bequest is made to one named, as executor, " to enable him to carry into effect the trusts of the will," and none are declared,[3] or a gift is made upon *trusts* thereafter to be declared, and no declaration is ever made,[4] the legal title only will pass to the grantee or devisee, while a trust in the equitable interest will result to the settlor, his heirs, or legal representatives, according to the nature of the property, whether real or personal ; for it appears upon the instrument itself that the legal title alone was intended for the first taker, and that the equitable interest was intended to go to some other person, and as such other person cannot take the equitable interest for want of a declaration of the

doctrine has never prevailed in America, it is not worth while to state all the learning and nice distinctions of the courts. They will be found in Hill, Story, and Fonblanque as above cited.

[1] Cook *v.* Dunkenfield, 2 Atk. 567; Metford School, 8 Co. 130; Moggridge *v.* Thackwell, 7 Ves. 73; Atty-Gen. *v.* Bristol, 2 J. & W. 308; Mills *v.* Farmer, 1 Mer. 55; Atty-Gen. *v.* Haberdashers' Co., 4 Bro. Ch. 103; see *post*, chapter upon Charitable Trusts, where this matter is stated at large.

[2] Atty-Gen. *v.* Windsor, 8 H. L. Ca. 369; 24 Beav. 679; Gloucester *v.* Wood, 1 H. L. Ca. 272; 3 Hare, 131; Dawson *v.* Clark, 18 Ves. 254; Dunnage *v.* White, 1 J. & W. 583; Morice *v.* Durham, 10 Ves. 537; Woollett *v.* Harris, 5 Mad. 452; Southouse *v.* Bate, 2 Ves. & B. 396; Goodere *v.* Lloyd, 3 Sim. 538; Pratt *v.* Sladden, 14 Ves. 198; Anon., 1 Com. 345; Penfold *v.* Bouch, 4 Hare, 271; Brown *v.* Jones, 1 Atk. 101; Sidney *v.* Shelley, 19 Ves. 359; Emblyn *v.* Freeman, Pr. Ch. 542.

[3] Barrs *v.* Feweke, 2 Hem. & M. 60.

[4] London *v.* Garway, 2 Vern. 571; Collins *v.* Wakeman, 2 Ves. Jr. 683; Emblyn *v.* Freeman, Pr. Ch. 541; Fitch *v.* Weber, 6 Hare, 145; Brookman *v.* Hales, 2 V. & B. 45; Brown *v.* Jones, 1 Atk. 188; Sidney *v.* Shelley, 19 Ves. 352; Taylor *v.* Haygarth, 14 Sim. 8; Flint *v.* Warren, 16 Sim. 124; Onslow *v.* Wallis, 1 H. & Tw. 513; 1 McN. & G. 506; Jones *v.* Goodchild, 3 P. Wms. 33.

trust, it results to the settlor or his heirs. So if a testator says that he gives the residue, and stops there,[1] or if he cancels a residuary bequest by drawing a line through it.[2] But if it should plainly appear from the whole instrument that the donee is to take beneficially in case the trusts are not declared, no trust will result to the owner or heir.[3]

§ 158. It is to be observed, however, that the intention of the instrument is to be gathered from its general scope; hence, although the words *upon trust* are very strong evidence of the donor's intention not to confer the beneficial interest upon the donee,[4] yet it may be negatived by the context, and the general interpretation of the whole paper;[5] so, if the donee is called a *trustee*, the term may be shown to apply to one of two funds, and the donee may take a beneficial interest in the other,[6] or it may be so used as to be a mere *descriptio personæ*. On the other hand it may appear, from the whole instrument, that the donee is not to take the beneficial interest, although the words *upon trust*, or *trustee*, are not used, as where there is a direction that the donee shall be allowed his costs and expenses out of the fund given him, which would be without meaning if he took the whole beneficial interest in the fund.[7] But, if the conveyance is by deed for a valuable consideration, the grantee will take the beneficial interest if the trusts fail to be declared, or fail in any way; for there can be no resulting trusts where the grantee pays a valuable consideration for the estate.[8]

§ 159. If the gift is made upon a trust, and the trust is insufficiently or ineffectually declared, as, if it is too indefinite, vague, and uncertain to be carried into effect, it will result to the settlor, his heirs, or representatives.[9] Whether a trust is insufficiently

[1] Cloyne *v.* Young, 2 Ves. Sr. 91; Langham *v.* Sandford, 17 Ves. 435; Mapp *v.* Elcock, 2 Phil. 793.

[2] Mence *v.* Mence, 18 Ves. 348; Skrymsher *v.* Northcote, 1 Swans. 566.

[3] Sidney *v.* Shelley, 19 Ves. 352.

[4] Hill *v.* London, 1 Atk. 620; Woollett *v.* Harris, 5 Mad. 452.

[5] Coningham *v.* Mellish, Pr. Ch. 31; Dawson *v.* Clark, 15 Ves. 409; 18 Ves. 247; Hughes *v.* Evans, 13 Sim. 496; Cook *v.* Hutchinson, 1 Keen, 42.

[6] Gibbs *v.* Rumsey, 2 V. & B. 294; Pratt *v.* Sladden, 14 Ves. 193; Battely *v.* Windle, 2 Bro. Ch. 31.

[7] Saltmarsh *v.* Barrett, 3 De G., F. & J. 279; 29 Beav. 474.

[8] Brown *v.* Jones, 1 Atk. 158; Kerlin *v.* Campbell, 15 Penn. St. 500; Ridout *v.* Dowding, 1 Atk. 419.

[9] Williams *v.* Kershaw, 5 Cl. & Fin. 111; Ellis *v.* Selby, 7 Sim. 352; 1 M. &

declared or not, depends, of course, upon the particular construction to be given to each individual deed or will;[1] and so, whether a trust is too vague to be executed, or not, depends upon the interpretation given to each instrument.[2] If the declaration of trust is too imperfect to establish that purpose, and yet plainly shows that the intention was that the donee should not take beneficially, and that the sole purpose of the gift or grant was to carry out the purpose of the trust, which fails, the donee will take in trust for the donor or his heirs; but if it appear, from the whole instrument, that some beneficial interest was intended for the donee, or that he was intended to take beneficially in case the particular purpose fails, no trust will result, but he will take the estate discharged of all burdens.[3]

§ 160. Where a gift is made upon trusts that are void, in whole or in part, for illegality, or that fail by lapse, or otherwise, during the life of the donor,[5] a trust will result to the donor, his heirs, or legal representatives, if the property is not otherwise disposed of. Thus, where the gift or trust is void by statute, as a disposition in favor of persons or objects prohibited from taking,[6] or given at a time, and in a manner forbidden, as in violation of the statutes of mortmain, or similar statutes,[7] or where the gift

C. 286; Fowler *v.* Garlike, 1 R. & M. 232; Morice *v.* Durham, 9 Ves. 399; 10 Ves. 522; Kendall *v.* Granger, 5 Beav. 300; Vesey *v.* Jamson, 1 S. & S. 69; Stubbs *v.* Sargon, 3 M. & C. 500; 2 K. 255; Leslie *v.* Devonshire, 2 Bro. Ch. 187; James *v.* Allen, 3 Mer. 17.

[1] Ellis *v.* Selby, 1 M. & K. 298.

[2] Ibid.

[3] Gibbs *v.* Rumsey, 2 Ves. & B. 294; Cawood *v.* Thompson, 1 Sm. & Gif. 409; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Hughes *v.* Evans, 13 Sim. 496; Ralston *v.* Telfair, 2 Dev. Eq. 255.

[4] Turner *v.* Russell, 10 Hare, 204; Cook *v.* Stationers' Co. 3 M. & K. 262; Carrick *v.* Errington, 2 P. Wms. 361; Tregonwell *v.* Sydenham, 2 Dow, 194; Arnold *v.* Chapman, 7 Ves. 108; Jones *v.* Mitchell, 1 S. & S. 290; Page *v.* Lefingwell, 18 Ves. 463; Pilkington *v.* Boughey, 12 Sim. 114; Gibbs *v.* Rumsey, 2 Ves. & B. 294; Stevens *v.* Ely, 1 Dev. Eq. 493; Dashiel *v.* Attorney-General, 6 Hen. & J. 1; Lemmond *v.* People, 6 Ired. Eq. 137.

[5] Williams *v.* Coade, 10 Ves. 300; Ackroyd *v.* Smithson, 1 Bro. Ch. 503; Spink *v.* Lewis, 3 Bro. Ch. 335; Muckleston *v.* Brown, 6 Ves. 63; Davenport *v.* Coltman, 12 Sim. 610; Cruse *v.* Barley, 3 P. Wms. 22; Hutcheson *v.* Hammond, 3 Bro. Ch. 128; Hawley *v.* James, 5 Paige, 318.

[6] Carrick *v.* Errington, 2 P. Wms. 361; Davers *v.* Dewes, 3 P. Wms. 43.

[7] Attorney-General *v.* Weymouth, Amb. 20; Jones *v.* Mitchell, 1 S. & S. 294; West *v.* Shuttleworth, 2 M. & K. 684; Acts 39 & 40 Geo. IV. c. 98;

contravenes some policy of the law, as tending to a perpetuity,[1] or where it fails by the death of the beneficial donee or *cestui que trust*,[2] a trust, to the extent of the estate given, will result to the donor, or his heirs, or legal representatives, if it is not otherwise disposed of. So, if a trust for a particular purpose fail, by the dissolution of a corporation, or other organized body, a trust created for their particular benefit will result to the donor's heirs.[3]

§ 161. It was formerly said, that if a man conveyed his estate to a stranger without consideration, or for a mere nominal one, a trust resulted to the owner, on the ground that the law would not presume a man to part with his property without some inducement thereto.[4] This was in strict analogy to the common law, whereby, if a feoffment was made without consideration, the legal title *only* passed to the feoffee, and a use resulted to the feoffor.[5] In conformity with this rule, Mr. Cruise lays it down, that if the legal estate in lands is conveyed to a stranger without any consideration, there arises a resulting trust to the original owner;[6] for where there is neither consideration, nor declaration of use, to show the intention of the parties, it cannot be supposed that the estate was intended to be given away.[7] And the burden was put upon the grantee to show the consideration, and upon failure of proof, a use was presumed to the grantor, for the reason, as stated by Sir Francis Bacon, that when feoffments were made, it grew doubtful whether estates were in use or purchase, and as purchases were things notorious, and uses were things secret, the Chancellor thought it more convenient to put the purchaser to prove his con-

Eyre *v.* Marsden, 2 Keen, 564; McDonald *v.* Bryce, 2 Keen, 276; Lemmond *v.* People, 6 Ired. Eq. 137.

[1] Tregonwell *v.* Sydenham, 3 Dow, 194; Leake *v.* Robinson, 2 Mer. 363; Marshall *v.* Holloway, 2 Swans. 432; Southampton *v.* Hertford, 2 V. & B. 54; Curtis *v.* Lukin, 5 Beav. 147; Boughton *v.* James, 1 Call, 26; 1 H. L. Ca. 406; Brown *v.* Stoughton, 14 Sim. 369; Scarisbrick *v.* Skelmersdale, 17 Sim. 187; Furrin *v.* Newcomb, 3 K. & J. 16.

[2] Ackroyd *v.* Smithson, 1 Bro. Ch. 503; Cox *v.* Parker, 22 Beav. 188.

[3] Easterbrooks *v.* Tillinghast, 5 Gray, 17.

[4] Lewin on Trusts, 116 (5th Lond. ed.), and cases cited; Tolar *v.* Tolar, 1 Dev. Eq. 456; 2 Story, Eq. Jur. § 1199; Cecil *v.* Butcher, 2 J. & W. 573; Souerbye *v.* Arden, 1 John. Ch. 240.

[5] Dyer *v.* Dyer, 2 Cox, 92; Pinney *v.* Fellows, 15 Vt. 538; Botsford *v.* Burr, 2 Johns. Ch. 405.

[6] Cruise, Dig. tit 12, c. 1, § 52; tit. 11, c. 4, § 16.

[7] Cruise, Dig. tit. 11, c. 4, § 16 *et seq.*

sideration, than the feoffor to prove his trust, and so made intendment toward the use, and put the purchaser to the proof of his purchase.[1] To the same effect are Coke on Littleton and many of the older, and some of the more modern, authorities.[2]

§ 162. But the rule that a trust resulted to the grantor upon a voluntary conveyance was confined to common-law conveyances or assurances, such as feoffments, grants, fines, recoveries, and releases which operated without consideration, and vested the estate in the alienee by the act itself, as by livery of seisin;[3] although it was always doubtful whether a use could result from a conveyance by lease and release, even though it was voluntary, and no uses were declared; for the extinguishment of the estate of the lessee was a good consideration, yet such a conveyance was a strict common-law conveyance.[4] This rule does not apply to modern conveyances, and no trust is now held to result to a grantor, although he conveys his estate without consideration.[5] At the present day almost all conveyances are in form deeds of bargain and sale, and operate to pass the estate by virtue of the statute of uses, or of statutes in the several States prescribing the formalities necessary to convey lands. Under the statute of uses, the bargain between the bargainor and the bargainee, and the consideration, raised a use in the bargainee, the statute immediately stepped in and vested the legal title in the same person for whom a beneficial use had been raised by the bargain. In conveyances that are in form deeds of bargain and sale, parol evidence cannot be received to control or contradict the statement of the consideration. Such a statement is a solemn and essential part of the deed, and its *existence* cannot be disproved by parol,[6] although it is allowed so far to control the state-

[1] Bacon on Uses, 317.

[2] 1 Inst. 23 *a*, 271 *a*; Dyer, 166 *a*, 186 *b*; 11 Mod. 182; Cleve's Case, 6 Rep. 17 *b*; Woodliffe *v.* Drury, Cro. Eliz. 439; Duke of Norfolk *v.* Brown, Pr. Ch. 80; Warman *v.* Seaman, 2 Freem. 308; Hayes *v.* Kingdome, 1 Vern. 33; Grey *v.* Grey, 2 Swans. 598; Elliot *v.* Elliot, 2 Ch. Ca. 232; Attorney-General *v.* Wilson, 1 Cr. & Ph. 1; Sculthorpe *v.* Burgess, 1 Ves. Jr. 92; Tyrrell's Case, 2 Freem. 304; Ward *v.* Lant, Pr. Ch. 182.

[3] Cruise Dig., tit. 11, c. 4, § 16.

[4] Cruise Dig., tit. 32, c. 11, § 17.

[5] Hutchins *v.* Lee, 1 Atk. 447; Lloyd *v.* Spellett, 2 Atk. 150; Young *v.* Peachy, 2 Atk. 257; Burn *v.* Winthrop, 1 John. Ch. 329.

[6] Leman *v.* Whitely, 4 Russ. 423; Philbrook *v.* Delano, 29 Me. 410; Graves *v.* Graves, 29 N. H. 129; Randall *v.* Phillips, 3 Mason, 388; Hutchinson *v.* Tin-

ment as to the payment of it, as to show that it still exists as a debt due from the grantee to the grantor.[1] And so in States where it is declared by statute, as in Massachusetts,[2] that deeds duly executed, acknowledged, and recorded, shall be effectual to pass the estate without other ceremony, it is not competent to control the effect of such deeds by parol, or to engraft uses, trusts, or other limitations upon them not contained in the instruments themselves, or in some other instrument executed before or at the same time with them, in such manner as to become a part of them.[3] To allow parol evidence to raise a resulting trust upon such deeds would be to break in upon the express provisions of the statute of frauds. Mr. Hill states the modern rule correctly when he says,[4] "that it is the clear result of the authorities that where a person, a stranger in blood to the donor, and *a fortiori* if connected with him in blood, is in possession of an estate under a voluntary conveyance duly executed, the mere fact of his being a volunteer will not of itself create any presumption that he is a trustee for the grantor; but he will be considered entitled to the enjoyment of the beneficial interest unless that title is displaced by sufficient evidence of an intention on the part of the donor to create a trust, and he need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it from him."[5] And where the deed contains a clause, as most deeds do, that the estate is had and held to the grantee, his heirs and assigns *to his and their use and behoof*,

dall, 2 Green, Ch. 357; Alison *v.* Kurtz, 2 Watts, 187; Wilkinson *v.* Wilkinson, 2 Dev. Eq. 376; Morris *v.* Morris, 2 Bibb, 311; Movan *v.* Hayes, 1 John. Ch. 339; Rathburn *v.* Rathburn, 6 Barb. 93; Balbeck *v.* Donaldson, 6 Am. Law Reg. 148.

[1] Leman *v.* Whitely, 4 Russ. 423; Graves *v.* Graves, 29 N. H. 129; Philbrook *v.* Delano, 29 Me. 410; Randall *v.* Phillips, 3 Mason, 388; Thomas *v.* McCormack, 9 Dana, 188; Radsall *v.* Radsall, 9 Wis. 379; Farrington *v.* Barr, 36 N. H. 86.

[2] Gen. Stat. c. 89, § 1.

[3] Titcomb *v.* Morrill, 10 Allen, 15; Bartlett *v.* Bartlett, 14 Gray, 278; Philbrook *v.* Delano, 29 Me. 410; Graves *v.* Graves, 29 N. H. 129; Rathburn *v.* Rathburn, 6 Barb. 105; Bank of U. S. *v.* Housman, 6 Paige, 526; Miller *v.* Wilson, 15 Ohio, 108; Parnell *v.* Hingston, 3 Sm. & Gif. 337; Taylor *v.* Taylor, 1 Atk. 386; Dyer *v.* Dyer, 2 Cox, 93; Fordyce *v.* Wallis, 3 Bro. Ch. 576; Squire *v.* Harder, 1 Paige, 494; Balbeck *v.* Donaldson, 6 Am. Law Reg. 148; Jackson *v.* Garnsey, 16 John. 189; Jackson *v.* Caldwell, 1 Cow. 622.

[4] Hill on Trustees, 170 (4th Am. ed.).

[5] Cook *v.* Fountain, 3 Swans. 590; Clavering *v.* Clavering, 2 Vern. 473;

no trust can result, as it is a rule that when a use is declared, no other use can be shown to result.[1] And when a deed contains covenants of warranty, no use can result to the grantor, for such covenants estop him from claiming any legal or beneficial interest in the estate.[2]

§ 163. It may be stated that courts do not favor voluntary conveyances, and will not lend their aid to enforce them if they are imperfectly executed, and their decrees are necessary to give them validity and force. In such cases equity will not interfere, but will leave the parties to their rights at law.[3] And, further, equity will always look upon such conveyances with suspicion, especially if made to strangers for no particular purpose. If any fraud or misrepresentation is practised upon a grantor, equity will fasten a trust upon the conscience of the fraudulent grantee.[4] If fraud upon the grantor is alleged, the fact that the conveyance was without consideration is always considered, as pertinent evidence, and will be considered as one badge of fraud, if there are other facts and circumstances pointing in that direction.[5] A disposition by will, however, is not subject to these rules, as a gift by will imports a consideration, and no averments by parol can be received to fasten a use or trust upon such gift; but the donee will take both the legal and beneficial estate, unless it clearly appears from the whole will that such was not the intention of the donor.[6]

§ 164. It is further to be observed that voluntary conveyances to a wife or child were never within the rule that such gifts raised a resulting trust for the donor. In conveyances of this kind to the donor's family the analogy of the common law was followed, whereby if a feoffment was made to a stranger without consideration a use resulted to the feoffor; but if a feoffment was made to a wife or child no use resulted, for the consideration of blood was held a good consideration, and an advance or settlement was presumed. So marriage was not only a good but a valuable consid-

Boughton *v.* Boughton, 1 Atk. 625; Cecil *v.* Butcher, 2 Jac. & W. 573; Jeffreys *v.* Jeffreys, 1 Cr. & Ph. 138; Dummer *v.* Pitcher, 2 M. & K. 262; Leman *v.* Whitley, 4 Russ. 423.

[1] Graves *v.* Graves, 29 N. H. 129; Sprague *v.* Woods, 4 Watts & S. 192; Vandervolgen *v.* Yates, 5 Seld. 219.

[2] Philbrook *v.* Delano, 29 Me. 410.

[3] Lane *v.* Ewing, 31 Mo. 75.

[4] *Post*, chap. VI.

[5] *Post*, § 187.

[6] *Ante*, § 94.

eration, and no trusts could result from conveyances made in consideration of marriage, either of the grantor or of any member of his family. But if voluntary conveyances to wife or children were made by a man deeply indebted, or with an intention to delay his creditors, while he could not raise a trust in his own favor, yet his creditors could avoid the conveyances or raise a trust upon them in their own favor to the extent of their claims.[1]

§ 165. If the voluntary conveyance is made for some illegal or fraudulent purpose, whether it is a common-law or a modern conveyance, no trust will result to the grantor; as, if the voluntary conveyance is made to delay, hinder, and defeat creditors,[2] or to give a man a colorable qualification to vote, or to sit in parliament,[3] or to kill game,[4] or to disqualify the grantor for an office.[5]

[1] Dunnica *v.* Coy, 28 Mo. 525.

[2] Cottington *v.* Fletcher, 2 Atk. 156; Chaplin *v.* Chaplin, 3 P. Wms. 233; Muckleston *v.* Brown, 6 Ves. 68; Stewart *v.* Iglehart, 7 Gill & J. 132; Bryant *v.* Mansfield, 22 Me. 310; Randall *v.* Phillips, 3 Mason, 378; Wilson *v.* Cheshire, 1 McCord, 233; Mason *v.* Baker, 1 A. K. Marsh. 208; Chamberlayne *v.* Temple, 2 Rand. 384; Stewart *v.* Dailey, 6 Litt. 212; Jackson *v.* Dutton, 3 Har. 98; McClure *v.* Purcel, 3 A. K. Marsh. 61; Steele *v.* Worthington, 2 Ham. 82.

[3] Pitts's Case, cited Amb. 266; Curtis *v.* Perry, 747.

[4] Roberts *v.* Roberts, Daniel, 143; Brackenbury *v.* Brackenbury, 2 Jac. & W. 391; Cecil *v.* Butcher, 2 Jac. & W. 565.

[5] Birch *v.* Blagrave, Amb. 264; Gaskell *v.* Gaskell, 2 Y. & J. 502; Vandenberg *v.* Palmer, 4 K. & J. 204; Childers *v.* Childers, 1 De G. & J. 482; Field *v.* Lonsdale, 13 Beav. 78.

CHAPTER VI.

CONSTRUCTIVE TRUSTS.

§ 166. THE trusts thus far considered arise from the *express* agreements and intentions of the parties, or from their intentions *implied* from their agreements, or *result* from their express or implied agreements. These trusts arise, result, or are implied from the contracts and relations of the parties. The intention of the parties as manifested in contracts made in good faith is the foundation of them. There is another large class of trusts which arise from frauds committed by one party upon another. Thus, if one party procures the legal title to property from another by fraud or misrepresentation or concealment, or if a party makes use of some influential or confidential relation which he holds towards the owner of the legal title, to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee. If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circum-

stances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society. Such trusts are called constructive trusts. They differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made from which they are construed by the court, but they are thrust upon a party contrary to his intention and against his consent. The reason is that courts of equity have a large jurisdiction over all matters of trust and confidence. They control and direct their administration, and in certain cases they annul and put an end to them by directing the trustee to convey the trust property to the person beneficially interested. They can also remove the trustees and appoint new ones. Therefore, courts of equity by raising a trust by construction in cases of fraud can do equal and complete justice between the parties. By this fiction of a constructive trust courts of equity have great powers. They can order the constructive trustee to hold the legal title for the original owner upon just and proper terms. If he has paid any value for the legal estate, they can order the estate to stand as security for it; they can order accounts to be taken and settled; they can decree a reconveyance of the property, or they can put an end to the trust by declaring the conveyances to the constructive trustee to be null and void, and order that they be surrendered up and cancelled.

§ 167. Courts of common law have an extensive jurisdiction in cases of fraud, but it is readily seen that the remedy in equity is more easily moulded to the varying circumstances of different cases. As between the immediate parties, fraud makes all things void which are done under its direct influence. Thus, *non est factum* can be pleaded to a suit upon a deed or bond, procured by fraud or duress, on the ground that whatever is done under the influence of fraud is not done at all.[1] The same evidence is admissible in both courts. Probably the same evidence that would convince a court of equity that a deed was procured by fraud, and that the grantee ought to hold as a constructive trustee for the grantor, would also persuade a jury to return a verdict against

[1] 1 Chit. Plead. 483.

such deed. In some States the parties have a right to trial by jury of all questions of fact, as of fraud or no fraud, arising upon the pleadings in equity. In other States the court may in its discretion send such issues of fact to trial by a jury.[1] Thus, the remedy in equity in cases of fraud is sought, not so much from the mode of proof and the rules of evidence, as it is from the complete character of the relief given. It is true, that in some cases courts of equity will act upon circumstances and presumptions of fraud which courts of law would not deem satisfactory proofs.[2] As if a guardian purchases an estate from a ward, equity will presume fraud from the existence of the relation of guardian and ward, a rule that courts of law would not always act upon. Lord Eldon said, that courts of equity in many cases would order an instrument to be delivered up, as unduly obtained, which a jury would not be justified in impeaching by the rules of law.[3] However, fraud must be proved in both courts, and is not to be imputed from mere circumstances of suspicion. It is not, however, the rule that the court will not presume or construe a trust to arise except in cases of absolute necessity;[4] for courts of equity will act upon the just preponderance of all the facts and circumstances of proof in the case.[5]

§ 168. Constructive trusts may be divided into three classes to be determined according to the circumstances under which they arise, — first, trusts that arise from actual fraud practised by one man upon another. Second, trusts that arise from constructive fraud. In this second class the conduct may not be actually tainted with moral fraud or evil intention, but it may be contrary to some rule established by public policy for the protection of society. Thus, a purchase made by a guardian of his ward, or by a trustee of his *cestui que trust*, or by an attorney of his client, may be in good faith, and as beneficial to all parties as any other transaction in life; and yet the inconvenience and danger of allowing contracts to be entered into by parties holding such relations to each other are so great that courts of equity construe such contracts *prmia facie* to be fraudulent, and they construe a trust to

[1] 1 Story, Eq. Jur. § 190 a.
[2] Warner *v.* Daniels, 1 Wood. & M. 103; Denton *v.* McKenzie, 1 Des. 289.
[3] Fullager *v.* Clark, 18 Ves. 483; Chesterfield *v.* Janssen, 2 Ves. 155.
[4] Cook *v.* Fountain, 3 Swans. 555.
[5] 2 Story, Eq. Jur. § 1195; Steele *v.* Kinkle, 3 Ala. 352.

arise from them. Third, trusts that arise from some equitable principle independent of the existence of any fraud, as where an estate has been purchased, and the consideration money paid, but the deed is not taken, equity will raise a trust by construction for the purchaser.

§ 169. No certain and accurate definition or description of actual fraud can be given. Courts have never laid down, in a general proposition, what does and what does not constitute fraud, nor any general rule by which they are controlled in giving relief,[1] lest other means of committing fraud should be resorted to. As Lord Hardwicke said, "fraud is infinite, and were courts of equity once to lay down rules how far they would go and no further, in extending the relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive."[2] Although it is difficult to give a definition of it, yet Mr. Story said,[3] that "fraud in the sense of a court of equity properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[4] And courts of equity will not only interfere in cases of fraud to set aside acts done; but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done."[5]

§ 170. Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic, that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances.

[1] Mortlock *v.* Buller, 10 Ves. 306.

[2] Parke's Hist. of Chan. 508; Lawley *v.* Hooper, 3 Atk. 279; 1 Domat, Civil Law, B. 1, tit. 18, § 3, art. 1.

[3] 1 Story, Eq. Jur. § 187.

[4] Chesterfield *v.* Janssen, 2 Ves. Sr. 155; Gale *v.* Gale, 19 Barb. 251; 1 Fonb. Eq. B. 1, c. 2, § 3, note (r).

[5] Middleton *v.* Middleton, 1 Jac. & W. 96; Waltham's Case, cited 11 Ves. 638, 14 Ves. 290; Devenish *v.* Baines, Pr. Ch. 4.

The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense. In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case, and go at once to its essential morality and merit. Thus at law married women or infants are not liable upon their contracts, nor are they bound by their deeds, receipts, or releases, whether made *bona fide* or fraudulently;[1] but in equity if a married woman has obtained property by fraud, the court disregards the technical rules of common law in regard to married women, and converts her by construction into a trustee, and compels her to to do justice by executing the trust.[2] The same principles apply to infants, although they cannot be sued at common law, save in a few exceptional cases. So if an infant fraudulently misrepresents his age and gives deeds or releases, upon which others act, equity will not allow him to impeach such deeds on account of his minority.[3] This is on the ground that infants and married women shall not take advantage of the rules made for their protection to perpetrate frauds upon innocent persons, but that they shall be bound by their own fraudulent representations, or by equitable estoppels like other persons.[4]

§ 171. Fraud, arising from facts and circumstances of imposition, presents the plainest case for relief,[5] for it comes within what is called the *suggestio falsi*.[6] Wherever by misrepresentation, combination, conspiracy, oppression, intimidation, surprise, or any other practice at variance with honest, fair dealing, one is deceived, entrapped, or surprised into a conveyance of the legal title to his property, courts of equity will not allow the fraudulent grantee to avail himself of the transaction to enjoy the beneficial interest, but will construe him to be a trustee, and will order him to account

[1] People *v.* Kendall, 25 Wend. 399; Burley *v.* Russell, 10 N. H. 184; West *v.* Moore, 14 Vt. 447; Conroe *v.* Birdsall, 1 John. Cas. 127; Price *v.* Hewitt, 8 Exch. 145.

[2] Vaughan *v.* Vanderslegen, 2 Dr. 363; Jones *v.* Kearney, 1 Dr. & W. 167.

[3] Stoolfoos *v.* Jenkins, 12 S. & R. 399; Wright *v.* Snow, 2 De G. & S. 321.

[4] Davis *v.* Fingle, 8 B. Monr. 539; Wright *v.* Arnold, 4 B. Monr. 643; Hall *v.* Timmons, 2 Rich. Eq. 120.

[5] Chesterfield *v.* Janssen, 2 Ves. 155.

[6] Evans *v.* Bicknell, 6 Ves. 173; Jarvis *v.* Duke, 1 Vern. 20; Broderick *v.* Broderick, 1 P. Wms. 240; Nevitt *v.* Gibson, 1 Freem. Ch. 438.

upon equitable principles, and to make a reconveyance of the property.[1] Thus, where the devisee, under a will defectively executed, obtained a conveyance of the estate from the heir-at-law by representing that the will was duly executed,[2] or where an executor obtained a release of a legacy by representing, that there was no legacy given by the will,[3] or where a purchaser misrepresented the quantity and quality of the land he was about to purchase,[4] or where the vendor misrepresented the quantity of land in a tract sold, as twenty acres overflowed by a river, when in fact it was more than a hundred acres,[5] the court gave relief. In Smith *v.* Rickards,[6] the Supreme Court of the United States cited the following proposition[7] with approval: "Where a party intentionally or by design misrepresents a material fact, or produces a false impression[8] in order to mislead another,[9] or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is positive fraud in the truest sense of the term;[10] there is an evil act, with an evil intent; *dolum malum, ad circumveniendum.* And the misrepresentation may as well be by acts as words, by artifices that mislead[11] as by positive assertions."[12] Lord Thurlow said "it would

[1] Tyler *v.* Black, 13 How. 231; Boyce *v.* Grundy, 3 Pet. 210; Smith *v.* Rickards, 13 Pet. 26; McAllister *v.* Barry, 2 Hayw. 290; Walker *v.* Dunlop, 5 Hayw. 271; Stephenson *v.* Taylor, 1 A. K. Marsh. 235; Pitts *v.* Cottingham, 9 Porter, 675; Harris *v.* Williamson, 4 Hayw. 124; Lewis *v.* McLemore, 10 Yerg. 206; Spence *v.* Duren, 2 Ala. 251; Harris *v.* Carter, 3 Stew. 233; How *v.* Weldon, 2 Ves. 517; Neville *v.* Wilkinson, 1 Bro. Ch. 596; Earl of Bath's Case, 3 Ch. Ca. 56; Willan *v.* Willan, 16 Ves. 82; Say *v.* Barwich, 1 V. & B. 195; Barnsley *v.* Powell, 1 Ves. 289; Mathew *v.* Hanbury, 2 Vern. 187; Bridgman *v.* Green, 2 Ves. 627; Evans *v.* Llewellyn, 1 Cox, 340; Bennet *v.* Vade, 2 Atk. 324, Mad. Ch. Pr. 342; Clermont *v.* Tasburgh, 1 J. & W. 112.

[2] Broderick *v.* Broderick, 1 P. Wms. 239.

[3] Jarvis *v.* Duke, 1 Vern. 19; Murray *v.* Palmer, 18 Sch. & Le. 474; James *v.* Greaves, 2 P. Wms. 270; Horseley *v.* Chaloner, 2 Ves. 83.

[4] Tyler *v.* Black, 13 How. 231.

[5] Boyce *v.* Grundy, 3 Pet. 210.

[6] 13 Pet. 36.

[7] 1 Story's Eq. Jur. §§ 192, 193.

[8] Laidlaw *v.* Organ, 2 Wheat. 195; Pidcock *v.* Bishop, 3 B. & Cr. 605; Smith *v.* Bank of Scotland, 1 Dow, 72; Evans *v.* Bicknell, 6 Ves. 173.

[9] State *v.* Holloway, 8 Blackf. 45.

[10] Atwood *v.* Small, 6 Cl. & Fin. 232; 1 Younge, 407; Taylor *v.* Ashton, 11 Mee. & W. 401; Warner *v.* Daniel, 1 Wood. & M. 103; Torrey *v.* Buck, 1 Green, Ch. 366; Jarvis *v.* Duke, 1 Vern. 19; Broderick *v.* Broderick, 1 P. Wms. 239.

[11] Chisholm *v.* Gadsden, 1 Strobh. 220; Huguenin *v.* Baseley, 14 Ves. 273; State *v.* Holloway, 8 Blackf. 45.

[12] Ibid.; Laidlaw *v.* Organ, 2 Wheat. 195; Smith *v.* Bank of Scotland, 1 Dow,

be ridiculous for the court to make a distinction between the two cases."[1] "Whether the party thus representing a fact knew it to be false or made the assertion without knowing whether it was true or false is wholly immaterial;[2] for the affirmation of what one does not know or believe to be true is, equally in morals and law, as unjustifiable as the affirmation of what is known to be positively false.[3] And even if a party innocently misrepresent a fact by mistake it is equally conclusive; for it operates as a surprise and imposition on the other party.[4] Or as Lord Thurlow expresses it, it misleads the parties contracting on the subject-matter."[5]

§ 172. If a person purchasing an estate falsely pretends and represents that he is purchasing or acting as agent for another, when in fact he is purchasing for himself, and such misrepresentation misleads and throws the vendor off his guard, and the purchaser makes a better bargain than he otherwise could, or the representation is in any way material, equity will not enforce the agreement, or, if it is already executed, will convert the purchaser into a trustee.[6] And so if a purchaser at auction or otherwise represents that he is purchasing or bidding for some other person, as for the debtor in a sale under an execution,[7] or for the

272; 2 Kent, 484; Chesterfield *v.* Janssen, 2 Ves. 155; Neville *v.* Wilkinson, 1 Bro. Ch. 546.

[1] Neville *v.* Wilkinson, 1 Bro. Ch. 546.

[2] Wright *v.* Snow, 2 De G. & Sm. 321.

[3] Ainslie *v.* Medlycote, 9 Ves. 21; Graves *v.* White, Freem. 57; Pearson *v.* Morgan, 2 Bro. Ch. 389; Foster *v.* Charles, 6 Bing. 396; 7 Bing. 105; Taylor *v.* Ashton, 11 Me. & Wel. 401; Smith *v.* Mitchell, 6 Ga. 458; Hazard *v.* Irwin, 18 Pick. 85; Doggett *v.* Emerson, 3 Story, 733; Hough *v.* Richardson, 3 Story, 691; Mason *v.* Crosby, 1 Wood. & M. 352; Smith *v.* Babcock, 2 Wood. & M. 246; Hammatt *v.* Emerson, 27 Me. 308.

[4] Ibid.; Pearson *v.* Morgan, 2 Bro. Ch. 389; Burrows *v.* Locke, 10 Ves. 475; De Manville *v.* Compton, 1 Ves. & B. 355; *Ex parte* Carr, 3 Ves. & B. 111; Carpenter *v.* Am. Ins. Co., 1 Story, 57; Tayman *v.* Mitchell, 1 Md. Ch. Dec. 496; Pratt *v.* Philbrook, 33 Me. 17; Harding *v.* Randall, 15 Me. 332; Rosevelt *v.* Fulton, 2 Cow. 129; Champlin *v.* Laytin, 6 Paige, 189; Reese *v.* Wyman, 9 Ga. 439; Reynell *v.* Sprye, 8 Hare, 222; Lewis *v.* McLemore, 11 Yerg. 206; Thomas *v.* McCann, 4 B. Mon. 601; Hunt *v.* Moore, 2 Barr, 105; Joice *v.* Taylor, 6 G. & J. 54; Lockridge *v.* Foster, 4 Scam. 570; Turnbull *v.* Gadsden, 2 Strobh. Eq. 14.

[5] Neville *v.* Wilkinson, 1 Bro. Ch. 546.

[6] Phillips *v.* Bucks, 1 Vern. 227 and notes; Fellowes *v.* Gwydyr, 1 Sim. 63; 1 R. & M. 83.

[7] Peebles *v.* Reading, 8 Ser. & R. 484; Gilmore *v.* Johnson, 29 Ga. 67; Belcher *v.* Saunders, 34 Ala. 9; Roller *v.* Spilmore, 13 Wis. 26; Arnold *v.*

mortgagor in a sale under a foreclosure, or for the family under an executor's or administrator's sale, and competition is thus prevented and the purchase is made on his own terms, equity will decree that such person shall be a trustee for the person for whom he represented that he was acting. So if a purchaser by fraud prevents other purchasers from attending a sale,[1] or if a purchaser fraudulently agrees that he will purchase an estate in his own behalf and that of another in order to prevent competition, and gets the property into his own name, at a less price, he will be a trustee for the person defrauded.[2] On the other hand where an agent makes a fraudulent representation, or does a fraudulent act, in a purchase or sale, with or without the privity or knowledge or consent of his principal, and the principal adopts the bargain and attempts to reap an advantage from it so tainted by the fraud of the agent, he will be held bound by the fraud of the agent and relief will be given.[3] Indeed the doctrine has been thus broadly stated: "that where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent interest; for a third person by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in the beginning."[4] And the same rule applies with more force to misrepresentations made by one of several partners.[5] But if the agreement is a fair one between the parties, it will not be

Cord, 16 Ind. 176; Northcroft *v.* Martin, 28 Mis. 469; Soggins *v.* Heard, 31 Miss. 426.

[1] Martin *v.* Blight, 4 J. J. Marsh. 491.

[2] McCulloch *v.* Cowher, 5 Wat. & S. 427; Ferguson *v.* Williamson, 20 Ark. 272.

[3] Ferson *v.* Sanger, 1 Wood. & M. 147; Warner *v.* Daniels, 1 Wood. & M. 90; Kibbe *v.* Hamilton Ins. Co., 11 Gray, 163; Brooke *v.* Berry, 2 Gill, 83; Fitzsimmons *v.* Joslin, 21 Vt. 129; Fuller *v.* Wilson, 3 Ad. & El. (N. S.) 58. See also Cornfoot *v.* Fowke, 6 M. & Wel. 358; National Exchange Co. *v.* Drew, 2 Macqu. 103; V. & P. 718.

[4] Hortopp *v.* Hortopp, 21 Beav. 259; Scholefield *v.* Templar, John. 155; Cassard *v.* Hinman, 6 Bosw. 9; Wilde *v.* Gibson, 1 H. L. Ca. 605; Elwell *v.* Chamberlain, 31 N. Y. 619; Bennett *v.* Judson, 21 N. Y.; Buford *v.* Caldwell, 3 Mo. 477; Thomas *v.* McCann, 4 B. Mon. 601; Perham *v.* Randolph, 4 How. (Miss.) 435; Stone *v.* Denny, 4 Met. 161.

[5] Blair *v.* Bromley, 2 Phil. 239, 354.

affected because brought about by the fraud of some third person for his collateral benefit.[1] And if the agreement is not a fair one, it will not be invalidated by the fraudulent representations of a third person in no way connected with either party,[2] unless the circumstances are such that the bargain may be said to have been entered into by mistake.[3]

§ 173. However repugnant to entire good faith and sound morals any misrepresentation upon any subject, however made, may be, courts of justice cannot undertake to sit as censors upon mere morals. There are in every community two classes of rights, — perfect rights, and imperfect rights. Perfect rights are those that may be enforced, or for the breach of which damages may be recovered; imperfect rights are those which are conceded to every man, but which cannot be enforced by human tribunals, and for the breach of which no damages can be recovered. Thus every man has a right to the utmost good faith, and the most perfect frankness and truthfulness in all the transactions of business, but courts of justice would be utterly powerless to enforce such a standard of morality. They would have neither the time nor the means of investigating the innumerable arts of buyers and sellers. And so courts have been obliged to lay down certain practical rules and limitations upon the subject of misrepresentation. Thus the misrepresentation must generally be of facts, or matters-of-fact, and not of mere matters of expectation or opinion,[4] as if one should represent that an estate contained a valuable mine, when in fact no mine existed,[5] or that an estate contained only two or three hundred acres when in fact it contained over twelve hundred acres, or that there was no timber upon it when there was a large amount of valuable timber,[6] or the seller should falsely represent that the custom of a public-house was a certain sum monthly,[7] or that an estate was situate in one locality or county when it was situate in another,[8] or that stocks were selling for such a sum in the market when they were worthless,[9] or that

[1] Bellamy v. Sabine, 2 Phil. 425; Blackie v. Clarke, 15 Beav. 595.

[2] Fisher v. Boody, 1 Curtis, 206.

[3] Ibid.

[4] Ferson v. Sanger, 1 Wood. & M. 146; Warner v. Daniels, ib. 98.

[5] Lowndes v. Lane, 2 Cox, 363.

[6] Tyler v. Black, 13 How. 230.

[7] Philmore v. Hood, 6 Scott, 827.

[8] Best v. Stow, 2 Sand. Ch. 298; Bennett v. Judson, 21 N. Y. 238.

[9] Manning v. Albee, 11 Allen, 522. See Warner v. Daniels, 1 Wood. & M. 102.

a third person has paid a certain sum for the same property,[1] or that it rents for so much.[2] In these and similar cases, the misrepresentation is of facts that go to the merits of the contract, and avoid it, if false. But if the representation is to the value, which is matter of opinion, it will not in general avoid the contract, as where the affirmation is that the estate is worth so much, or even if the representation is stronger, as that so much was given for it, or that so much has been offered or refused.[3] Any person who confides in or is cheated by such representations is considered too careless of his own interests to invoke the interposition of courts.[4] A misrepresentation, however, of a mere matter of opinion may avoid a contract, or convert the fraudulent party into a trustee, where the other party is known to place confidence in the opinions and judgment of the person with whom he is dealing, or where the relations between the parties are of a confidential and fiduciary character, or where one party has peculiar or exclusive means of acquiring proper information upon which to form a judgment or opinion,[5] or where the representations are such that one party is induced to rely upon the opinions of the other.[6]

§ 174. Again the misrepresentation must be of some fact material to the contract, or of something that goes to its essence;[7] as if an estate is represented to contain one thousand acres, and it contains nine hundred and ninety-nine acres,[8] or if the age of an article is represented to be ten years, and it is a few months more or less,[9] or a thing is represented to have been purchased in one

[1] Medbury *v.* Watson, 6 Met. 259.

[2] Elkins *v.* Tresham, 1 Sev. 102; 1 Sid. 146.

[3] Hepburn *v.* Dunlop, 1 Wheat. 189; Irvine *v.* Kirkpatrick, 3 Eng. L. & Eq. 17; Medbury *v.* Watson, 6 Met. 259; Bacon *v.* Bronson, 7 John. Ch. 144; Stone *v.* Denny, 4 Met. 151; Small *v.* Atwood, 3 Younge, Exch. 407; Veasey *v.* Doton, 3 Allen, 351; Hemmer *v.* Cooper, 8 Allen, 334; Best *v.* Blackburn, 6 Litt. 51; Speiglemyer *v.* Crawfort, 6 Paige, 254.

[4] Manning *v.* Albee, 11 Allen, 422; 2 Kent, 484, 485; Vernon *v.* Keys, 12 East, 632; Hough *v.* Richardson, 3 Story, 696; Jenkins *v.* Eldredge, 3 Story, 181.

[5] Sheoffer *v.* Sleade, 7 Blackf. 178; Hill *v.* Gray, 1 Starkie, 352; Keates *v.* Cadogan, 2 Eng. L. & Eq. 321.

[6] Reynell *v.* Sprye, 8 Hare, 222; 1 De G., M. & G. 660.

[7] Phillips *v.* Bucks, 1 Vern. 227; Hough *v.* Richardson, 3 Story, 659; Turnbull *v.* Gadsden, 2 Strobh. Eq. 14; Morris Canal *v.* Emmet, 9 Paige, 186.

[8] Ibid.; Stebbins *v.* Eddy, 4 Mason, 414; Winston *v.* Gwatheney, 8 B. Mon. 19; Winch *v.* Winchester, 1 Ves. & B. 375; Ingpont *v.* Worcup, Finch, 310.

[9] Geddes *v.* Pennington, 5 Dow, 159.

place and it is in fact purchased at another,[1] or if a spring of water is represented to be upon a given tract of land, when in fact it is not:[2] in all these matters the facts represented are too trifling or collateral to be material, and no relief would be granted. Yet, if the leading motive of the purchase of an estate was known to be the purpose of acquiring a spring of water, then a fraudulent misrepresentation as to the locality of the spring would become material to the contract; or if the vendor should fraudulently point out the boundary lines, so as to take in the spring, or more land than belonged to him, the contract would be avoided.[3] But if the boundaries are properly pointed out, a misrepresentation as to the number of acres in a farm is not material.[4]

§ 175. The misrepresentation must also be of something peculiarly within the knowledge of one of the parties, or the facts must be of such a nature that both parties cannot easily obtain the information. Thus if both parties have the same means of information, as if both parties go upon a tract of land and have equal means of judging of the quantity of timber upon it,[5] or if representations are made of town lots and the future prospects of the town, and the facts are equally open to both parties upon inquiry,[6] or if there is a misrepresentation of title, and the facts are equally accessible to both parties,[7] or generally, if both parties have the same information, or an equal opportunity to obtain the same information, there cannot be such a fraud, arising from such a misrepresentation as will convert one of the parties into a trustee.[8] So, if there are fraudulent misrepresentations sufficient to avoid the contract, and the innocent party obtains a knowledge of all the facts before completing the contract, he can have no relief.[9] And so if the misrepresentations, though fraudulent, are so vague

[1] Ibid.

[2] Winston *v.* Gwathmey, 8 B. Mon. 19.

[3] Elliott *v.* Boaz, 9 Ala. 772.

[4] Stebbins *v.* Eddy, 4 Mason, 414; Morris Canal *v.* Emmett, 9 Paige, 168.

[5] Hough *v.* Richardson, 3 Story, 659; Tindall *v.* Harkinson, 19 Ga. 448.

[6] Bell *v.* Henderson, 6 How. (Miss.) 311.

[7] Glasscock *v.* Minor, 11 Mo. 655; Juzan *v.* Toulmin, 9 Ala. 662.

[8] Hobbs *v.* Parker, 31 Me. 143; Hutchinson *v.* Brown, 1 Clark, 408.

[9] Yeates *v.* Prior, 6 Eng. 68; Knuckolls *v.* Lea, 10 Humph. 577; Pratt *v.* Philbrook, 33 Me. 17.

and uncertain that they ought not to mislead a reasonable man, but should rather put him upon inquiry, he can have no relief.[1]

§ 176. The action of courts in cases of alleged fraud will frequently depend upon the form in which the matter is brought before them, and upon the relief sought in the proceedings. Thus a bill may be brought by a party for the specific performance of a contract which he holds, or a bill may be brought by a party to set aside the contract, or convert the opposite party who holds under the contract into a trustee, or a suit may be brought by a party at common law to recover damages for the breach of the same contract. It does not follow, because a court of equity would refuse to decree the specific performance of a contract, that it would also on a proper bill decree the contract to be set aside, or that it would order the party claiming under it to be a trustee for the other party.[2] And so if a party comes into a court of equity to ask that an agreement which he holds may be specifically performed by the opposite party, he must come with clean hands as it is said. There must not be any fraud, misrepresentation, or concealment on his part in procuring the contract; or still stronger, there must not be a suspicion of concealment, misrepresentation, fraud, or unfairness adhering to him. And even further, if the bargain imposes great hardship on the defendant, or is made under any misapprehension or mistake, or unadvisedly, courts of equity will decline to interfere actively in decreeing a specific execution of the agreement, but will leave the parties to their rights at law.[3] It will be seen from this that it requires much less evidence of fraud to enable a defendant to resist the specific performance of an agreement, than it requires to enable him to succeed as a plaintiff in a bill to set aside the same contract.[4] In the case last named he must establish the fraud affirmatively by proof of the facts and circumstances to the reasonable satisfaction of the court. And there may be such a case that the court would refuse to set aside a contract on the one side, because the evidence of fraud was in-

[1] Hough *v.* Richardson, 3 Story, 659.

[2] 1 Story's Eq. Jur. § 693.

[3] Savage *v.* Brocksopp, 18 Ves. 335; Cadman *v.* Horner, 18 Ves. 12; Clermont *v.* Tasburg, 1 Jac. & W. 112; Wall *v.* Stubbs, 1 Madd. 80; Mortlock *v.* Buller, 10 Ves. 292.

[4] Ibid.; Townshend *v.* Stangroom, 6 Ves. 328 n.; Lowndes *v.* Lane, 2 Cox, 363.

sufficient to set the court in motion, and on the other side it would refuse to decree a specific performance because the circumstances were too suspicious to allow it actively to interfere for the other party. In such case the parties would be left to an action at common law upon the agreements with such rights as they may have in a common-law suit.[1]

§ 177. The rules that apply to affirmative acts or representations which mislead, deceive, and defraud, are of comparatively easy application in most cases. A single affirmative word upon a material matter tending to mislead, and actually misleading, is enough to establish fraud.[2] It is the *suggestio falsi* which may be defined to be a false affirmation, in whatever form it may be made, whether by words or acts, of a material fact, rightfully acted upon by the other party: such an affirmation avoids the contract or converts the offending party into a trustee for the person defrauded. But how far a contracting party may legally conceal facts known to him, affecting the value of the subject-matter of the agreement, is another and more difficult question. There is no doubt in sound morals upon the matter. The natural instincts of every right-minded man concur with every writer on morals in condemning every concealment that suffers another to contract in ignorance of the facts that give value to his property.[3] The common law teaches as high a standard of morals as any other system of law. The decisions of judges, and the books of elementary writers, contain the highest and purest maxims of good faith and sound morality in every transaction and relation of life. Whenever, therefore, a question of concealment arises, either in a suit at common law, or in equity, it cannot be a question what the highest morality requires; but it is a question how far courts can go practically in giving relief, without rendering the contracts of men so uncertain that no business could be transacted without danger of prolonged litigation. In communities governed by known, fixed and practical rules, and not by the mere discretion of men or judges, it sometimes happens that courts must decline to give relief in cases where a man of pure principles and delicate honor would scorn to obtain or hold an advantage. Thus in all cases of *sug-*

[1] 1 Story, Eq. Jur. § 693.

[2] Turner *v.* Harvey, 1 Jac. 169.

[3] Cic. de Off. Lib. 3, c. 12, 13; Paley, Mor. Phi. B. 3, c. 7; Grotius, B. 2, c. 12, § 9; Puff. Law of Nature, B. 5, c. 3, § 4.

gestio falsi, where active steps have been taken to deceive and gain an advantage, courts have little trouble in giving relief; but where an advantage has been gained by concealment, or *suppressio veri* as it is called, or by mere silence, it is more difficult to lay down fixed rules that may not do more harm than good to business and society. However, concealment, or *suppressio veri*, is often of that fraudulent character that avoids a contract or converts the offending party into a trustee.

§ 178. There may be such relations between the parties that silence, or the non-disclosure of a material fact, will be a fraudulent concealment. If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee.[1] Thus, if an attorney contracts with his client without disclosing to him material facts in his possession, the contract would be void. The trust and confidence of the client in his attorney is such that an obligation is imposed upon the attorney to communicate every material circumstance of law or fact. Mere silence, under such circumstances, becomes fraudulent concealment.[2] The same rule applies to all contracts of an agent with his principal, principal with his surety, landlord with his tenant, parent with his child, guardian with his ward, ancestor with the heir, husband with his wife, trustee with his *cestui que trust*, executors or administrators with creditors, legatees or distributees of the estate, partners with their copartners, appointors with their appointees, and part-owners with part-owners.[3] Though the part-owners of a ship, holding by several and independent titles, were held not to stand in such confidential relations to each other, that one was under obligation to communicate material facts upon a negotiation to purchase.[4] If any of the parties above named propose to contract with the persons with whom they stand in such relations of trust and confidence, they must use the utmost

[1] Pidcock *v.* Bishop, 3 B. & Cr. 605; Martin *v.* Morgan, 1 Brod. & Bing. 289; Squire *v.* Whitton, 1 H. L. Ca. 333; Owen *v.* Homan, 3 Eng. L. & Eq. 121; 5 Mac. & Gor. 378; Etting *v.* Bank of U. S. 11 Wheat. 59; Carew's Case, 7 De G., M. & G. 43; Smith *v.* Bank of Scotland, 1 Dow. P. 292.

[2] Bulkley *v.* Wilford, 2 Clark & Fin. 102.

[3] Beaumont *v.* Boultbee, 5 Ves. 485; Ormond *v.* Hutchinson, 13 Ves. 51; Gartside *v.* Isherwood, 1 Bro. Ch. App. 558; Willford *v.* Chancellor, 5 Grat. 39.

[4] Mathews *v.* Bliss, 22 Pick. 48.

good faith. It is not enough that they do not affirmatively misrepresent: *they must not conceal; they must speak, and speak fully to every material fact known to them*, or the contract will not be allowed to stand.[1] Thus, if a partner who keeps the accounts of the firm should purchase his copartners' interest, without disclosing the state of the accounts, the agreement could not stand.[2] The same rule applies to family relations in general; as, where a younger brother disputed the legitimacy of his elder brother, and a settlement and partition were entered into, the younger brother having in his possession facts that tended to show that his parents intermarried before the birth of the elder, which facts he did not communicate, the settlement was set aside.[3]

§ 179. There are, also, cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. Thus, if a party taking a guaranty from a surety does not disclose facts within his knowledge that enhance the risk, and suffers the surety to bind himself in ignorance of the increased risk,[4] or if a party already defrauded by his clerk should receive security from a third person for such clerk's fidelity, without communicating the fact of the fraud already committed, thus holding the clerk out as trustworthy;[5] in both these, and in similar cases, the contracts would be void for concealment. Silence as to such facts, under such circumstances, would be equivalent to a positive affirmation that no such facts existed.[6]

[1] Maddeford *v.* Austwick, 1 Sim. 89; 2 M. & K. 279; Popham *v.* Brooke, 5 Russ. 8; Gordon *v.* Gordon, 3 Swans, 470; Cocking *v.* Pratt, 1 Ves. 401; Higgins *v.* Joyce, 2 Jones & La. 328; Farnham *v.* Brooks, 9 Pick. 234; Ogden *v.* Astor, 4 Sand. S. C. 312; Ormond *v.* Hutchinson, 13 Ves. 51; Beaumont *v.* Boultbee, 5 Ves. 485; Gartside *v.* Isherwood, 1 Bro. Ch. App. 558.

[2] Maddeford *v.* Austwick, 1 Sim. 89; 2 M. & K. 279; Smith *in re* Hay, 6 Madd. 2; Popham *v.* Brooke, 5 Russ. 8.

[3] Gordon *v.* Gordon, 3 Swans. 399; Cocking *v.* Pratt, 1 Ves. 401.

[4] Martin *v.* Morgan, 1 Brod. & Bing. 289; Pidcock *v.* Bishop, 3 B. & Cr. 605; Owen *v.* Homan, 3 Eng. L. & Eq. 121; 25 Eng. L. & Eq. 1; 4 H. L. Ca. 997; Carew's Case, 7 De G., M. & G. 43; Leith Banking Co. *v.* Bell, 8 Shaw & Dun, 721; Railton *v.* Matthews, 10 Clark & Fin. 935; Hamilton *v.* Watson, 12 Clark & Fin. 119; Squire *v.* Whitton, 1 H. L. Ca. 333; N. British Ins. Co. *v.* Lloyd, 28 Eng. L. & Eq. 456; 10 Exch. 523; Evans *v.* Kneeland, 9 Ala. 42.

[5] Franklin Bank *v.* Cooper, 36 Me. 195; Smith *v.* Bank of Scotland, 1 Dow. P. Ca. 272; Etting *v.* Bank of U. S., 11 Wheat. 59; Maltby's Case, 1 Dow. P. Ca. 294.

[6] Ibid.

And so, if a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the relation was confidential, and yet not to state material facts is fraudulent. It is said that a party in such circumstances *is bound to destroy the confidence reposed in him, or to state all the facts which such confidence demands.*[1] He cannot himself contract at arm's length, and permit the other to act as though the relation was one of trust and confidence. And so, if one party knows that the other has fallen into a delusion or mistake as to an article of property, and he does not remove such delusion or mistake, but is silent, and enters into a contract, knowing that the other is contracting under the influence of such delusion or mistake, the contract may be set aside; *for, not to remove that delusion or mistake is equivalent to an express misrepresentation.*[2]

§ 180. There must be a positive concealment to amount to a *suppressio veri.* Mere silence, if nothing is done to conceal a fact, is not in general *suppressio veri. Aliud est celare, aliud tacere.* Mere silence between strangers, contracting at arm's length, and understanding that they are so contracting, will not in general avoid a contract, or convert one of the parties into a trustee for the other.[3] Thus, the value of property may frequently depend upon extrinsic facts; as, whether there is peace or war, whether there is or is not a demand in the market, or in a distant place for property of that description, whether transportation is accessible, or whether the money market is easy or close. If one having information upon such matters enters into a contract with another with whom he has no confidential or fiduciary relations, and he neither says nor does any thing to mislead or deceive, but is simply silent upon the facts known to him, equity will not

[1] Per Mr. Redfield, 1 Story's Eq. Jur. § 212 a.; Bruce *v.* Ruler, 2 Man. & Ry. 3; Fitzsimmons *v.* Joslin, 21 Vt. 129; Hanson *v.* Edgerly, 29 N. H. 343; Bank of Republic *v.* Baxter, 31 Vt. 101; Allen *v.* Addington, 7 Wend. 10; 11 Wend. 374; Paddock *v.* Strobridge, 29 Vt. 470; Dolman *v.* Nokes, 22 Beav. 402; Hayward *v.* Cope, 25 Beav. 140.

[2] Keates *v.* Cadogan, 2 Eng. L. & Eq. 318; Hill *v.* Gray, 1 Starkie, 434.

[3] Fox *v.* Mackreth, 2 Bro. Ch. 300; 2 Cox, 320; Harris *v.* Tyson, 24 Penn. St. 359; Mathews *v.* Bliss, 22 Pick. 48.

in general disturb the contract;[1] but, if he speak a word, or does an act, that tends to mislead the other party, or throw him off his guard, the contract may be avoided, and he may be converted into a trustee.[2] The law permits persons to deal at arm's length, if they both understand that they are so dealing, and it permits them to be silent as to matters known only to one of them, if no inquiries are made, but it does not permit any artifice to be added to silence, in order to conceal a fact material to the contract. Thus, concealment, or *suppressio veri*, which amounts to a fraud in the sense of a court of equity, and for which it will grant relief, is defined to be the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiæ, sed juris et de jure*, to know.[3] Thus, if a stranger discover a valuable mine or spring, or any other thing or circumstances, on or in connection with land of another, he may be silent, and purchase the land;[4] but, if he use any art to prevent a knowledge of the fact from coming to the owner, equity will rescind the contract,[5] and a very slight act will convert innocent silence into fraudulent concealment.[6] But if one of the parties employs an agent to contract, and the agent, knowing a material fact, is silent or conceals it, his principal will not be affected with the knowledge, nor will the contract be vitiated.[7]

§ 181. Courts of equity will not only interfere in cases of fraud, to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere, and treat the case exactly as if the acts had been done; and this they will do, by

[1] Ibid. Mr. Kent in the earlier editions of his Commentaries stated a broader doctrine, but his later editions state the doctrine as in the text. See 2 Kent, 482, 484, 490, and notes; Laidlaw *v.* Organ, 2 Wheat. 178.

[2] Turner *v.* Harvey, Jac. 169; Laidlaw *v.* Organ, 2 Wheat. 178; Mathews *v.* Bliss, 22 Pick. 48.

[3] Young *v.* Bumpass, 1 Freem. Ch. 241; 1 Story's Eq. Jur. § 207; Irvine *v.* Kirkpatrick, 3 Eng. L. & Eq. 17; Laidlaw *v.* Organ, 2 Wheat. 178.

[4] Fox *v.* Mackreth, 2 Bro. Ch. 400; 2 Cox, 300; 1 Lead. Ca. Eq. 188; Harris *v.* Tyson, 24 Penn. St. 359; Earl of Bath, &c., Case, 3 Ch. Ca. 56, 74, 103, 104; Mathews *v.* Bliss, 22 Pick. 48.

[5] Bowman *v.* Bates, 2 Bibb, 47.

[6] Turner *v.* Harvey, Jac. 169; Laidlaw *v.* Organ, 2 Wheat. 178; Torrey *v.* Buck, 1 Green, Ch. 380; Mathews *v.* Bliss, 22 Pick. 48.

[7] Wilde *v.* Gibson, 1 H. L. Ca. 605, reversing same case, 2 You. & Col. 542.

converting the party who has committed the fraud, and profited by it, into a trustee for the party in whose favor the act would otherwise have been done.[1] Thus, if a person by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded, to the extent of the interest intended for him.[2] So, where the tenant in tail in remainder, fraudulently or by force, prevented the tenant in tail for life in possession from suffering a common recovery, and thereby barring the entail for the purpose of providing for other persons by will out of the estate, it was held that the tenant in tail in remainder, when the estate came to him, was a trustee, and the court took care that the estate should go precisely as if the common recovery had been suffered, although the tenant in tail was a married woman, and the fraud had been committed by her husband, and she was not privy to it.[3] And where issue in tail prevented his father, tenant in tail, from suffering a recovery, by promising to provide for younger children, in favor of whom the recovery was to be suffered, equity converted the tenant in tail into a trustee for the younger children.[4] And where a person fraudulently intercepts a gift intended for another, by promising to hand it over if it is left to him, equity will compel an execution of the promise, by converting such person into a trustee.[5] So, if devisees or heirs prevent a testator from charging his estate with annuities or legacies, by saying that it is not worth while to put them in the will, and that they will pay them, they will be trustees for such intended annuitants, or legatees.[6] So, if an executor pre-

[1] Middleton *v.* Middleton, 1 Jac. & W. 96; Reach *v.* Kennegate, 1 Ves. 123; Oldham *v.* Litchford, 2 Vern. 506; Dutton *v.* Poole, 2 Lev. 211; Mestaer *v.* Gillespie, 11 Ves. 638, and cases cited; Jenkins *v.* Eldredge, 3 Story, 181; See remarks in McGowan *v.* McGowan, 14 Gray, 119; Morey *v.* Herrick, 18 Penn. St. 128; Wallgrave *v.* Tebbs, 2 K. & J. 313; Dixon *v.* Olmius, 1 Cox, Ch. 414.

[2] Ibid.

[3] Luttrell *v.* Olmius, and Waltham's Case, cited 11 Ves. 638; and 14 Ves. 290.

[4] Jones *v.* McKee, 6 Barr, 428; Devenish *v.* Baines, Prec. Ch. 4.

[5] Hoge *v.* Hoge, 1 Watts, 213; Devenish *v.* Baines, Prec. Ch. 4.

[6] Chamberlain *v.* Chamberlain, 2 Freem. 34; Oldham *v.* Litchford, 2 Vern. 506; Mestaer *v.* Gillespie, 11 Ves. 638; Huguenin *v.* Baseley, 14 Ves. 290; Griffin

vents a gift or legacy from being given to one, by promising to pay it as if inserted in the will, he will be a trustee.[1] So, where a testator held a note against his father, which he intended to give up in his will, the residuary legatee promising that she would surrender the note, equity held her to be a trustee.[2] So, where one fraudulently procured a deed to be made to herself, instead of to another.[3] But there must be some actual fraud in procuring a deed or devise to one's self: the mere breach of a promise to convey is not enough.[4] So if an heir fraudulently, or through ignorance, procure a will to be revoked, so that the estate comes to him, he will be a trustee; as, where A. had sold a part of his estate, and the purchaser desired a fine to be levied, B., his heir, acting as his attorney, advised a fine to be levied of his whole estate, whereby A.'s will was revoked, and the estate descended to B.; the devisee under the will called upon B. to hold the property, as his trustee, and he was so held by the court; Lord Eldon saying, "You, who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be trustee of the property for the benefit of that person who would have been entitled to it, if you had known what, as an attorney, you ought to have known; and, not knowing it, you shall not take advantage of your own ignorance."[5]

§ 182. While a court of equity will thus create a trust where a person has by fraud prevented a will from being made in favor of another, it has no jurisdiction to prevent the probate of, or to set aside, a will fraudulently procured. Ecclesiastical and common-law courts in England, and probate courts with the common-law courts in the United States, alone have jurisdiction over wills. Thus, until within a short period all wills in England were first presented to the ecclesiastical courts, and they were there allowed or

v. Nanson, 4 Ves. 344; Hoge *v.* Hoge, 1 Watts, 213; Jones *v.* McKee, 3 Barr, 496, and 4 Barr, 428.

[1] Thynn *v.* Thynn, 1 Vern. 296; Reach *v.* Kennigate, Amb. 67; Barrow *v.* Greenbough, 3 Ves. 152; Chamberlain *v.* Agar, 2 V. & B. 250; Podmore *v.* Gunning, 7 Sm. 644.

[2] Richardson *v.* Adams, 10 Yerg. 273; Jones *v.* McKee, 3 Barr, 496.

[3] Miller *v.* Pearce, 6 Wat. & S. 97.

[4] Hoge *v.* Hoge, 1 Watts, 213.

[5] Bulkly *v.* Wilford, 2 Cl. & Fin. 177; 8 Bligh, (N. S.) 11; Seagrave *v.* Kirwan, Beat. 157; Nanney *v.* Williams, 22 Beav. 542.

disallowed according to the evidence. If they were allowed, the final judgment allowing them was conclusive upon the personalty until such judgment was reversed or annulled. The validity of such will, however, so far as real estate was concerned, was tried in the courts of common law, as often as the title to the separate parcels of land was in controversy. Whenever in the prosecution or defence of a real action such will of real estate was given in evidence, not only its execution was tried, but its validity, as whether it was obtained by undue influence or fraud, or whether the testator was of sound mind. Courts of equity in a few early cases assumed jurisdiction to set aside wills procured by fraud,[1] but it is now well settled that they will not interfere, but that courts of common law have exclusive jurisdiction: nor will they interfere to set aside the judgment or probate of a will procured by fraud.[2] To set aside such a judgment, proceedings must be had in the nature of proceedings for a new trial in the court in which such judgment or decree was passed.[3] The extent to which a court of equity will go, in correcting a fraud perpetrated in relation to a will, is to give relief where fraud has prevented a will from being made, or where a fraud has been practised upon the legatee, as where a name is inserted fraudulently in a will in place of the intended devisee or legatee, or where the revocation of a will has been procured by fraud,[4] or where there is a gift to executors under such circumstances that it ought to be a trust for relations, or where a legatee promises the testator that he will hand over the legacy to a third person.[5] In all these cases the will itself is established, but certain other collateral things are decreed growing

[1] Maundy *v.* Maundy, 1 Ch. R. 66; Well *v.* Thornagh, Pr. Ch. 123; Goss *v.* Tracy, 1 P. Wms. 287; 2 Vern. 700.

[2] Roberts *v.* Wynne, 1 Ch. R. 125; Archer *v.* Mosse, 2 Vern. 8; Herbert *v.* Lownes, 1 Ch. R. 13; Thynn *v.* Thynn, 1 Vern. 296; Devenish *v.* Baines, 1 Pr. Ch. 3; Barnesley *v.* Powell, 1 Ves. 287; Marriott *v.* Marriott, Str. 666; Plume *v.* Beale, 1 P. Wms. 388; Rockwood *v.* Rockwood, 1 Leon. 192, Cro. Eliz. 163; Dutton *v.* Poole, 1 Vent. 318; Beringer *v.* Beringer, 26 Car. II.; Chamberlain *v.* Chamberlain, 2 Freem. 34; Leicester *v.* Foxcroft, Gilb. 11; Ketrick *v.* Barnsby, 3 Bro. P. C. 358; Webb *v.* Claverden, 2 Atk. 424; Bennett *v.* Vade, 2 Atk. 324; Anon., 3 Atk. 17; Sheffield *v.* Buckingham, 1 Atk. 628; Allen *v.* Macpherson, 5 Beav. 469; 1 Phil. 133; 1 H. L. Ca. 191.

[3] Waters *v.* Stickney, 12 Allen, 1.

[4] Buckley *v.* Welford, 2 Cl. & Fin. 177; 8 Bligh (N. S.), 11; Seagrave *v.* Kirwan, Beat. 157; Nanney *v.* Williams, 22 Beav. 452.

[5] Kennell *v.* Abbott, 4 Ves. 802; Marriott *v.* Marriott, Str. 666, cited Gilbert 203, 209.

out of the manner in which the will was procured.[1] In New York, New Jersey, and South Carolina, the old English practice is followed, and wills must be proved whenever they are used to establish or defeat the title to real estate, nor has a court of equity jurisdiction to set them aside. This rule has been modified in New York so far that when the title of real estate depends upon a will, the validity of which is doubted, and the parties are not in possession of the real estate, nor in such a position that a real action can be brought, or if there is any technical reason why a real action cannot be sustained, a court of equity will take jurisdiction to prevent a failure of justice.[2] In nearly all the other States the judgments of the courts of probate allowing a will are conclusive upon all the world, both as to real and personal estate. In all actions at law involving title under such wills, it is only necessary to produce the judgment of the probate court allowing them. Courts of equity have no jurisdiction to set aside such wills for fraud, nor can they set aside the judgments of the probate court allowing them.[3] If, however, a will is probated by accident or mistake, or the probate is procured by fraud, the judgment may be reversed or modified, by proceedings in the same court in the nature of a petition for a review or for a new trial.[4] This, however, may depend upon the statutes of the several States giving jurisdiction to their several courts of probate. While courts of equity will not interfere to set aside wills procured by fraud, or to set aside the probate of those procured by fraud, they will not interfere in favor of the fraudulent party to enable him to establish any rights under the will.[5] As a general rule neither courts of equity nor of common law will take notice of a will for any purpose unless it

[1] Marriott *v.* Marriott, Str. & Gil. *ut supra.*

[2] Brady *v.* McCosker, 1 Comst. 214; Clarke *v.* Sawyer, 2 Com. 498.

[3] Gould *v.* Gould, 3 Story, 516; Fouvergne *v.* New Orleans, 18 How. 470; Gaines *v.* Chew, 2 How. 645; Tarver *v.* Tarver, 9 Pet. 180; Adams *v.* Adams, 22 Vt. 50; Cotton *v.* Ross, 1 Paige, 396; Muir *v.* Trustees, 3 Barb. Ch. 477; Hamberlin *v.* Tenny, 7 How. (Miss.) 143; Lyne *v.* Guardian, 1 Mis. 410; Hunter's Will, 6 Ohio, 499; Watson *v.* Bothwell, 11 Ala. 653; Johnson *v.* Glasscock, 2 Ala. 233; Hunt *v.* Hamilton, 9 Dana, 90; McDowall *v.* Peyton, 2 Des. 313; Howell *v.* Whitchurch, 4 Heyw. 49; Burrows *v.* Ragland, 6 Humph. 481; Blue *v.* Patterson, 1 Dev. & Bat. Eq. 459; Trexler *v.* Miller, 6 Ired. Eq. 248.

[4] Waters *v.* Stickney, 12 Allen, 1.

[5] Nelson *v.* Oldfield, 2 Vern. 76.

has been proved in the courts of probate having jurisdiction over such matters.[1]

§ 183. Another instance of a constructive trust arising from fraud in relation to deeds or wills, is where a party has suppressed or destroyed a deed or other instrument of title. Every one is entitled to aid from the judicial tribunals in all cases of fraud, and if a defendant has fraudulently suppressed or destroyed the evidence of a man's title, and is in possession of the property himself, he ought to be declared a trustee for the rightful owner under the suppressed paper;[2] and if a deed or will is destroyed or suppressed, a court of equity can give relief. There seems to be no difficulty in this matter so far as relates to deeds,[3] nor so far as relates to wills of real estate in those jurisdictions where a will must be proved in court in every instance where it is necessary to the title of real estate; but in jurisdictions where a will cannot be noticed by other courts until it is first proved in a court of probate, there is a difficulty in proceeding in equity for fraud in suppressing it, except by a bill of discovery of evidence to use in the courts of probate in proving the will. Accordingly it has been determined in some States that a will cannot be acted upon in courts of equity, although lost, destroyed, or suppressed, until it is first proved in a probate court.[4] In other States courts of equity, in cases of suppressed or spoliated wills, have taken jurisdiction *in odium spoliatoris*, and have allowed such will to be proved and have carried its provisions into effect, as a court of probate would have done if the will had been produced and regularly administered.[5]

[1] Price *v.* Dewhurst, 4 My. & Cr. 76, 80, 81; Gaines *v.* Chew, 2 How. 645, 646.

[2] Bates *v.* Heard, Toth. 66; 1 Dick. 4; Tucker *v.* Phipps, 3 Atk. 360; Hayne *v.* Hayne, 1 Dick. 18; Eyton *v.* Eyton, 2 Vern. 280, Pr. Ch. 116; Dalston *v.* Coatsworth, 1 P. Wms. 731; Woodroff *v.* Burton, 1 P. Wms. 734; Saltern *v.* Melhuish, Amb. 249; Cowper *v.* Cowper, 2 P. Wms. 748; Garteside *v.* Radcliffe, 1 Ch. Ca. 292; Hunt *v.* Mathews, 1 Vern. 408; Wardour *v.* Beresford, 1 Vern. 452; Downes *v.* Jennings, 32 Beav. 290; Sansom *v.* Rumsey, 2 Vern. 561; 1 P. Wms. 733; Hampden *v.* Hampden, 3 Bro. P. C. 550; 1 P. Wms. 733; Spencer *v.* Smith, 1 N. C. C. 75; Middleton *v.* Middleton, 1 J. & W. 99; Wood *v.* Abrey, 3 Mod. 423; Floyer *v.* Sherrard, Amb. 18; Coles *v.* Trecothick, 9 Ves. 246; Law *v.* Barchard, 8 Ves. 133; White *v.* Damon, 7 Ves. 35; Moth *v.* Atwood, 5 Ves. 845; Stephens *v.* Bateman, 1 Bro.Ch. 22; Griffith *v.* Spratley, 2 Bro. Ch. 179.

[3] Ward *v.* Webber, 1 Wash. Va. 274.

[4] Morningstar *v.* Selby, 15 Ohio, 345; Gaines *v.* Chew, 2 How. 345; Gaines *v.* Hennen, 24 How. 553.

[5] Bailey *v.* Stiles, 1 Green, Ch. 220; Allison *v.* Allison, 7 Dana, 90; Legare

§ 184. If a party in ignorance and mistake of his rights and interests execute a conveyance, although no fraud is practised upon him, a court of equity will relieve against the instrument; for it is against good conscience to take advantage of one's ignorance to obtain his property,[1] Thus if an heir in ignorance of the value of his inheritance,[2] or in ignorance that some legacies or devises had lapsed,[3] should convey his interest for an inadequate consideration, equity would convert the purchaser into a trustee. And if the purchaser should have full knowledge, or should stand in any confidential relation, or should practise the slightest art to mislead or conceal, the equities would of course be much stronger against the transaction;[4] but these circumstances are not necessary to avoid the conveyance, for relief will be granted where both parties are in a mutual state of ignorance, or are laboring under the same mistake.[5] It is to be observed, however, that the ignorance or mistake which entitles a party to relief must be as to some matter of fact; and that mistake or ignorance of the law, or of the consequences that will follow from the conveyance, will not entitle a party to relief.[6] This rule is established by reason of the great

v. Ashe, 1 Bay, 464; Meade *v.* Langdon, cited 22 Vt. 59; Buchanan *v.* Matlock, 8 Humph. 390. In New York the matter is regulated by statute, and courts of equity or the Supreme Court has exclusive jurisdiction in case of a lost or spoliated will. Bowen *v.* Idley, 6 Paige, 46; Bulkley *v.* Redmond, 2 Brad. Sur. 281.

[1] Bingham *v.* Bingham, 1 Ves. 126; Ramsden *v.* Hylton, 2 Ves. 394; Turner *v.* Turner, 2 Ch. R. 81; Dunnage *v.* White, 1 Swans. 137; Naylor *v.* Wynch, 1 S. & S. 564; Evans *v.* Llewellyn, 2 Bro. Ch. 150; 1 Cox, 333; Gossmour *v.* Pigge, 8 Jur. 526; McCarthy *v.* Decaix, 2 R. & M. 614; Huguenin *v.* Basely, 4 Ves. 373; Hore *v.* Beecher, 12 Sim. 465; Marshall *v.* Collett, 1 Y. & Col. Exch. 238; Midland Great Western Railway *v.* Johnson, 6 H. L. Ca. 811.

[2] Beard *v.* Campbell, 2 A. K. Marsh. 125; Tyler *v.* Black, 13 How. 231.

[3] Pusey *v.* Desbouvrie, 3 P. Wms. 316.

[4] Gossmour *v.* Pigge, 13 L. J. Ch. 322; Tyler *v.* Black, 13 How. 231; McCarthy *v.* Decaix, 2 R. & M. 222; Cocking *v.* Pratt, 1 Ves. 400.

[5] Ibid.; Lansdowne *v.* Lansdowne, 2 J. & W. 205; Mose. 364; Willan *v.* Willan, 16 Ves. 72.

[6] Marshall *v.* Collett, 1 Y. & C. Exch. 238; Midland Great Western Railway *v.* Johnson, 6; H. L. Ca. 811; Hunt *v.* Rousmaniere, 1 Pet. 1; Brown *v.* Ingham, 1 Bro. Ch. 92; Pullen *v.* Ready, 2 Atk. 591; Magniac *v.* Thompson, 2 Wall. Jr. 209; Campbell *v.* Carter, 14 Ill. 286; Hall *v.* Read, 2 Barb. Ch. 503; Brown *v.* Armistead, 6 Rand. 594; Hinchman *v.* Emans, Saxt. 100; Freeman *v.* Cook, 6 Ired. Eq. 378; Gunter *v.* Thomas, 1 Ired. Eq. 199; Crofts *v.* Middleton, 2 K. & J. 194; Wintermute *v.* Snyder, 2 Green, Ch. 498; Farley *v.* Bryant,

danger of abuse that would arise if parties were allowed to reclaim their property upon allegations that they were ignorant of the law, or mistook the consequences of their acts.[1] Thus if a party has full knowledge of all the facts and intends to do the acts, or execute the instruments in question in the form in which they are executed, he cannot have relief because he was ignorant of or mistook the law, or because the consequences which legally and naturally follow from the transaction, are different from what he expected.[2] But if there is a mistake in the instrument itself, and it contains what was not agreed or intended, or does not contain all that was agreed and intended, to be in the writing, equity will give relief.[3] And if there are any other ingredients in the case, as if there is joined to a party's ignorance or mistake of the law, some practice upon him to lead him into the bargain,[4] or if the other party knowing his ignorance or mistake, still suffers him to go on without information,[5] equity will give relief. If there are any exceptions to the rule that ignorance or mistake of the law is not a ground for relief, they are few in number, and have something peculiar in their character, which calls in other elements of equity, or they stand upon some urgent pressure of circumstances.[6]

§ 185. When a conveyance is made to compromise claims, which the parties deem doubtful,[7] and especially if the conveyance has

32 Me. 474; Fergerson *v.* Fergerson, 1 Ga. Dec. 135; Freeman *v.* Curtis, 51 Me. 140.

[1] Bilbie *v.* Lumley, 2 East, 472; Lyon *v.* Richmond, 2 John. Ch. 51; Shotwell *v.* Murray, 1 John. Ch. 512; Storrs *v.* Barker, 6 John. Ch. 169; Proctor *v.* Thrall, 22 Vt. 262.

[2] Storrs *v.* Barker, 6 John. Ch. 169; Lyon *v.* Saunders, 23 Miss. 124; Shafer *v.* Davis, 13 Ill. 395; Emmett *v.* Dewhirst, 8 Eng. L. & Eq. 83; Hunt *v.* Rousmaniere, 1 Pet. 1; Farley *v.* Bryant, 32 Me. 474; Mellish *v.* Robertson, 25 Vt. 608; Gilbert *v.* Gilbert, 9 Barb. 532; Arthur *v.* Arthur, 10 Barb. 9; Freeman *v.* Curtis, 51 Me. 140.

[3] Heacock *v.* Fly, 14 Penn. St. 541; Larkins *v.* Biddle, 21 Ala. 256; Wyche *v.* Green, 11 Ga. 169; 16 Ga. 49; Moser *v.* Lebenguth, 2 Rawle, 428; Fitzgerald *v.* Peck, 4 Litt. 127.

[4] 1 Story, Eq. Jur. § 133.

[5] Cook *v.* Nathan, 16 Barb. 342; Langstaffe *v.* Fenwick, 10 Ves. 405.

[6] State *v.* Paup, 13 Ark. 135; Hunt *v.* Rousmaniere, 1 Pet. 1; 1 Story, Eq. Jur. §§ 116, 137.

[7] Brown *v.* Pring, 1 Ves. 407; Cann *v.* Cann, 1 P. Wms. 727; Naylor *v* Winch, 1 Sim. & S. 555; Goodman *v.* Sayers, 2 J. & W. 263; Pickering *v* Pickering, 2 Beav. 91; Stewart *v.* Stewart, 6 Clark & Fin. 699; Gibbons *v.* Caunt, 4 Ves. 849; Neale *v.* Neale, 1 Keen, 672; Attorney-General *v.* Bouch-

for its object the settlement of family controversies,[1] courts will support it if possible, although founded in ignorance or mistake of facts, as well as of law; provided no fraud has been used to mislead and deceive the party executing the conveyance.[2]

§ 186. If a deed is drawn by accident or mistake to embrace property not intended by the parties, equity will construe the grantee to be a trustee, and will execute the trust by reforming the deed or by ordering a reconveyance. It would be against natural right to allow a person to hold property which he never intended to buy, and which has come to him by such mistake.[3] But courts require the most full and satisfactory proof before they will vary by parol evidence the contract between the parties, as written and signed by them,[4] and will not give relief unless the mistake is common to both parties,[5] except the case is such that the parties may be restored to their original situation.[6]

erett, 25 Beav. 116; Wiles *v.* Greshon, 5 De G., M. & G. 770; Bradley *v.* Chase, 22 Me. 511; Richardson *v.* Eyton, 15 Eng. L. & Eq. 51; 2 De G., M. & G. 79.

[1] Currie *v.* Steele, 2 Sandf. 542; Stone *v.* Godfrey, 27 Eng. L. & Eq. 318; 5 De G., M. & G. 76; Gordon *v.* Gordon, 3 Swans. 463, 476; Stockley *v.* Stockley, 1 V. &. B. 29; Bellamy *v.* Sabine, 2 Phil. 425; Stapilton *v.* Stapilton, 1 Atk. 10; 3 Lead. Ca. Eq. 684; Cann *v.* Cann, 1 P. Wms. 727; Persse *v.* Persse, 1 West, 110; 7 Clark & Fin. 279; Cory *v.* Cory, 1 Ves. 19; Heap *v.* Tonge, 7 Eng. L. & Eq. 189; 9 Hare, 90; Leonard *v.* Leonard, 2 Ball & B. 171; Dunnage *v.* White, 1 Swans. 137; Harvey *v.* Cook, 4 Russ. 34; Jodrell *v.* Jodrell, 9 Beav. 45; Frank *v.* Frank, 1 Ch. Ca. 84.

[2] Smith *v.* Pincombe, 10 Eng. L. & Eq. 50; 3 Mac. & G. 653; Groves *v.* Perkins, 6 Sim. 576; Hoge *v.* Hoge, 1 Watts, 163; Dunnage *v.* White, 1 Swans. 137; Evans *v.* Llewellyn, 1 Cox, 333; 2 Bro. Ch. 150; Townshend *v.* Stangroom, 6 Ves. 333; Chesterfield *v.* Janssen, 2 Ves. 155; Ormond *v.* Hutchinson, 13 Ves. 51; Henly *v.* Cook, 4 Russ. 34; Stainton *v.* Carson Co., 6 Jur. (N. S.) 360; Ashhurst *v.* Mill, 7 Hare, 502; Lawton *v.* Campion, 18 Beav. 87; Bennett *v.* Merriman, 6 Beav. 360; Hogton *v.* Hogton, 15 Beav. 278; 11 Eng. L. & Eq. 134.

[3] Exeter *v.* Exeter, 3 M. & Cr. 321; Lindo *v.* Lindo, 1 Beav. 496; Ramsden *v.* Hylton, 2 Ves. 304; Beaumont *v.* Bramley, T. & R. 52; Underhill *v.* Horwood, 10 Ves. 225; Canedy *v.* Marcy, 13 Gray, 373; Brown *v.* Lamphear, 35 Vt. 252; Green *v.* Morris, 1 Beasley, 170; Richardson *v.* Bleight, 8 B. Monr. 580; Whaley *v.* Eliot, 1 A. K. Marsh. 343; Belknap *v.* Scaley, 2 Duer, 570; Gray *v.* Woods, 4 Blackf. 432; Peters *v.* Goodrich, 3 Conn. 146; Oliver *v.* Ins. Co. 2 Curtis, 277; Tilton *v.* Tilton, 9 N. H. 385; Farley *v.* Bryant, 32 Me. 474.

[4] Sawyer *v.* Hovey, 3 Allen, 331; Gillespie *v.* Moore, 2 John. Ch. 585; Andrews *v.* Essex Ins. Co., 3 Mason 10; 1 Story's Eq. Jur. § 157.

[5] Andrews *v.* Essex Ins. Co., 3 Mason, 10; Bradford *v.* Romney, 30 Beav. 431.

[6] Garrard *v.* Fanchell, 30 Beav. 445; Harris *v.* Pepperell, 5 Law R. Eq. 1.

§ 187. Lord Hardwicke, in his analysis of the various kinds of fraud, stated one species to be, "fraud apparent from the intrinsic value and subject of the bargain, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other."[1] The meaning of this is, that fraud may be proved by the inadequacy of the consideration paid for property by the purchaser on the one hand,[2] or the consideration may be so extravagantly large on the other,[3] as to show that the purchaser was imposed upon. It is to be observed, however, that the consideration alone, whether too large or too small, cannot of itself prove fraud in a transaction, for the reason that a mere voluntary conveyance, without *any* consideration, is good and valid between the parties. On the same ground mere inadequacy of consideration will not vitiate a deed,[4] and so if a party, knowing that the consideration is inadequate, enters into the agreement with his eyes open, he cannot have relief.[5] It is only where some fraud is practised upon a party that the consideration of a conveyance is material.[6] If it appears that a person intended to convey his property for a consideration reasonably proportionate to its value, but that in fact the consideration received was grossly inadequate, then a court of equity would infer that

[1] Chesterfield *v.* Janssen, 2 Ves. 155; Harvey *v.* Mount, 8 Beav. 439.

[2] Ibid.; Rosevelt *v.* Fulton, 2 Cow. 129; McDonald *v.* Neilson, 2 Cow. 139.

[3] Cockell *v.* Taylor, 15 Beav. 103.

[4] Pickett *v.* Loggon, 14 Ves. 215; Reynell *v.* Sprye, 8 Hare, 222; 1 De G., M. & G. 600; Howard *v.* Edgell, 17 Vt. 9; Osgood *v.* Franklin, 2 John Ch. 1; 14 John. 527; Butler *v.* Haskell, 4 Des. 651; Erwin *v.* Perham, 12 How. 197; Judge *v.* Wilkins, 19 Ala. 765; McCormick *v.* Malin, 5 Blackf. 509; Delafield *v.* Anderson, 7 S. & M. 630; Farmers' Bank *v.* Douglass, 11 S. & M. 469; Robinson *v.* Robinson, 4 Md. Ch. 183; Powers *v.* Hale, 5 Foster, 145; Dunn *v.* Chambers, 4 Barb. 376; Mann *v.* Betterly, 21 Vt. 326; Green *v.* Thompson, 2 Ired. Eq. 365; White *v.* Flora, 2 Overt. 426; Forde *v.* Herron, 4 Munf. 316; Holmes *v.* Fresh, 9 Mis. 201; Young *v.* Frost, 5 Gill, 287; Coster *v.* Griswold, 4 Edw. 364; Westervelt *v.* Matheson, 1 Hoff. 37; Davidson *v.* Little, 27 Penn. St. 251; Coles *v.* Trecothick, 9 Ves. 246; Moth *v.* Atwood, 5 Ves. 845; White *v.* Damon, 7 Ves. 35; Low *v.* Barchard, 8 Ves. 133; Griffith *v.* Spratley, 2 Bro. Ch. 179; Wood *v.* Abrey, 3 Mad. 423; Floyer *v.* Sherrard, Amb. 18; Stephens *v.* Bateman, 1 Bro. Ch. 22; Harrison *v.* Guest, 6 De G., M. & G. 424; 8 H. L., Cas. 481; Denton *v.* Donner, 23 Beav. 285; Eyre *v.* Potter, 15 How. 60.

[5] Willis *v.* Jernegan, 2 Atk. 251.

[6] Huguenin *v.* Baseley, 14 Ves. 273; Wormack *v.* Rogers, 9 Ga. 60; How *v.* Weldon, 2 Ves. 516; Mann *v.* Betterly, 21 Vt. 326.

some fraud or deceit had been practised upon him;[1] or as Lord Thurlow said, "where the inadequacy of the consideration is so gross and manifest that it is impossible to state it to a man of common sense without producing an exclamation at the inequality of it,[2] the court will infer from that fact *alone*, that there must have been such imposition or oppression in the transaction, or such a want of common understanding in the party, as to amount to a case of fraud, from which no advantage or benefit ought to be derived by the other party."[3] Other authorities say that courts will act on the fact *alone* of inadequacy of consideration when it is so gross and manifest as to *shock the conscience*.[4] This principle is loose enough,[5] if it is a principle, and of course every case would depend upon its own facts and circumstances. Where there are suspicious circumstances connected with the fact of inadequacy of price, as where the parties stand in a fiduciary relation to each other,[6] or one of them is in distress,[7] or is ignorant,[8] or is weak-minded and imbecile,[9] inadequacy of consideration will be-

[1] Gwynne *v.* Heaton, 1 Bro. Ch. 8; Baugh *v.* Price, 3 Wilson, 320; Eyre *v.* Potter, 15 How. 60; Butler *v.* Haskell, 4 Des. 652; Barnett *v.* Spratt, 4 Ired. Eq. 171; Wright *v.* Wilson, 4 Yerg. 294; Juzan *v.* Toulmin, 9 Ala. 692.

[2] Gwynne *v.* Heaton, 1 Bro. Ch. 8; Hamet *v.* Dundass, 4 Barr, 178.

[3] Heathcote *v.* Paignon, 2 Bro. Ch. 175; Underhill *v.* Horwood, 10 Ves. 219; Ware *v.* Horwood, 14 Ves. 28; Stilwell *v.* Wilkinson, Jac. 282; Barnett *v.* Spratt, 4 Ired. Eq. 171.

[4] Coles *v.* Trecothick, 9 Ves. 246; Osgood *v.* Franklin, 2 John. Ch. 1; 14 John. 527; Gwynne *v.* Heaton, 1 Bro. Ch. 9; Underhill *v.* Horwood, 10 Ves. 219; Peacock *v.* Evans, 16 Ves. 512; Wright *v.* Wilson, 2 Yerg. 294; Deaderick *v.* Watkins, 8 Humph. 520; Stilwell *v.* Wilkinson, Jac. 280; Copis *v.* Middleton, 2 Madd. 409; Howard *v.* Edgell, 17 Vt. 9; Butler *v.* Haskell, 4 Des. 652; Eyre *v.* Potter, 15 How. 60; Gist *v.* Frazier, 2 Litt. 118; Seymour *v.* Delancey, 6 John. Ch. 222; Juzan *v.* Toulmin, 9 Ala. 692; James *v.* Morgan, 1 Lev. 111; Rice *v.* Gordon, 11 Beav. 215.

[5] Gibson *v.* Jeyes, 6 Ves. 273.

[6] Herne *v.* Meeres, 1 Vern. 456; Gibson *v.* Jeyes, 6 Ves. 266; Shaeffer *v.* Sleade, 7 Blackf. 178; Brooke *v.* Berry, 2 Gill. 83; Wright *v.* Wilson, 2 Yerg. 294; Butler *v.* Haskell, 4 Des. 680.

[7] Cockell *v.* Taylor, 15 Beav. 103.

[8] Herne *v.* Meeres, 1 Vern. 456; Pickett *v.* Loggon, 14 Ves. 215; Murray *v.* Palmer, 2 Sch. & Lef. 477; Gwynne *v.* Heaton, 1 Bro. Ch. 1; Wood *v.* Abrey, 3 Madd. 417; McKinney *v.* Pinkard, 2 Leigh, 149; Gasque *v.* Small, 2 Strob. Eq. 72; Esham *v.* Lamar, 10 B. Mon. 43; Butler *v.* Haskell, 4 Des. 680.

[9] Clarkson *v.* Hanway, 2 P. Wms. 203; Gartside *v.* Isherwood, 1 Bro. Ch. 558; Stanhope *v.* Toppe, 2 Bro. P. C. 183; McArtee *v.* Engart, 13 Ill. 242; Wormack *v.* Rogers, 9 Ga. 60; How *v.* Weldon, 3 Ves. 517; Addis *v.* Camp-

come very pertinent, and oftentimes conclusive evidence that fraud and undue influence have been used to bring about a bargain advantageous to the one side and ruinous to the other.

§ 188. Immediately connected with this subject is the sale by an heir or reversioner of his expectancy or reversionary interest. It is said that "it is incumbent upon those who deal with an expectant heir, relative to his reversionary interest, to make good the bargain; that is, to be able to show that a full and adequate consideration was paid. In all such cases the issue is upon the adequacy of the price. No proof of fraud is necessary; and the relief is given upon general principles of mischief to the public, without requiring particular evidence of actual imposition."[1] Such a purchase is a constructive fraud, and the purchaser, if a stranger, will be compelled to account and to give up the bargain, if found to be advantageous.[2] A sale by an heir will not be supported against him unless it is perfectly fair in every respect, and beyond suspicion, and for an adequate price.[3] The burden is upon the purchaser to show the fairness of the transaction, and the sufficiency of the consideration, and not upon the heir to impeach either the one or the other;[4] and it is said that it is immaterial that the heir is of mature age.[5] In this country the rule may be stated

bell, 4 Beav. 401; Holden *v.* Crawford, 1 Atk. 390; Mann *v.* Betterly, 21 Vt. 326; Crane *v.* Conklin, Saxt. 346; Brooke *v.* Berry, 2 Gill. 83; Rumph *v.* Abercrombie, 12 Ala. 64.

[1] Sir Wm. Grant in Gowland *v.* De Faria, 17 Ves. 20.

[2] Jenkins *v.* Pye, 12 Pet. 258; Call *v.* Gibbons, 3 P. Wms. 290; Barnardiston *v.* Lingood, 2 Atk. 133; Gwynne *v.* Heaton, 1 Bro. Ch. 10; Walmesly *v.* Booth, 2 Atk. 28.

[3] Knott *v.* Hill, 1 Vern. 167; Westerfield *v.* Janssen, 2 Ves. 125; 1 Lead Ca. Eq. 428–494, Eng. and Am. notes; Bawtree *v.* Watson, 3 M. & K. 339; Portmore *v.* Taylor, 4 Sim. 182; Peacock *v.* Evans, 16 Ves. 512; Newton *v.* Hunt, 5 Sim. 54; Foster *v.* Roberts, 29 Beav. 467; Talbot *v.* Staniforth, 1 John. & H. 484; Jones *v.* Ricketts, 31 Beav. 130; Salter *v.* Bradshaw, 26 Beav. 161; King *v.* Hamlet, 4 Sim. 223; 2 M. & K. 456; Denton *v.* Donner, 23 Beav. 285; Bury *v.* Oppenheim, 26 Beav. 594; Hannah *v.* Hodgson, 30 Beav. 19; St. Albyn *v.* Harding, 27 Beav. 11; Nesbitt *v.* Berridge, 32 Beav. 282; Perfect *v.* Lane, 31 L. J. Ch. 489; Edwards *v.* Burt, 2 De G., M. & G. 55; Aldborough *v.* Frye, 7 Clark & Fin. 436.

[4] Gowland *v.* De Faria, 17 Ves. 24; Coles *v.* Trecothick, 9 Ves. 246; Davis *v.* Marlborough, 2 Swans. 141; Portmore *v.* Taylor, 4 Sim. 209; Shelley *v.* Nash, 3 Mad. 236; Nimmo *v.* Davis, 7 Tex. 260; Poor *v.* Hazelton, 15 N. H. 364.

[5] Davis *v.* Marlborough, 2 Wils. 146; Evans *v.* Cheshire, Belt Supp. 305; Addis *v.* Campbell, 4 Beav. 401.

with still more severity, that the sale by an heir of his expectancy during the life of the ancestor, is contrary to public policy and is void, unless such sale is assented to by the ancestor, and supported by an adequate consideration.[1] If, however, the sale is at auction, it will be some proof of fairness and sufficiency of price,[2] and if the sale is made with the knowledge and assent of the ancestor it will be good.[3] But it seems that the rule is confined to those expectancies that combine the relation of heir with that of remainder-man and reversioner. If the expectant is not heir, but is simply entitled to a remainder or reversion by virtue of some instrument or settlement, he may sell and assign his future interest, and such sale will not be avoided unless some of the common rules of equity are violated by the purchaser. In such cases there is no fraud upon parents or third persons, consequently there is nothing contrary to public policy in such purchases.[4]

§ 189. Another kind of constructive trust arises from the mental incapacity of parties to enter into contracts. Thus a *non compos mentis* cannot make a binding contract.[5] The deed of such person is either absolutely void, or at least voidable,[6] and equity

[1] Varick *v.* Edwards, 1 Hoff. 383; Boynton *v.* Hubbard, 7 Mass. 112; Fitch *v.* Fitch, 8 Pick. 480; Trull *v.* Eastman, 3 Met. 121; Poor *v.* Hazleton, 15 N. H. 564; Nimmo *v.* Davis, 7 Tex. 266; Jenkins *v.* Pye, 12 Pet. 257; Davidson *v.* Little, 22 Penn. St. 252.

[2] Fox *v.* Wright, 6 Mad. 111; Shelley *v.* Nash, 3 Mad. 232; Newman *v.* Meek, 1 Freem. Ch. 441; Erwin *v.* Parham, 12 How. 197.

[3] Fitch *v.* Fitch, 8 Pick. 480; Trull *v.* Eastman, 3 Met. 121; Nimmo *v.* Davis, 7 Tex. 266; King *v.* Hamlet, 2 M. & K. 456. In Ohio, however, it has been held that a contract is invalid by which a son released to his father, in consideration of an advancement, all his expectancies upon the father's estate. Needles *v.* Needles, 7 Ohio St. 432. The case is not sustained by other authorities, and seems not to rest upon the principles applicable to such transactions.

[4] Cribbins *v.* Markwood, 13 Grat. 495; Dunn *v.* Chambers, 4 Barb. 376; Davidson *v.* Little, 22 Penn. St. 252; Wiseman *v.* Beake, 2 Vern. 121; Cole *v.* Gibbons, 3 P. Wms. 290; Barnardiston *v.* Lingood, 2 Atk. 133; Bowers *v.* Heaps, 3 V. & B. 117; Davis *v.* Marlborough, 2 Swans. 130; Addis *v.* Campbell, 4 Beav. 401; Nickolls *v.* Gould, 2 Ves. 422; Henley *v.* Axe, 2 Bro. Ch. 17; 2 Swans. 141; Griffith *v.* Spratley, 2 Bro. Ch. 179; 1 Cox, 383; Moth *v.* Atwood, 5 Ves. 845; Montesquieu *v.* Sandys, 18 Ves. 302. The peculiar character and position of sailors call for the interposition of courts when they are defrauded, and when one had sold his prize-money for a small sum, the Master of the Rolls said, that it was reasonable to regard them as young heirs, and to relieve them accordingly. How *v.* Weldon, 2 Ves. 515.

[5] Chesterfield *v.* Janssen, 2 Ves. 155.

[6] Allis *v.* Billings, 6 Met. 415; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 239;

will give relief by declaring a party taking under such a conveyance to be a trustee, and by ordering him to execute a reconveyance.[1] Whether a person has capacity enough to make a contract, is always a question of fact in each particular case; for mere weakness of mind, not amounting to idiocy or insanity, is no ground for avoiding a contract. Courts cannot measure the extent of a party's understanding. If, therefore, a person is not an idiot nor an insane person, he may enter into contracts, although he may be of a low order of intelligence and of weak reasoning powers.[2] At the same time such persons are easily imposed upon and defrauded; and if it appears that one of the parties to a contract is of weak mind and feeble powers, the whole transaction will be carefully investigated, and the conduct of the person procuring such contract will be closely scrutinized; for arts and practices that would be perfectly harmless in a transaction with a man of high intelligence and prudence and great power of observing and reasoning, may, and probably would, deceive and mislead a person of weak mind and feeble powers, although not incapable of entering into contracts and transacting business generally.[3] Therefore the weakness of a party's mind is a very material fact in determining the character of a transaction, and if in contracts with such persons, there is found the least art or stratagem, or any undue influence, or any ingredient of fraud or suspicion of unfairness, courts will set the contract aside, or convert the offending party

Price *v.* Berrington, 3 Mac. & G. 486; Moulton *v.* Camroux, 2 Exch. 487; 4 Exch. 17; Desilver's Est. 5 Rawl. 111; Bensell *v.* Chancellor, 5 Whart. 376; Beals *v.* Lee, 10 Barr, 56.

[1] Rushloy *v.* Mansfield, Toth. 42; Mansfield's Case, 12 Co. 123; Addison *v.* Mascall, 2 Vern. 678; 3 Atk. 110; Price *v.* Berrington, 7 Hare, 394; 3 Mac. & G. 486; Addison *v.* Dawson, 2 Vern. 678; Welby *v.* Welby, Toth. 164; Wright *v.* Booth, Toth. 166; Wilkinson *v.* Brayfield, 2 Vern. 307; Clark *v.* Ward, Pr. Ch. 150; Ferres *v.* Ferres, Eq. Ab. 695; Attorney-General *v.* Parnther, 3 Bro. Ch. 441.

[2] Osmond *v.* Fitzroy, 3 P. Wms. 130; Willis *v.* Jernegan, 2 Atk. 251; 1 Story, Eq. Jur. § 235; *Ex parte* Allen, 15 Mass. 58; Hadley *v.* Latimer, 3 Yerg. 537; Mann *v.* Betterly, 21 Vt. 326; Thomas *v.* Sheppard, 2 McCord, Eq. 36; Rippy *v.* Gant, 4 Ired. Eq. 447; Mason *v.* Williams, 3 Munf. 126; Morrison *v.* McLeod, 2 Dev. & Bat. Eq. 221; Green *v.* Thompson, 2 Ired. Eq. 365; Bath and Montague's Ca. 3 Ch. Ca. 107.

[3] Bridgman *v.* Green, Wilm. 61; 2 Ves. 627; Donnegal's Case, 2 Ves. 407; Gartside *v.* Isherwood, 1 Bro. Ch. 560; Blackford *v.* Christian, 1 Knapp, 77; Dunn *v.* Chambers, 4 Barb. 376.

into a trustee.[1] Upon these principles, if the contract is of an unusual, unreasonable, or extraordinary character,[2] or if it is without consideration, or upon an inadequate consideration,[3] or if the instrument falsely recites a consideration,[4] or if there is actual proof of undue influence, or of art or circumvention,[5] or if there is a fiduciary, confidential, or influential relation between the parties,[6] courts will interfere and protect a person of weak mind from his contracts.

§ 190. Mental weakness is not of itself a sufficient ground for avoiding an agreement, but it must appear that some advantage was taken of it to procure a favorable contract; and if the other party stood in some fiduciary relation to the person of weak mind, the burden is upon him to show that the contract was in every respect fair, and that no advantage was obtained from the influential position on the one hand, or from the feebleness of mind on the other. And it is quite immaterial from whence the mental weakness arises. It may arise from a natural and permanent imbecility of mind, or it may arise from some temporary illness or debility, or from the weakness and infirmity of extreme old age.

[1] Griffin *v.* De Veulle, 3 Wood. Lect. App. 16; Nottige *v.* Prince, 2 Gif. 246; Longmate *v.* Ledger, 2 Gif. 157; Baker *v.* Monk, 33 Beav. 419; Boyse *v.* Rossborough, 6 H. L. Ca. 2; Harding *v.* Handy, 11 Wheat. 103; Tracey *v.* Sackett, 1 Ohio St. 54; Whitehorn *v.* Hines, 1 Munf. 557; Whelan *v.* Whelan, 3 Cow. 537; Deatly *v.* Murphy, 3 A. K. Marsh. 472; Brogden *v.* Walker, 2 H. & J. 285; Rumph *v.* Abercrombie, 12 Ala. 64.

[2] Fane *v.* Devonshire, 2 Bro. P. C. 77; Bridgman *v.* Green, 2 Ves. 627; Dent *v.* Bennett, 7 Sim. 539; 4 M. & Cr. 629; Malin *v.* Malin, 2 John. Ch. 238; Bennett *v.* Vade, 2 Atk. 235; Nantes *v.* Corrock, 9 Ves. 181; Willan *v.* Willan, 16 Ves. 72; Ball *v.* Maurice, 3 Bligh, (N. S.) 1; 1 Dow, (N. S.) 392.

[3] Ibid.; Clarkson *v.* Hanway, 2 P. Wms. 203; Gartside *v.* Isherwood, 1 Bro. Ch. 558; Hutchinson *v.* Tindall, 2 Green, Ch. 357; Rumph *v.* Abercrombie, 12 Ala. 64; Fillmer *v.* Gott, 7 Bro. P. C. 70; Hunt *v.* Moore, 2 Barr, 105.

[4] Gibson *v.* Russell, 2 N. C. C. 104; Harvey *v.* Mount, 8 Beav. 439.

[5] Portington *v.* Eglington, 2 Vern. 189; Gartside *v.* Isherwood, 1 Bro. Ch. 558; Bridgman *v.* Green, 2 Ves. 627; Edmunds *v.* Bird, 1 V. & B. 542; Fox *v.* Macreth, 2 Bro. Ch. 420.

[6] Kennedy *v.* Kennedy, 2 Ala. 571; Brice *v.* Brice, 5 Barb. 533; Buffalow *v.* Buffalow, 2 Dev. & Bat. Eq. 241; Osmond *v.* Fitzroy, 3 P. Wms. 130; Dent *v.* Bennett, 7 Sim. 539; 4 M. & C. 269; Cruise *v.* Christopher, 5 Dana, 181; Whipple *v.* Clure, 2 Root, 216; Brooke *v.* Berry, 2 Gill, 83; McCraw *v.* Davis, 2 Ired. Eq. 618; Huguenin *v.* Baseley, 14 Ves. 273; Griffith *v.* Robins, 3 Mad. 191; Whelan *v.* Whelan, 3 Cow. 537.

Each case must depend upon its own circumstances. If there is a fixed and permanent state of idiocy or insanity, or if the party is a declared lunatic and his affairs are in the hands of a committee or of a guardian, there can be little or no doubt. Questions generally arise where there is not this entire want of capacity, — where no general rule can be laid down, but the court is left to judge of the capacity of the contracting party, of the circumstances under which the contract was made, and whether from all the facts in the case the contract ought in equity and good conscience to be sustained. Extreme old age, accompanied by great infirmity; or extreme weakness and feebleness of mind, arising from temporary illness or permanent imbecility, stopping short of absolute incapacity, — are all pertinent facts, tending to show, if accompanied by other circumstances, a fraudulent contract; but if upon all the evidence the contract is a fair one, if the enfeebled person is surrounded by his friends, who understand the transaction and explain it to the party, it will not be set aside.[1]

§ 191. Substantially the same rules apply to deeds and instruments executed by a drunken person. Drunkards while laboring under the frenzy of drink, are *non compotes mentis* by their own act,[2] and it is said that they may plead *non est factum* to a deed executed while so drunk that they do not know what they are doing.[3] In such case there can of course be no intelligent consent to any contract. But equity will not always interfere to protect a drunken man from the folly of his own acts, and will not on account of drunkenness alone set aside a contract or convert the other party into a trustee.[4] And this is more especially the rule where the

[1] Griffith *v.* Robins, 3 Mad. 191; Harding *v.* Handy, 11 Wheat. 193; Dent *v.* Bennett, 7 Sim. 539; Attorney-General *v.* Parnther, 3 Bro. Ch. 443; Hunter *v.* Atkins, 3 M. & K. 146; Lewis *v.* Pead, 1 Ves. Jr. 19; Pratt *v.* Barker, 1 Sim. 1; 4 Russ. 507; Rippy *v.* Gant, 4 Ired. Eq. 447; Gratz *v.* Cohen, 11 How. 1.

[2] Co. Lit. 247 a, 447 a; Beverley's Case, 4 Co. 124; Hendrick *v.* Hopkins, Cary, 93.

[3] Cole *v.* Robins, Bull, N. P. 172; Cook *v.* Clayworth, 18 Ves. 12; Reynolds *v.* Waller, 1 Wash. 212; Rutherford *v.* Ruff, 4 Des. 350; Gore *v.* Gibson, 13 M. & W. 623; Barrett *v.* Buxton, 2 Aik. 167; Peyton *v.* Rawlins, 1 Hayw. 77; Clifton *v.* Davis, 1 Pars. Eq. 31; French *v.* French, 2 Ham. 214; Wigglesworth *v.* Steers, 1 Hen. & Munf. 70; Shaw *v.* Thackray, 1 Sm. & Giff. 537.

[4] Johnson *v.* Meddlicott, 3 P. Wms. 131, n.; Cory *v.* Cory, 1 Ves. 19; Nagle *v.* Bayler, 2 Dr. & W. 60; Cooke *v.* Clayworth, 18 Vès. 12; Maxwell *v.*

object of the contract is to carry out a family settlement, or the contract is fair and reasonable in its terms.[1] But if there is any contrivance or management to induce drunkenness and to procure a contract, or if there was any unfair advantage taken of the drunkenness to procure a contract, it would be an actual fraud, and the court will not allow a party to retain any advantage procured in such manner, nor would it lend its aid to carry it into effect.[2]

§ 192. So, equity will relieve in all cases of contracts procured by duress, or fear, or apprehension; for, if there has been any restraint upon a person's freedom to consent or dissent, or any practice upon his fears, it is a kind of fraud, and no one ought to enjoy an advantage gained in such manner.[3] Thus, if a contract is made with one in prison, or under any circumstances of oppression, equity will scrutinize it with great care.[4] And so, if advantage is taken of the extreme distress or necessity of a party, to obtain a favorable bargain from him, equity will give relief;[5] but

Pittinger, 2 Green, Ch. 156; Morrison *v.* McLeod, 2 Dev. & Bat. Eq. 221; Whitesides *v.* Greenlee, 2 Dev. Eq. 152; Moore *v.* Read, 2 Ired. Eq. 580; Hotchkiss *v.* Fortson, 7 Yerg. 67; Belcher *v.* Belcher, 19 Yerg. 121; Hutchinson *v.* Brown, 1 Clark, Ch. 408; Harbison *v.* Lemon, 3 Blackf. 51.

[1] Cory *v.* Cory, 1 Ves. 19; Cooke *v.* Clayworth, 18 Ves. 12.

[2] Johnson *v.* Meddlicott, 3 P. Wms. 131; Say *v.* Barwick, 1 V. & B. 195; Jenness *v.* Howard, 6 Blackf. 240; Cory *v.* Cory, 1 Ves. 19; Cooke *v.* Clayworth, 18 Ves. 12; Crane *v.* Conklin, Saxt. 346; Calloway *v.* Wetherspoon, 5 Ired. Eq. 128; Hutchinson *v.* Tindall, 2 Green, Ch. 128; Phillips *v.* Moore, 11 Miss. 600; Cooley *v.* Rankin, 11 Miss. 642; Cragg *v.* Holme, 18 Ves. 14, n.; Shiers *v.* Higgons, 1 Mad. Ch. Pr. 399; Nagle *v.* Baylor, 2 Dr. & W. 64; Shaw *v.* Thackray, 1 Sm. & Gif. 537.

[3] Attorney-General *v.* Sothen, 2 Vern. 497; Crowe *v.* Ballard, 1 Ves. Jr. 220; Anon., 3 P. Wms. 29, n. (e); Gist *v.* Frazier, 2 Lit. 118; Evans *v.* Llewellyn, 1 Cox, 340; Hawes *v.* Wyatt, 3 Bro. Ch. 158.

[4] Attorney-General *v.* Sothen, 2 Vern. 497; Roy *v.* Beaufort, 2 Atk. 190; Falkner *v.* O'Brien, 2 B. & B. 214; Underhill *v.* Horwood, 10 Ves. 219; Nicholls *v.* Nicholls, 1 Atk. 409; Griffith *v.* Spratley, 1 Cox, 333; Hinton *v.* Hinton, 2 Ves. 634.

[5] Gould *v.* Okeden, 3 Bro. P. C. 560; Harvey *v.* Mount, 8 Beav. 439; Hawes *v.* Wyatt, 3 Bro. Ch. 156; Bosanquet *v.* Dashwood, Ca. t. Talb. 37; Pickett *v.* Loggon, 14 Ves. 215; Farmer *v.* Farmer, 1 H. L. Ca. 724; Fitzgerald *v.* Rainsford, 1 B. & B. 37; Underhill *v.* Horwood, 10 Ves. 219; Huguenin *v.* Baseley, 14 Ves. 273; Carpenter *v.* Elliott, 2 Ves. Jr. 494; Proof *v.* Hines, Ca. t. Talb. 111; Basy *v.* Magrath, 2 Sch. & Lef. 31; Ramsbottom *v.* Parker, 6 Mad. 6; Wood *v.* Abrey, 3 Mad. 417; Crowe *v.* Ballard, 1 Ves. Jr. 215; Nottige *v.* Prince, 6 Jur. (N. S.) 1066; Davis *v.* McNally, 5 Sneed, 583; Graham *v.* Little, 3 Jones, Eq. 152; Stewart *v.* Hubbard, 3 Jones, Eq. 186.

the advantage must have been within the contemplation of the parties at the time.

§ 193. Of course, if two or more of these suspicious circumstances are found in the same case; as, if property is obtained from a person of weak mind, or under duress, or in great distress, for a grossly inadequate consideration, or upon any unusual, extraordinary, or oppressive terms, the evidence would be much stronger of some fraudulent practice, and would call upon the suspected party for a very complete vindication of the transaction, or he would be converted into a trustee.[1]

§ 194. Lord Hardwicke's "third species of fraud may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed."[2] At law, fraud must be proved; but in equity there are certain rules prohibiting parties, bearing certain relations to each other, from contracting between themselves; and if parties bearing such relations enter into contracts with each other, courts of equity presume them to be fraudulent, and convert the fraudulent party into a trustee. And, herein, courts of equity go further than courts of law, and presume fraud in cases where a court of law would require it to be proved; that is, if parties within the prohibited relations or conditions contract between themselves, courts of equity will avoid the contract altogether, without proof, or they will throw upon the party standing in this position of trust, confidence, and influence, the burden of proving the entire fairness of the transaction. Thus, if a parent buys property of his child, a guardian of his ward, a trustee of his *cestui que trust*, an attorney of his client, or an agent of his principal, equity will either avoid the contract altogether, without proof, or it will throw the burden of proving the fairness of the transaction upon the purchaser; and, if the proof fails, the contract will be avoided, or the purchaser will be construed to be a trustee at the election of the other party. The ground of this rule is, that the danger of allowing persons holding such relations of trust and influence with others to deal with them is so great that the presumption ought to be against the transaction, and the person holding the trust or influence ought to be required to vindicate it from

[1] Griffin *v.* De Veulle, Wood. Lect. App. 16.

[2] Chesterfield *v.* Janssen, 2 Ves. 155.

all fraud, or to hold it in trust for the benefit of the ward, *cestui que trust*, or other person holding a similar relation.[1]

§ 195. These principles are applied in their full vigor to all contracts and sales between trustee and *cestui que trust*.[2] The trustee is in such a position of confidence and influence over the *cestui que trust*, that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust*, unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust*.[3] The general rule is, that the trustee shall not take beneficially by gift or purchase from the *cestui que trust*,[4] but there are exceptions to the rule, and a trustee may buy from the *cestui que trust*, provided there is a

[1] Hoghton *v.* Hoghton, 15 Beav. 278; Cooke *v.* Lamotte, 15 Beav. 234; Ahearne *v.* Hogan, 1 Dr. 310; Espey *v.* Lake, 10 Hare, 260; Prideaux *v.* Lonsdale, 1 De G., J. & S. 433; Bayley *v.* Williams, 11 Jur. (N. S.) 236; Clark *v.* Malpas, 31 Beav. 80; Grosvenor *v.* Sherratt, 28 Beav. 659; Beanland *v.* Bradley, 2 Sm. & Gif. 339; Taylor *v.* Taylor, 8 How. 183; Greenfield's Est., 14 Penn. St. 504; Graham *v.* Pancoast, 30 Penn. St. 89; Nace *v.* Boyer, 30 Penn. St. 99; Sears *v.* Shafer, 2 Seld. 268; Buffalow *v.* Buffalow, 2 Dev. & Bat. 241; Prewett *v.* Coopwood, 30 Miss. 369; Graham *v.* Little, 3 Jones, Eq. 152; Powell *v.* Cobb, 3 Jones, Eq. 456; Gass *v.* Mason, 4 Sneed, 497.

[2] Hatch *v.* Hatch, 9 Ves. 296; Hylton *v.* Hylton, 2 Ves. 549; Hunter *v.* Atkins, 3 M. & K. 135; Bulkley *v.* Wilford, 2 Clark & Fin. 102; Farnam *v.* Brooks, 9 Pick. 212.

[3] Crosskill *v.* Bower, 32 Beav. 86; Pooley *v.* Quilter, 2 De G. & J. 327; Spring *v.* Pride, 10 Jur. (N. S.) 646; *Ex parte* Ridgeway, 1 Jur. (N. S.) 97; Herne *v.* Meeres, 1 Vern. 465; Ayliffe *v.* Murray, 2 Atk. 59; Fox *v.* Macreth, 2 Bro. Ch. 400; Coles *v.* Trecothick, 9 Ves. 246; *Ex parte* Lacey, 6 Ves. 625; Morse *v.* Royal, 2 Ves. 376; Hunter *v.* Atkins, 3 M. & K. 135; Whichcote *v.* Lawrence, 3 Ves. 740; Scott *v.* Davis, 4 M. & Cr. 87; Kerr *v.* Dungannon, 1 Dr. & W. 509; Van Epps *v.* Van Epps, 9 Paige, 237; Hawley *v.* Cramer, 4 Cow. 717; Campbell *v.* Walker, 5 Ves. 678; Gibson *v.* Jeyes, 6 Ves. 277; Michoud *v.* Girod, 4 How. 503; De Caters *v.* Chaumont, 3 Paige, 178; Child *v.* Bruce, 4 Paige, 309; Campbell *v.* Johnston, 1 Sandf. Ch. 148; Cram *v.* Mitchell, ib. 251; Davis *v.* Simpson, 5 Har. & J. 147; Boyd *v.* Hawkins, 2 Ired. Ch. 304; Matthews *v.* Dragand, 3 Des. 25; Thorp *v.* McCullum, 1 Gilm. 614; Davoue *v.* Fanning, 2 John. Ch. 252; De Bevoise *v.* Sandford, 1 Hoff. 192; Stuart *v.* Kissam, 2 Barb. 493; Richardson *v.* Jones, 3 G. & J. 163; Clark *v.* Lee, 14 Io. 425; Zimmerman *v.* Harmon, 4 Rich. Eq. 165; Johnson *v.* Blackman, 11 Conn. 343; Moody *v.* Vandyke, 4 Binn. 31; Armstrong *v.* Campbell, 3 Yerg. 201; Bruch *v.* Lantz, 2 Rawle, 329; Herr's Est., 1 Grant's Ca. 172; Painter *v.* Henderson, 7 Barr, 48; Brackenridge *v.* Holland, 2 Blackf. 377; Scroggins *v.* McDougald, 8 Ala. 382; Thompson *v.* Wheatley, 5 S. & M. 499; Shelton *v.* Homer, 5 Met. 462.

[4] Coles *v.* Trecothick, 9 Ves. 234.

distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee to buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee.[1] Lord Eldon said he admitted that the exception was a difficult case to make out.[2] Any withholding of information,[3] or any inadequacy of price,[4] will make such purchaser a constructive trustee. The *cestui que trust* must know that he is dealing with the trustee. Therefore, if the trustee purchases through an agent or third person, and the *cestui que trust* does not know the trustee in the transaction, the contract will be void, or a trust in the agent.[5] So, if the trustee purchases at auction of the *cestui que trust*, the presumption is strongly against the transaction.[6] And one of several trustees is under the same disabilities.[7] And so, if the purchase is made by an agent of the trustee.[8]

§ 196. If among the assets of the trust estate there are leases, the trustee cannot renew them in his own name; and, if he renews them in his own name, he must hold them by a constructive trust for the same persons beneficially interested in the old leases.[9]

[1] Ibid.; Bryan *v.* Duncan, 11 Ga. 67; Dobson *v.* Racey, 3 Sandf. 61; Brackenridge *v.* Holland, 2 Blackf. 377; Paillon *v.* Martin, 1 Sandf. 569; Stuart *v.* Kissam, 2 Barb. 494; Braman *v.* Oliver, 2 Stewart, 47; Julian *v.* Reynolds, 8 Ala. 680; Stallings *v.* Foreman, 2 Hill, Ch. 401; Pratt *v.* Thornton, 28 Me. 335; McCartney *v.* Calhoun, 17 Ala. 301; Marshall *v.* Stevens, 8 Humph. 159; Beeson *v.* Beeson, 9 Barr, 279; McKinley *v.* Irvine, 14 Ala. 681; Farnam *v.* Brooks, 9 Pick. 212; Lyon *v.* Lyon, 8 Ired. Eq. 201; Harrington *v.* Brown, 5 Pick. 519; Jennison *v.* Hapgood, 7 Pick. 1; Dunlap *v.* Mitchell, 10 Ohio, 117; Scott *v.* Freeland, 7 Sm. & M. 410; Pennock's App. 4 Penn. St. 446; Bruch *v.* Lantz, 2 Rawle, 392; Field *v.* Arrowsmith, 3 Humph. 442; Monro *v.* Allaire, 2 Caine's Cas. 183; Salmon *v.* Cutts, 4 De G. & Sm. 131.

[2] Coles *v.* Trecothick, 9 Ves. 246.

[3] Fox *v.* Mackreth, 2 Bro. Ch. 400; Scott *v.* Davis, 4 M. & Cr. 87; Herne *v.* Meeres, 1 Vern. 465.

[4] Pugh *v.* Bell, 1 J. J. Marsh. 398; Morse *v.* Royal, 12 Ves. 373.

[5] Randall *v.* Errington, 10 Ves. 423.

[6] Attorney-General *v.* Dudley, Coop. 146; Whelpdale *v.* Cookson, 1 Ves. 9; Lister *v.* Lister, 6 Ves. 631; Sanderson *v.* Walker, 13 Ves. 601; Downes *v.* Grazebrook, 3 Mer. 200; Campbell *v.* Walker, 3 Ves. 378; Whitcomb *v.* Minichin, 5 Mad. 91.

[7] Whichcote *v.* Lawrence, 3 Ves. 740.

[8] Campbell *v.* Walker, 3 Ves. 378.

[9] Keech *v.* Sandford, commonly called the Rumford Market Case, Sel. Ch. Ca. 61; 1 Lead. Ca. Eq. 36, Eng. and Am. notes; Griffin *v.* Griffin, 1 Sch. & Lef. 354; Pickering *v.* Vowles, 1 Bro. Ch. 198; Pierson *v.* Shore, 1 Atk. 480; Nes-

Even if the lessor refuse to renew the lease for the benefit of the *cestui que trust*, and the trustee takes it in his own name, he is still a constructive trustee, and he must account for all the income and profits. This is on the ground that a trustee should be under no temptations to make any contracts in relation to the trust property, even collaterally, on his own private account.[1] The same rule extends to all persons who have only a partial interest in property: they shall not take advantage of their situation to renew leases in their own names; as, tenants for life,[2] mortgagees,[3] devisees subject to debts, legacies, or annuities,[4] joint tenants,[5] or partners;[6] and where there was a mere tenancy at will, it was held that the tenant could not renew in his own name, and deprive the remainder-man of what might come to him.[7] And if, instead of renewing, the trustee or other person sell the right to renew for money, he must account for the price to the persons beneficially interested.[8] Nor can an agent acting for the trustee renew in his own name.[9]

§ 197. It is thus seen that the rule against purchasing by trustees of the *cestui que trust*, amounts almost to prohibition; for if a trustee purchases the property, and sells it at a profit, he must

bitt *v.* Tredennick, 1 B. & B. 46; Turner *v.* Hill, 11 Sim. 14; Walley *v.* Whalley, 1 Vern. 484; Holt *v.* Holt, 1 Ch. Ca. 190; Abney *v.* Miller, 2 Atk. 597; Killick *v.* Flexney, 4 Bro. Ch. 161; Luckin *v.* Rushworth, Finch, 392; Anon., 2 Ch. Ca. 207; Mulvaney *v.* Dillon, 1 B. & B. 409; Fosbrook *v.* Balguy, 1 M. & K. 226; Owen *v.* Williams, Amb. 794.

[1] Keech *v.* Sandford, Sel. Ch. Ca. 61; Griffin *v.* Griffin, 1 Sch. & Lef. 353.

[2] Eyre *v.* Dolphin, 2 B. & B. 290; Rawe *v.* Chichester, Amb. 719; Coffin *v.* Fernyhough, 2 Bro. Ch. 291; Taster *v.* Marriott, Amb. 668; James *v.* Dean, 11 Ves. 383; 15 Ves. 236; Kempton *v.* Packman, 7 Ves. 176; Giddings *v.* Giddings, 3 Russ. 241; Crop *v.* Norton, 9 Mod. 233; Buckley *v.* Lanauze, Ll. & G. t. Plunk. 327; Tanner *v.* Elworthy, 4 Beav. 487; Waters *v.* Bailey, 2 Y. & C. Ch. 218; Yem *v.* Edwards, 3 K. & J. 564; 1 De G. & J. 598; Brookman *v.* Hales, 2 V. & B. 45.

[3] Rushworth's Case, Freem. 13; Nesbitt *v.* Tredennick, 1 B. & B. 46.

[4] Jackson *v.* Welch, Ll. & G. t. Plunk. 346; Winslow *v.* Tighe, 2 B. & B. 195; Stubbs *v.* Roth, ib. 548; Webb *v.* Lugar, 2 Y. & C. 247; Jones *v.* Kearney, 1 Conn. & Laws, 34.

[5] Palmer *v.* Young, 1 Vern. 276.

[6] Fetherstonhaugh *v.* Fenwick, 17 Ves. 298; *Ex parte* Grace, 1 Bos. & P. 376; Clegg *v.* Fishwick, 1 McN. & G. 294; Clegg *v.* Edmondson, 8 De G., M. & G. 787.

[7] James *v.* Dean, 11 Ves. 383; 15 Ves. 236; *Re* Tottenham, 16 Ir. Ch. 118.

[8] Owen *v.* Williams, Amb. 734.

[9] Edwards *v.* Lewis, 3 Atk. 538.

account for it as a trustee; not because there was any fraud in the transaction, but because it is against the policy of the law to allow such transactions.[1] Nor is it material that there should be an advantage, or profit, arising out of a purchase by the trustee from the *cestui que trust*. It is not necessary to prove such advantage or profit: it is enough to show the relation and the purchase. The trustee can make no profit from his management of the estate, and he is bound not to put himself in any position where his private interests may conflict with the interests of the *cestui que trust*.[2]

§ 198. The *cestui que trust* alone can avoid such conveyances. They are at his option. And, if they are found to be beneficial to him or otherwise, he may compel the trustee to complete a purchase and take the estate and pay the purchase-money.[3]

§ 199. The above rule does not apply to mere naked or dry trustees who practically have no interest in or power over the estate, as trustees to preserve contingent remainders.[4] Where the trustee has no duty to perform, as where one is trustee in fee for another in fee, having no authority over the estate, and standing in no relation of influence over the *cestui que trust*, the person named as trustee may purchase;[5] and if the *cestui que trust* make all the arrangements for the sale, such as plans, notices, choice of auctioneer, terms and conditions, and the trustee is in no situation to obtain any exclusive information, the court will deal with the contract as with contracts between other parties.[6] A mortgagee may

[1] Hawley *v.* Cramer, 4 Cow. 117; Prevost *v.* Gratz, 1 Pet. 66, 367; 6 Wheat. 481; Edwards *v.* Meyrick, 2 Hare, 60; Hamilton *v.* Wright, 6 Cl. & Fin. 111; Fox *v.* Macreth, 2 Brow. Ch. 400; 1 Cox, 310.

[2] *Ex parte* Lacey, 6 Ves. 625; Chesterfield *v.* Janssen, 2 Ves. 138; Campbell *v.* Walker, 5 Ves. 678; 13 Ves. 138; Cane *v.* Allen, 2 Dow. 289; Slade *v.* Van Vechten, 11 Paige, 21; Davoue *v.* Fanning, 2 John. Ch. 252; Michoud *v.* Girod, 4 How. 503; Dobson *v.* Racey, 3 Sandf. 61; Morse *v.* Royal, 12 Ves. 355; *Ex parte* James, 8 Ves. 337; *Ex parte* Bennett, 10 Ves. 381; Saagar *v.* Wilson, 4 S. & W. 102.

[3] Thorp *v.* McCallum, 1 Gilm. 624; McClure *v.* Miller, 1 Bail. Ch. 107; Lister *v.* Lister, 6 Ves. 631; *Ex parte* Reynolds, 5 Ves. 707; Sanderson *v.* Walker, 13 Ves. 603.

[4] Parker *v.* White, 11 Ves. 226; Naylor *v.* Winch, 1 S. & S. 567; Sutton *v.* Jones, 15 Ves. 587; Pooley *v.* Quilter, 4 Drew. 189.

[5] Pooley *v.* Quilter, 4 Drew. 189.

[6] Coles *v.* Trecothick, 9 Ves. 248; Monro *v.* Allaire, 2 Caine's Ca. 183; Salmon *v.* Cutts, 4 De G. & Sm. 131.

purchase of the mortgagor under a decree of foreclosure or otherwise,[1] but if the mortgage contains a power of sale, the mortgagee becomes a *quasi* trustee for the mortgagor and he cannot purchase, or if he does, he becomes a constructive trustee,[2] and where land is devised to one charged with the payment of an annuity to another for life, the devisee does not stand in the position of trustee for the annuitant, and he may purchase the annuity at a profit.[3] So a *cestui que trust* may devise property to his trustee, and there is no presumption against such gifts.[4] A *cestui que trust* may purchase the trust property or other property of the trustee, and the purchase will be good, at least the trustee cannot set it aside.[5] But sales to a *cestui que trust* involving an investment of the trust fund or any dealing in relation to it may be avoided by the *cestui que trust*.[6]

§ 200. Conveyances from wards to guardians are investigated with more severity by courts than contracts between parent and child, for the reason that there is not that family relationship and affection which sustain and uphold family settlements. The relation between guardian and ward is one of great influence over the ward, and is generally founded upon the pecuniary relation between them. While the relation actually subsists no contracts can be made.[7] But if a contract or conveyance is made by the ward to the guardian just after attaining his property, and before a full settlement is made, and while the influence of the guardian is still in full force, courts will examine it in all its aspects; and

[1] Iddings *v.* Bruen, 4 Sand. Ch. 223; Murdoch's Case, 2 Bland. 461; Knight *v.* Majoribanks, 2 Mac. & G. 10; 2 Hall & T. 308.

[2] Dobson *v.* Racey, 4 Selden, 216; Waters *v.* Groom, 11 Cl. & Fin. 684; Mapps *v.* Sharpe, 32 Ill. 13. But a second mortgagee may purchase under a power of sale contained in a prior mortgage. Parkinson *v.* Hanbury, 1 Dr. & Sm. 143; Shaw *v.* Bunney, 34 L. J. Ch. 257; 11 Jur. (N. S.) 99; Kirkwood *v.* Thompson, 11 Jur. (N. S.) 385. And so a trustee may buy the equity of redemption in property on which he holds a mortgage as trustee. Britton *v.* Lewis, 8 Rich. Eq. 271; Eldridge *v.* Smith, 5 Shaw, 484.

[3] Powell *v.* Murray, 2 Edw. 636.

[4] Stump *v.* Gaby, 5 De G., M. & G. 623; Hindson *v.* Wetherill, 5 De G., M. & G. 301; but see Waters *v.* Thorn, 22 Beav. 547.

[5] Walker *v.* Brungard, 13 Sm. & M. 723; Bank *v.* Macy, 4 Ind. 362.

[6] McCants *v.* Bee, 1 McCord, Ch. 383; Chester *v.* Greer, 5 Humph. 26; Wade *v.* Harper, 3 Yerg. 383.

[7] Dawson *v.* Massey, 1 B. & B. 226; Blackmore *v.* Shelby, 8 Humph. 439; Bostwick *v.* Atkins, 3 Comst. 53; Gallatian *v.* Cunningham, 8 Cow. 361.

the guardian claiming under such a conveyance must satisfy the court that the transaction was fair and proper, and that it did not proceed from undue influence or from any fear, hope, or other unworthy motive induced in the mind of the ward by the conduct of the guardian.[1] If there is the slightest suspicion of any improper motive for a gift, as that a better or more speedy settlement may be obtained, the conveyance will be avoided and the guardian will continue to hold the property in trust for the ward. The influence of the guardian over the ward may be so subtle, and the motives of the gift may be of such a nature as to baffle a court of equity in reaching them. Therefore it has been said that although the gift from the ward may be a highly moral act and alike creditable and honorable to him, yet if the court is not entirely satisfied by clear demonstration that the gift was properly made, it will be set aside. Nothing can be allowed to stand that proceeds from the pressure of the relation of guardian and ward fresh upon the mind of the ward.[2] But if the relation has entirely ceased, and a full settlement has been made, and the ward has obtained the full control of his property, and if sufficient time has elapsed to emancipate the mind of the ward from all undue impressions and influences, it may not only be proper, but highly meritorious and honorable, for a ward to make a fitting gift to a guardian who has faithfully performed his trust, and a court fully satisfied upon these points would uphold it.[3]

§ 201. In the same manner courts of equity carefully scrutinize contracts between parents and children by which the property of children is conveyed to parents. The position and influence of a parent over a child are so controlling, that the transaction should be carefully examined, and sales by a child to a parent must appear to be fair and reasonable.[4] Such contracts are not, however,

[1] Richardson *v.* Linney, 7 B. Mon. 471; Andrews *v.* Jones, 10 Ala. 400; Dawson *v.* Massey, 1 B. & B. 229; Wright *v.* Proud, 13 Ves. 136; Wedderburn *v.* Wedderburn, 4 M. & C. 41; Aylward *v.* Kearney, 2 B. & B. 463; Mulhallen *v.* Murum, 3 Dr. & W. 317; Cary *v.* Mansfield, 1 Ves. 379.

[2] Hatch *v.* Hatch, 9 Ves. 297; Hylton *v.* Hylton, 2 Ves. 548; Pierce *v.* Waring, ib., and 1 Ves. 380, and 1 P. Wms. 120, n.; 1 Cox, 125; Wood *v.* Downes, 18 Ves. 126; Johnson *v.* Johnson, 5 Ala. 90; Williams *v.* Powell, 1 Ired. Eq. 460; Caplinger *v.* Stokes, Meigs, 175; Somes *v.* Skinner, 16 Mass. 348; Whitman's App., 28 Penn. St. 348; Hawkin's App., 32 Penn. St. 263; Scott *v.* Freeland, 7 Sm. & M. 420.

[3] Hylton *v.* Hylton, 2 Ves. 547; Hatch *v.* Hatch, 9 Ves. 548.

[4] Blunder *v.* Barker, 1 P. Wms. 639; Wallace *v.* Wallace, 2 Dr. & W. 452;

prima facie void, but there must be some affirmative proof of undue influence or other improper conduct to render the transaction void; for while the parent holds a powerful influence over the child, the law recognizes it as a rightful and proper influence, and does not presume, in the first instance, that a parent would make use of his authority and parental power to coerce, deceive, or defraud the child.[1] Therefore it is always necessary to prove some improper and undue influence, in order to set aside contracts between parents and children.[2] As purchases by a parent in the name of a child do not create a resulting trust, but are presumed, in the first instance, to be the advances made by the parent to the child, so conveyances to the parent by the child may be a proper family arrangement, and for the best interest of the child.[3] If no such considerations can be found in the case, and the conveyance, after all allowances are made, is found to have been wrongfully obtained from the child, a court of equity will set it aside or convert the parent into a trustee.[4] But the proceedings must be had at once. The child cannot wait until the parent's death, or until the rights of other parties have intervened.[5] The same rules apply when contracts are made between children, and those who

Cocking *v.* Pratt, 1 Ves. 401; Heron *v.* Heron, 2 Atk. 181; Carpenter *v.* Heriot, 1 Ed. 328; Young *v.* Peachey, 2 Atk. 258.

[1] Jenkins *v.* Pye, 12 Pet. 253, 254.

[2] Cocking *v.* Pratt, 1 Ves. 401; Hawes *v.* Wyatt, 3 Bro. Ch. 156; 2 Cox, 263; Heron *v.* Heron, 2 Atk. 161; Young *v.* Peachy, 2 Atk. 161; Carpenter *v.* Heriot, 1 Ed. 328.

[3] Blackborn *v.* Edgeley, 1 P. Wms. 607; Cooke *v.* Burtchaell, 2 Dr. & W. 165; Browne *v.* Carter, 5 Ves. 877; Tendrill *v.* Smith, 2 Atk. 85; Cory *v.* Cory, 1 Ves. 19; Kinchant *v.* Kinchant, 3 Bro. Ch. 374; Tweddell *v.* Tweddell, T. & R. 14; Hartopp *v*, Hartopp, 21 Beav. 259; Hannah *v.* Hodgson, 30 Beav. 19.

[4] King *v.* Savery, 1 Sm. & Gif. 271; 5 H. L. Ca. 627; Berdoe *v.* Dawson, 11 Jur. (N. S.) 254; Bury *v.* Oppenheim, 26 Beav. 594; Baker *v.* Bradley, 7 De G., M. & G. 597; 35 Eng. L. & Eq. 449; Field *v.* Evans, 15 Sim. 375; Slocumb *v.* Marshall, 2 Wash. C. C. 397; Brice *v.* Brice, 5 Barb. 533; Whelan *v.* Whelan, 2 Cow. 537; Young *v.* Peachy, 2 Atk. 254; Glisson *v.* Ogden, 2 Atk. 258; Baker *v.* Tucker, 2 Eng. L. & Eq. 1; Blackborn *v.* Edgerley, 1 P. Wms. 607; Morris *v.* Burroughs, 1 Atk. 402; Tendrill *v.* Smith, 2 Atk. 85; Hoghton *v.* Hoghton, 15 Beav. 278; Wallace *v.* Wallace, 2 Dr. & W. 452; Cooke *v.* Lamotte, 15 Beav. 234; Hunter *v.* Atkins, 3 M. & K. 146; Archer *v.* Hudson, 7 Beav. 551; Findley *v.* Patterson, 2 B. Mon. 76.

[5] Wright *v.* Vanderplank, 2 K. & J. 1; 8 De G., M. & G. 133; Brown *v.* Carter, 5 Ves. 877; Taylor *v.* Taylor, 8 How. 201; Crispell *v.* Dubois, 4 Barb. 393.

have put themselves *in loco parentis;*[1] and so when family relatives make use of their position and influence to obtain undue and improper advantages, as where two brothers obtained a deed from a sister, it was set aside.[2]

§ 202. The relation of attorney and client is one of especial confidence and influence, and while that relation continues the attorney cannot receive gifts or make purchases from the client.[3] It has been said in some cases that the attorney is absolutely prohibited from entering into contracts with his clients.[4] If the rule is not quite so peremptory as this, it at least goes to the extent of prohibiting him from contracting with his client for an interest in the subject-matter of the litigation.[5] The client is so completely in the hands of the attorney, in relation to the subject-matter of litigation, that it would be almost impossible for him to enter into a free and fair contract in regard to it. Beside, it is against the policy of the law that attorneys should obtain interests in litigated claims, and exercise their offices under such influences of gain. In all cases the burden is upon the attorney, making a purchase of a client, to vindicate the transaction from all suspicion.[6] And

[1] Archer *v.* Hudson, 7 Beav. 551; Maitland *v.* Backhouse, 16 Sim. 68; Maitland *v.* Irving, 15 Sim. 437.

[2] Sears *v.* Shafer, 2 Seld. 268; Hewitt *v.* Crane, 2 Halst. Ch. 159; Boney *v.* Hollingsworth, 23 Ala. 690.

[3] Welles *v.* Middleton, 1 Cox, 125; Wright *v.* Proud, 13 Ves. 137; Cheslyn *v.* Dalby, 2 Y. & Col. 194; Hunter *v.* Atkins, 3 M. & K. 113; Wood *v.* Downes, 18 Ves. 126; Savery *v.* King, 35 Eng. L. & Eq. 100; De Montmorency *v.* Devereaux, 7 Cl. & Fin. 188; Jones *v.* Tripp, Jac. 322; Godard *v.* Carlisle, 9 Price, 169; Edwards *v.* Meyrick, 2 Hare, 68.

[4] Wright *v.* Proud, 13 Ves. 138; Holman *v.* Loynes, 4 De G., M. & G. 270; Thompson *v.* Judge, 3 Dr. 306; 19 Jur. 583; 24 L. J. Ch. 785; Henry *v.* Raiman, 25 Penn. St. 354; West *v.* Raymond, 21 Ind. 305.

[5] Oldham *v.* Hand, 2 Ves. 259; Wood *v.* Downes, 18 Ves. 120; Hall *v.* Hallett, 1 Cox, 134; West *v.* Raymond, 21 Ind. 305.

[6] Newman *v.* Payne, 2 Ves. Jr. 199; Welles *v.* Middleton, 1 Cox, 112; 4 Bro. P. C. 245; Harris *v.* Tremenheere, 15 Ves. 34; Hunter *v.* Atkins, 3 M. & K. 135; Kane *v.* Allen, 2 Dow. 289; Champion *v.* Rigby, 1 R. & M. 539; Bellow *v.* Russell, 1 B. & B. 107; Gibson *v.* Jeyes, 6 Ves. 277; Uppington *v.* Buller, 2 Dr. & W. 184; Walmsley *v.* Booth, 2 Atk. 30; Montesquieu *v.* Sandys, 18 Ves. 302; Edwards *v.* Meyrick, 2 Hare, 60; Wood *v.* Downes, 18 Ves. 120; Lewis *v.* Hillman, 3 H. L. Ca. 607; Salmon *v.* Cutts, 4 De G. & Sm. 131; Holman *v.* Loynes, 4 De G., M. & G. 270; King *v.* Savery, 5 H. L. Ca. 627; Robinson *v.* Briggs, 1 Sm. & Gif. 184; Greenfield's Est., 2 Harris, 489; Merritt *v.* Lambert, 10 Paige, 357; Wallis *v.* Loubat, 2 Denio, 607; Howell *v.* Ransom,

if the attorney cannot produce evidence, that puts the transaction clearly beyond all doubt or question, it will be set aside or he will be converted into a trustee.[1] This disability of an attorney continues as long as the relation of attorney and client continues, and as much longer as the influence of the relation can be supposed to extend. If the relation has ceased, but the influence of the relation continues to affect the minds of the parties, all contracts made under the influence will be avoided.[2] But if the relation has entirely ceased, and there can be supposed to be no influence remaining, the rule will not apply.[3] And so, if an attorney makes a purchase of a client of property entirely disconnected with the subject of the litigation, and the transaction is in all respects as if it had taken place between strangers, the rule will not apply.[4] So the rule does not apply to a gift to an attorney in the will of a client, if the will is a good and valid instrument in the courts where it is presented for probate;[5] and a voidable conveyance to an attorney may be confirmed in the will of the client.[6] But the rule will not apply to an attorney incidentally consulted concerning some point of the litigation, but who is not employed or confided in, for the management of the case,[7] nor will it apply to the attorney upon the other side.[8] Nor will it apply after the relation has ceased and the attorney has assumed a hos-

11 Paige, 538; Evans *v.* Ellis, 5 Denio, 640; Barry *v.* Whitney, 3 Sand. S. C. 696; Hawley *v.* Cramer, 4 Cow. 717; Mott *v.* Harrington, 12 Vt. 199; Miles *v.* Ervin, 1 McCord, Ch. 524; Waters *v.* Thorn, 22 Beav. 547; Bank *v.* Tyrrell, 27 Beav. 273; 10 H. L. Ca. 26; Wall *v.* Cockerell, 10 H. L. Ca. 229; Brown *v.* Kennedy, 33 Beav. 133; Smedley *v.* Varley, 23 Beav. 359; O'Brien *v.* Lewis, 4 Gif. 221; Corley *v.* Stafford, 1 De G. & J. 238; Spring *v.* Pride, 10 Jur. (N. S.) 646; Gresley *v.* Mousley, 4 De G. & J. 78; Barnard *v.* Hunter, 2 Jur. (N. S.) 1213; Douglass *v.* Culverwell, 31 L. J. Ch. 65, 543; Brock *v.* Barnes, 40 Barb. 521.

[1] Ibid.; Smith *v.* Brotherline, 62 Penn. St. 461.

[2] Henry *v.* Raiman, 25 Penn. St. 354; Leisenring *v.* Black, 5 Watts, 303; Hockenbury *v.* Carlisle, 5 W. & S. 350.

[3] Wood *v.* Downes, 18 Ves. 127.

[4] Edwards *v.* Meyrick, 2 Hare, 60; Bellows *v.* Russell, 1 B. & B. 104; Montesquieu *v.* Sandys, 18 Ves. 302.

[5] Hindson *v.* Wetherell, 5 De G., M. & G. 30, overruling same case, 1 Sm. & G., 604. But see 23 L. Rev. 442, and notes to 1 Sm. & G. 604.

[6] Stump *v.* Gaby, 2 De G., M. & G. 623. But see Waters *v.* Thorn, 22 Beav. 447.

[7] Dobbins *v.* Stevens, 17 S. & R. 13; Devinney *v.* Norris, 8 Watts, 314.

[8] Bank *v.* Foster, 8 Watts, 305.

tile position in endeavoring to collect his fees.[1] But it has been held that an attorney having a lien or an execution in favor of his client, could not buy in land of his client at a sale thereof on execution.[2] If an attorney takes an absolute deed from a client in payment of his fees, the court may order it to stand as a mortgage security,[3] and where there was a fair agreement that an attorney's fees should be charged upon the estate, if recovered, the court allowed it to stand in the absence of undue influence,[4] and so the court will not interfere after a great lapse of time where the sale was for full value.[5]

§ 203. All the dealings between attorney and client will be carefully examined by courts. Thus a bond obtained from a poor and distressed client, the consideration not appearing with sufficient clearness, was set aside,[6] and so a bond was not allowed to stand except for the amount of fees actually due,[7] and a judgment was inquired into after a considerable lapse of time.[8] And even where a barrister married a lady client, and undertook to draw the marriage settlement, according to the stipulations between them, it was held to be open to investigation by the court.[9] The same rules are applied to all persons standing in the relation of attorneys or confidential advisers, although they are not attorneys in fact; thus clerks in an attorney's office, who do business for the client and obtain a knowledge of his affairs and his confidence, cannot avail themselves of their position to make favorable bargains or purchases,[10] and so one who acts as a confidential adviser in a matter before a magistrate, where attorneys are not employed, is under the same obligations and disabilities.[11]

[1] Johnson *v.* Fesemeyer, 3 De G. & J. 13; Smith *v.* Brotherline, 62 Penn. St. 461.

[2] Stockton *v.* Ford, 11 How. 232.

[3] Pearson *v.* Benson, 28 Beav. 598; Morgan *v.* Higgins, 5 Jur. (N. S.) 236.

[4] Moss *v.* Bainbridge, 6 De G., M. & G. 292; Blagrave *v.* Routh, 2 K. & J. 509.

[5] Clanricarde *v.* Henning, 30 Beav. 175.

[6] Proof *v.* Hines, Cas. t. Talb. 111; Walmesley *v.* Booth, 2 Atk. 99.

[7] Newman *v.* Payne, 4 Bro. Ch. 350; 2 Ves. Jr. 200; Langstaffe *v.* Taylor, 14 Ves. 262; Pitcher *v.* Rigby, 9 Price, 79; Jones *v.* Roberts, 9 Beav. 419.

[8] Drapers' Company *v.* Davis, 2 Atk. 295.

[9] Corley *v.* Stafford, 1 De G. & J. 258.

[10] Hobday *v.* Peters, 28 Beav. 349; 6 Jur. (N. S.) 794; Cowdry *v.* Day, 5 Jur. (N. S.) 1199; Gardner *v.* Ogden, 22 N. Y. 327; Poillon *v.* Martin, 1 Sandf. Ch. 569.

[11] Buffalow *v.* Buffalow, 5 Dev. & Bat. Eq. 241.

§ 204. The same principles apply to transactions between all persons standing in confidential and influential relations to each other. The person, thus possessing the confidence of another, and having an influence by reason of such confidence, cannot use his influence to obtain contracts, conveyances or property. *Quasi* guardians, confidential advisers, stewards, keepers of asylums, in which the *quasi ward* may have been treated, or confidential medical advisers, all come within the rule.[1] But the mere fact that the donee is an attending physician, there being no confidential relation, will not avoid a deed.[2]

§ 205. Upon the same principles, administrators and executors cannot purchase the estate under their charge to administer. They cannot purchase directly of themselves, nor from the heirs, legatees, devisees, or other persons interested in the estate,[3] nor can they purchase indirectly by procuring a third person to purchase in the first instance, and by receiving a conveyance from such third person.[4] This rule is so strict, that they cannot purchase any of the assets of the estate under their charge, although the assets are ordered by the court to be sold at public auction;[5] and

[1] Trevelyan *v.* Charter, 9 Beav. 140; 11 Cl. & Fin. 714; Revett *v.* Harvey, 1 S. & S. 502; Huguenin *v.* Baseley, 14 Ves. 273; Gray *v.* Mansfield, 1 Ves. 379; Wright *v.* Proud, 13 Ves. 136; Ahearne *v.* Hogan, 1 Dr. 310; Billing *v.* Southee, 9 Hare, 534; 16 Jur. 188; Crispell *v.* Dubois, 4 Barb. 393; Blackie *v.* Clarke, 22 L. J. Ch. 377; Whitehorn *v.* Hines, 1 Munf. 559; Shallcross *v.* Oldham, 2 John. & Hem. 609; Dent *v.* Bennett, 4 M. & Cr. 269; Gibson *v.* Russell, 2 Y. & C. N. R. 104; Pratt *v.* Barker, 1 Sim. 1.

[2] Doggett *v.* Lane, 12 Mo. 215.

[3] Davoue *v.* Fanning, 2 John. Ch. 252; Van Epps *v.* Van Epps, 9 Paige, 237; Ward *v.* Smith, 3 Sand. Ch. 592; Ames *v.* Browning, 1 Bradf. 321; Rogers *v.* Rogers, 3 Wend. 503; Bostwick *v.* Atkins, 1 Comst. 53; Michoud *v.* Girod, 4 How. 504; Drysdale's App. 14 Penn. St. 531; Moody *v.* Vandyke, 4 Binn. 31; Beeson *v.* Beeson, 9 Barr. 279; Winter *v.* Geroe, 1 Halst. Ch. 319; Conway *v.* Green, 1 H. & J. 151; Bailey *v.* Robinson, 1 Grat. 4; Hudson *v.* Hudson, 5 Munf. 180; Baines *v.* McGee, 1 Sm. & M. 208; Baxter *v.* Costin, 1 Busb. Eq. 262; Breckenridge *v.* Holland, 2 Blackf. 377; Edmunds *v.* Crenshaw, 1 McCord, Ch. 252. But in South Carolina an executor may purchase the personal property. Stallings *v.* Foreman, 2 Hill, Eq. 401; and so in Alabama, Julian *v.* Reynolds, 8 Ala. 680.

[4] Davoue *v.* Fanning, 2 John. Ch. 252; Paul *v.* Squibb, 12 Penn. St. 296; Woodruff *v.* Cook, 2 Edw. Ch. 259; Hawley *v.* Cramer, 4 Cow. 717; Beaubien *v.* Poupard, Harr. Ch. 206; Buckles *v.* Lafferty, 2 Rob. 292; Hunt *v.* Bass, 2 Dev. Eq. 292.

[5] Wallington's Est. 1 Ashm. 307; Beeson *v.* Beeson, 9 Barr. 279; Rham *v.*

even where a creditor seized a portion of the estate and exposed it to public sale, it was held that the executor or administrator could not purchase.[1] So if an executor join with others in the purchase of the estate the sale may be avoided.[2] If however, the estate is sold in good faith to a stranger, with no collusion between him and the executor, there is nothing to prevent the executor from purchasing it afterwards like any other property.[3] If fraud is superadded to a purchase by an executor, or any use of his situation is made to make a more favorable purchase, it will of course be avoided, or he will be ordered to account for the property and all the profits received.[4] But generally a purchase of the assets of an estate by an executor is not void, but only voidable, and such sale may be confirmed by all the parties interested in the estate;[5] and so a long acquiescence in a purchase made by an executor, by all the heirs, would be held to be a confirmation.[6] If an administrator purchases the estate at his own sale, and afterwards conveys the estate to a third person, his vendee will be charged with notice of the defect of title, as it would be apparent upon the face of the deed.[7] But if the administrator should collusively convey to a third person and take back a deed from him, and then himself sell, the purchaser would not probably be charged with notice unless he had actual notice.

§ 206. The relation of principal and agent is a fiduciary one, and the same observations apply as to other relations of trust and

North, 2 Yeates, 117; Jewett *v.* Miller, 10 N. Y. 402; Fox *v.* Macreth, 1 Lead. Ca. Eq. 1.

[1] Spindler *v.* Atkinson, 3 Md. 410; Fleming *v.* Teran, 12 Ga. 394; Wyncoop *v.* Wyncoop, 12 Ind. 206. But the contrary rule was held in Fisk *v.* Sarber, 6 W. & S. 18; Prevost *v.* Gratz, 1 Pet. C. C. 364; Campbell *v.* Johnson, 1 Sandf. Ch. 148; Bank of Orleans *v.* Torrey, 7 Hill, 260.

[2] Mitchum v. Mitchum, 3 Dana, 260; Paul *v.* Squibb, 12 Penn. St. 296.

[3] Silverthorn *v.* McKinister, 12 Penn. St. 67.

[4] Van Horn *v.* Fonda, 5 John. Ch. 388; Hudson *v.* Hudson, 5 Munf. 180.

[5] Harrington *v.* Brown, 5 Pick. 519; Bruch *v.* Lantz, 2 Rawle, 392; Pennock's App., 14 Penn. St. 446; Longworth *v.* Goforth, Wright, 192; Dunlap *v.* Mitchell, 10 Ohio, 117; Williams *v.* Marshall, 4 G. & J. 377; Moore *v.* Hilton, 12 Leigh, 2; Scott *v.* Freeland, 7 Sm. & M. 410; Lyon *v.* Lyon, 8 Ired. Eq. 201.

[6] Jennison *v.* Hapgood, 7 Pick. 1; Hawley *v.* Cramer, 4 Cow. 719; Ward *v.* Smith, 3 Sandf. Ch. 592; Baker *v.* Read, 18 Beav. 398; Musselman *v.* Eshelman, 10 Barr, 394; Bell *v.* Webb, 2 Gill, 164; Todd *v.* Moore, 1 Leigh, 457.

[7] Lazarus *v.* Bryson, 3 Binn. 59; Ward *v.* Smith, 3 Sandf. 592.

confidence. Some have doubted whether it would not have been wiser to have prohibited all contracts between parties sustaining these relations to each other, and to have thus taken away all temptation to abuse the trust, rather than to investigate each case as it arises.[1] But perhaps the entire freedom of trade and business, and the convenience of society, demand that there should be at least the possibility of dealing between persons bearing these relations, and thus there is no absolute prohibition. The principal may buy and sell of the agent, and he may make an agent the object of his bounty, but there must be the utmost good faith and frankness in the dealing.[2] The principal is entitled to the best skill and judgment of his agent in the conduct of his affairs. If at the same time the agent is at liberty to purchase the property of his principal, there would be such a conflict between his duty and his interest, that there could be no safety in business. An agent, therefore, if he purchases property of his principal, must communicate fully and truly every fact in relation to such property within his knowledge; and he must also be known as the purchaser, for if he acts secretly the contract will certainly be held to be fraudulent; and so if he is employed to purchase for another and he purchases for himself, he will be held to be a trustee.[3] All the knowledge of the agent belongs to the principal for whom he acts, and if the agent use it for his own benefit, he will become a trustee for his principal.[4] Therefore, whatever an agent may be

[1] Dunbar *v.* Tredennick, 2 B. & B. 319; Norris *v.* La Neve, 3 Atk. 38.

[2] Selsey *v.* Rhoades, 2 S. & S. 49; 1 Bligh, 1; Kerr *v.* Dungannon, 1 Dr. & W. 509, 541; Huguenin *v.* Baseley, 14 Ves. 273; Molony *v.* Kernan, 2 Dr. & W. 31; Harris *v.* Tremenheere, 15 Ves. 40; Winchelsea *v.* Garrety, 1 M. & K. 253; Benson *v.* Heatham, 1 Y. & C. N. R. 326; Neeley *v.* Anderson, 2 Strob. Eq. 262; Brooke *v.* Berry, 2 Gill, 83.

[3] Lees *v.* Nuttall, 1 R. & M. 53; Taml. 282; Church *v.* Marine Ins. Co., 1 Mason, 341; Crowe *v.* Ballard, 3 Bro. Ch. 120; Barker *v.* Ins. Co., 2 Mason, 369; Massey *v.* Davies, 2 Ves. Jr. 318; Woodhouse *v.* Meredith, 1 J. & W. 204; Purcell *v.* Macnamara, 14 Ves. 91; Wott *v.* Grove, 2 Sch. & Lef. 492; Lowther *v.* Lowther, 13 Ves. 102; Green *v.* Winter, 1 John. Ch. 27; Morret *v.* Paske, 2 Atk. 53; Coles *v.* Trecothick, 9 Ves. 246; Parkist *v.* Alexander, 1 John. Ch. 394; Gray *v.* Mansfield, 1 Ves. 379; Belt, Suppl. 167; Fox *v.* Mackreth, 2 Bro. Ch. 400; 2 Cox, 320; 1 Lead. Ca. Eq. 92, and notes.

[4] Gillett *v.* Peppercorne, 3 Beav. 78; Taylor *v.* Salmon, 2 Mee. & Comp. 139; 4 M. & C. 139; Voorhees *v.* Church, 8 Barb. 136; Van Epps *v.* Van Epps, 9 Paige, 237; Torrey *v.* Bank, &c., 9 Paige, 649; Cram *v.* Mitchell, 1 Sandf. 251; Dobson *v.* Racey, 3 Sandf. 61; Reed *v.* Norris, 2 M. & Cr. 361; Ringo *v.* Binns, 10 Pet. 269; Farnham *v.* Brooks, 9 Pick. 212.

employed to do, he cannot use his position nor the knowledge obtained by his employment, to obtain a bargain from his principal. In some cases he may innocently purchase of his principal, but if he conceals himself and acts through another, either in purchasing from or selling to his principal, he may be held as a trustee, or the contract may be entirely avoided; [1] or if he accepts any benefits in conducting the business of his principal, he will hold them in trust for him.[2]

§ 207. The directors of corporations are trustees and agents of the shareholders and of the corporation, and the same rules are applied to the contracts of directors with the corporation, as are applied to the dealings of other parties holding a fiduciary relation to each other.[3] The directors are intrusted with the management of the property of the corporation for the best interests of all the members, and the directors are bound to execute their trust; nor must they allow their private interests to interfere with the duties of the trust that they have assumed. It it said that the contracts of trustees are of two classes. One class consists of contracts made by trustees with themselves, or with a board of trustees or directors of which they are members. These contracts are void from the fact that no man can contract with himself. If therefore a board of directors should convey all the property of a corporation to themselves, the conveyance would be void, without any inquiry into its fairness, or whether it was beneficial to the corporation or not. And the same rule applies if a board of directors convey the property of a corporation, or any part of it, to one of their number, he being one of the trustees negotiating a contract with

[1] Winn *v.* Dillon, 27 Miss. 494; Lewis *v.* Hillman, 3 H. L. Cas. 629; Parkist *v.* Alexander, 1 John. Ch. 394; Sweet *v.* Jacocks, 6 Paige, 364; Bank of Orleans *v.* Torrey, 7 Hill, 260; 9 Paige, 653; Myers's App., 2 Barr, 463; Rankin *v.* Porter, 7 Watts, 387; Piatt *v.* Oliver, 2 McLean, 267; 3 How. 353; Church *v.* Ins. Co., 1 Mason, 341; Teakle *v.* Barley, 2 Brock. 44; Oldham *v.* Jones, 5 B. Mon. 467; Banks *v.* Judah, 8 Conn. 146; Copeland *v.* Ins. Co., 6 Pick. 198.

[2] Bailey *v.* Watkins, Sug. Law of Prop. 726; Gaskell *v.* Chambers, 26 Beav. 360.

[3] Gaskell *v.* Chambers, 26 Beav. 360; Great Luxembourg R. Co. *v.* Magnay, 586; *Ex parte* Bennett, 18 Beav. 339; Cumberland Coal Co. *v.* Hoffman Steam Coal Co., 18 Md. 456; Cumberland Coal Co. *v.* Sherman, 30 Barb. 553; Aberdeen R. Co. *v.* Blaikie, 1 McQueen, 461; Michoud *v.* Girod, 4 How. 554; Hodges *v.* New Eng. Screw Co., 1 R. I. 321; York *v.* North Midland R. Co., 16 Beav. 485; Benson *v.* Hawthorne, 6 Y. & Col. 326; Verplanck *v.* Ins. Co., 1 Edw. Ch. 84; Percy *v.* Milladon, 3 La. 568; Robinson *v.* Smith, 3 Paige, 222.

himself.[1] The other class of contracts is where a trustee contracts with the *cestui que trust*, or a third person. These contracts are not void; as where a director makes a purchase of property from the corporation itself, acting independently of its directors, the contract is not void; but the same rules apply that apply to other trustees purchasing of the *cestui que trust:* the burden is upon the trustee to vindicate the transaction from all suspicion.[2] And so all advantages, all purchases, all sales, and all sums of money received by directors in dealing with the property of the corporation, are made and received by them as trustees of the corporation, and they must account for all such moneys, or advantages received by them by reason of their position as trustees.[3]

§ 208. Again, if the parents, relations, agents, or friends of young persons hold out inducements of marriage by representing the amount of property that will come to one or the other of the parties; or, if they hold out pecuniary considerations to induce the marriage, and if the marriage and a marriage settlement take place upon the faith of such representations and inducements, the persons making them will be bound to make them good: if the persons making the representations and holding out the inducements have the property referred to in their hands or under their control, a court of equity will construe them into trustees of such property for the parties to whom the inducements were held out; and the court will compel them to execute the trust by making good the representations or inducements, if they are of such a character that a party entering into a marriage might reasonably have relied upon them.[4] If, however, a person states his intention to confer property upon one of the parties to a marriage, as that he has made his will giving a certain estate to one of the parties, and that he does not know any reason, or have any intention of altering it, but at the same time refuses to make any contract or agreement, or to be bound in any way not to alter his will, equity will not compel the execution of such a representation or inten-

[1] Cumberland Coal Co. *v.* Sherman, 30 Barb. 563.

[2] Ibid; Beeson *v.* Beeson, 9 Penn. St. 280.

[3] Gaskell *v.* Chambers, 26 Beav. 360; Bowers *v.* City of Toronto, 11 Moore, P. C. Cas. 463; *Ex parte* Hill, 32 L. J. Ch. 154.

[4] Hamersley *v.* De Biel, 12 Cl. & Fin. 45; Downes *v.* Jennings, 32 Beav. 290; Hunt *v.* Mathews, 1 Vern. 408; Walford *v.* Gray, 11 Jur. (N. S.) 106, 403; Jordan *v.* Money, 5 H. L. Cas. 185; 8 Jur. (N. S.) 281; Caton *v.* Caton, L. R. 2 H. L. 127; 1 Story, Eq. Jur. §§ 268–272.

tion; and the estate named cannot be affected by a constructive trust in favor of the party to the marriage, in case the will is afterwards altered, and the estate is given to some other person.[1]

§ 209. These rules apply to every kind of fiduciary relation. The principle is the same in all of them. Assignees of bankrupt or insolvent estates are subject to the same rules, whether they are appointed by courts and by operation of law, or by voluntary assignments, or by deeds of trust for creditors.[2] So the solicitors of a bankrupt cannot purchase his property. Committees or guardians of a lunatic cannot obtain the ownership of the property,[3] nor can the directors, trustees, or governors of a charity so deal with the funds of the charity, or take leases of the charity lands, as to make a profit to themselves.[4] In all these cases the fiduciary must account for all the trust property that comes to his hands, whether by purchase or otherwise, and for all profits which may come to him by dealing with such property, and even for all bonuses or gratuities given to him by strangers for contracts made with them in relation to the trust property.[5]

§ 210. But equity goes even further than this. It not only watches over these defined relations of parties, but it scrutinizes the undefined relations of friendly habits of intercourse, personal reliance, and confidential advice.[6] It is well known that habits of kindness, confidence and trust grow between neighbors and friends; and if advantage is taken of such relations to obtain an unfair bargain, equity will set it aside or convert the offending party into a trustee.[7] Of course no rules can be laid down by which to judge all such cases; for every case must of necessity depend upon its own facts.[8] Nor will a gift or sale be set aside merely because it

[1] Maunsell *v.* Hedges, 4 H. L. Cas. 1039.

[2] *Ex parte* Hughes, 6 Ves. 617; Morse *v.* Royal, 12 Ves. 372; *Ex parte* Morgan, 12 Ves. 6; *Ex parte* Lacey, 6 Ves. 625; *Ex parte* Reynolds, 5 Ves. 707; *Ex parte* Bennett, 10 Ves. 381; Campbell *v.* McLain, 23 Leg. Intel. 26, Phila.; Fisk *v.* Sarber, 6 W. & S. 18; Beeson *v.* Beeson, 9 Barr, 284; Dorsey *v.* Dorsey, 3 H. & J. 410; Chapin *v.* Weed, 1 Clark, 264; Saltmarsh *v.* Beene, 4 Porter, 283; Harrison *v.* Mocks, 10 Ala. 185; Wade *v.* Harper, 3 Yerg. 383.

[3] Wright *v.* Proud, 13 Ves. 136.

[4] Attorney-General *v.* Clarendon, 17 Ves. 500.

[5] Bailey *v.* Watkins, Sug. Law of Prop. 726.

[6] Hunter *v.* Atkins, 3 M. & K. 140; James *v.* Holmes, 8 Jur. (N. S.) 553, 732.

[7] Ibid.; Dent *v.* Bennett, 4 M. & Cr. 277; Smith *v.* Kay, 7 H. L. Cas. 750.

[8] Hunter *v.* Atkins, 3 M. & K. 140.

is to a confidential friend or adviser, even though it is made by an old and infirm person, or by one of weak mind; but if there is any proof of any superadded concealment, misrepresentation, or contrivance, or any art by which the party was thrown off his guard, or unduly influenced by his trust and confidence in, or partiality for a supposed friend, equity will interpose and correct the wrong.[1] Dealings of ship-owners with their masters,[2] of parishioners with their clergymen,[3] of medical advisers with their patients,[4] of friends and neighbors who by their situation and habits of intercourse have obtained the confidence of each other,[5] and of a man and woman living together as husband and wife,[6] come within this rule. And so the relation of landlord and tenant, partner and partner, principal and surety, may create such influences of trust and confidence that courts of equity will construe a trust to arise out of their contracts, or will decree such contracts to be set aside.[7]

§ 211. So property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured; or, as Lord Ch. Justice Wilmot said, "Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it."[8] This principle of course cannot

[1] Dent *v.* Bennett, 7 Sim. 539; 4 M. & C. 269; Huguenin *v.* Baseley, 14 Ves. 273; Gibson *v.* Russell, 2 N. C. C. 104; Griffiths *v.* Robins, 3 Mad. 191; Popham *v.* Brooke, 5 Russ. 8.

[2] Shallcross *v.* Oldham, 2 John. & H. 609.

[3] Greenfield's Estate, 24 Penn. St. 232.

[4] Pratt *v.* Barker, 1 Sim. 1; 4 Russ. 507; Crisspell *v.* Dubois, 4 Barb. 393; Billing *v.* Southee, 10 Eng. L. & Eq. 37.

[5] Hunter *v.* Atkins, 3 M. & K. 113; Greenfield's Estate, 14 Penn. St. 489; Cooke *v.* Lamotte, 15 Beav. 234; Smith *v.* Kay, 7 H. L. Cas. 750.

[6] James *v.* Holmes, 8 Jur. (N. S.) 553, 732.

[7] Maddeford *v.* Austwick, 1 Sim. 89; Farnham *v.* Brooks, 9 Pick. 212; Oliver *v.* Court, 8 Price, 127; Griffiths *v.* Robins, 3 Mad. 191; People *v.* Jansen, 7 John. 332; 2 John. 554; Dawson *v.* Lawes, Kay, 280; Campbell *v.* Moulton, 30 Vt. 667; Boultbee *v.* Stubbs, 18 Ves. 23; *Ex parte* Rushworth, 10 Ves. 409; Hayes *v.* Ward, 4 John. Ch. 123; Mayhew *v.* Crickett, 2 Swanst. 186.

[8] Bridgman *v.* Green, 2 Ves. 627; Wilm. 58, 64; Luttrell *v.* Olmius, cited 11 Ves. 638; 14 Ves. 290; Huguenin *v.* Baseley, 14 Ves. 289.

prevail against a purchaser in good faith for a valuable consideration, and without notice of any fraudulent influence.

§ 212. So a contract intended to defraud third persons, who are not parties to it, will be set aside, or a trust will be declared for such third persons. Thus if property is conveyed by a debtor for the purpose of defrauding his creditors, the conveyance is void at law, and in some cases equity will construe it to create a trust for the creditors.[1] And so if in an arrangement and composition of creditors with the debtor, one of them secretly obtains an extra advantage for executing the composition deed, he will be converted into a trustee by reason of the fraud, and the agreement will be null and void.[2]

§ 213. If a man or woman on the point of marriage privately convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust, or subject to the rights of the defrauded husband or wife.[3] But such conveyance is not void at law unless there is an actual fraud.[4] Nor will such

[1] Loomis *v.* Lift, 16 Barb. 543. See 1 Story, Eq. Jur. §§ 350–381.

[2] Chesterfield *v.* Janssen, 2 Ves. 156; 15 Ves. 52; Mann *v.* Darlington, 15 Penn. St. 310; Case *v.* Gerrish, 15 Pick. 50; Ramsdell *v.* Edgarton, 8 Met. 227; Lothrop *v.* King, 8 Cush. 382; Partridge *v.* Messer, 14 Gray, 180; Kahn *v.* Gunherts, 9 Ind. 430; Spooner *v.* Whiston, 8 Moore, 580; Mallalieu *v.* Hodgson, 16 Ad. & El. N. R. 689–715; Turner *v.* Hoole, Dowl. & Ry. N. P. 27; Smith *v.* Cuff, 6 M. & S. 160; Horton *v.* Riley, 11 M. & W. 492; Alsager *v.* Spalding, 6 Scott, 204; Arnold, 181; 4 Bing. N. C. 407; Leicester *v.* Rose, 4 East, 380; Howden *v.* Haight, 11 Ad. & El. 1038; Fawcett *v.* Gee, 3 Anst. 910; Breck *v.* Cole, 4 Sandf. 83; Knight *v.* Hunt, 5 Bing. 433.

[3] Hunt *v.* Mathews, 1 Vern. 408; England *v.* Downes, 2 Beav. 522; Ball *v.* Montgomery, 2 Ves. Jr. 191; Strathmore *v.* Bowes, 2 Bro. Ch. 345; 2 Cox, 485; 1 Ves. Jr. 22; Goddard *v.* Snow, 1 Russ. 485; Tucker *v.* Andrews, 13 Me. 124; Waller *v.* Armistead, 2 Leigh, 11; Logan *v.* Simmons, 3 Ired. Eq. 487; Terry *v.* Hopkins, 1 Hill, Eq. 1; Duncan's App., 43 Penn. St. 67; Wrigley *v.* Swainson, 3 De G. & Sm. 458; Manes *v.* Durant, 2 Rich. Eq. 404; McAfee *v.* Ferguson, 9 Mon. 495; Linker *v.* Smith, 4 Wash. 224; Ramsay *v.* Joyce, 1 McMull. Eq. 237; Williams *v.* Carle, 2 Stockt. Ch. 543; Lewellin *v.* Cobbald, 1 Sm. & Gif. 376; Cheshire *v.* Payne, 16 B. Mon. 618; Carleton *v.* Dorset, 2 Vern. 17; 2 Cox, 63; McDonnell *v.* Hesilridge, 16 Beav. 346; Howard *v.* Hooker, 2 Ch. R. 81; St. George *v.* Wake, 1 M. & K. 622; Taylor *v.* Pugh, 1 Hare, 608; Ashton *v.* McDougall, 5 Beav. 56; Griggs *v.* Staples, 2 De G. & Sm. 572; Smith *v.* Smith, 2 Halst. Ch. 515; Petty *v.* Petty, 4 B. Mon. 215.

[4] Richards *v.* Lewis, 11 C. B. 1035; Logan *v.* Simmons, 1 Dev. & Bat. Law, 13.

conveyance be avoided, if made for a good consideration,[1] or for a valuable consideration;[2] or with the knowledge or concurrence of the other party, although an infant;[3] and the party alleging fraud must prove it to the satisfaction of the court.[4] For the same reasons a conveyance by a husband during the pendency of a divorce suit on the part of his wife, in order to avoid the payment of alimony, will be held to be fraudulent and void.[5] If an intended husband has no knowledge of the particular property conveyed, and the negotiations for the marriage have no reference to that particular property, its conveyance is not fraudulent, unless it was actually intended as a fraud upon him,[6] and so there must be an intent to defraud the individual who is afterwards married; for if a deed is made to defraud another individual who is not married, but a marriage afterwards takes place with a person, not in contemplation at the time, there is no fraud.[7] If no notice of the conveyance is shown to have been given, it will be presumed that no notice was had;[8] and it is always a question of fact upon the whole transaction whether the conveyance is fraudulent.[9] If, however, the property is of that character that the husband could obtain no right over it by the marriage, the conveyance of it by the wife before marriage cannot be set aside.[10]

[1] De Manville *v.* Crompton, 1 V. & B. 354; England *v.* Downes, 2 Beav. 522; Smith *v.* Smith, 2 Halst. Ch. 515; Tucker *v.* Andrews, 13 Me. 124; Manes *v.* Durant, 2 Rich. Eq. 404; Terry *v.* Hopkins, 1 Hill, Eq. 1; Hunt *v.* Mathews, 1 Vern. 408; King *v.* Cotton, 2 P. Wms. 674; Mos. 259.

[2] Blanchet *v.* Foster, 2 Ves. 264. But if the consideration is fraudulently stated in the deed, it will make the conveyance fraudulent. Lewellin *v.* Cobbald, 1 Sm. & Giff. 376.

[3] St. George *v.* Wake, 1 M. & K. 610; McClure *v.* Miller, 1 Bail. Eq. 108; Knottman *v.* Peyton, 1 Speer's Eq. 46; Terry *v.* Hopkins, 1 Hill. Eq. 1; Cheshire *v.* Payne, 16 B. Mon. 618; Fletcher *v.* Ashley, 6 Grat. 332; Slocombe *v.* Glubb, 2 Bro. Ch. 545.

[4] St. George *v.* Wake, 1 M. & K. 610; England *v.* Downes, 2 Beav. 522.

[5] Blenkinsop *v.* Blenkinsop, 1 De G., M. & G. 495; Krupp *v.* Scholl, 10 Penn. St. 193.

[6] Thomas *v.* Williams, Mos. 177; De Manville *v.* Crompton, 1 V. & B. 354; St. George *v.* Wake, 1 M. & K. 622; and see Goddard *v.* Snow, 1 Russ. 485.

[7] Strathmore *v.* Bowes, 1 Ves. Jr. 22; 2 Bro. Ch. 345; 2 Cox, 28; 6 Bro. P. C. 427; 1 Lead. Ca. Eq. 325; England *v.* Downes, 2 Beav. 522; Cheshire *v.* Payne, 16 B. Mon. 618; Wilson *v.* Daniel, 13 B. Mon. 351.

[8] Cole *v.* O'Neill, 3 Md. 174; Wrigley *v.* Swainson, 3 De G. & Sm. 458.

[9] Ibid.

[10] Ibid. Whether the deed on record is notice or not, is a question. Cole *v.* O'Neill, 3 Md. 174.

§ 214. There are certain purposes for which neither express law nor public policy will allow parties to contract; thus, the law will not permit contracts for the procuring of marriages,[1] or of public offices,[2] or of legislation,[3] or of illicit cohabitation.[4] If, therefore, such contracts are entered into, equity will enjoin their performance.[5] And the party creating the interest, although *in pari delicto*, may apply for an injunction. In such cases, the person applying must return any benefit that he may have received.[6] Such contracts are equally void at law, and if the parties are *in pari delicto*, the law will leave them where it finds them. If one party has advanced money upon an immoral or illegal contract, the law will give him no aid to recover it back. But equity will sometimes fasten a trust upon the conscience of the party who has received money or property under such contracts, and compel him to repay or reconvey it.[7]

§ 215. If at a sale of an estate of a debtor upon execution, any one announces, for the purpose of preventing competition, that he is bidding or purchasing for the debtor;[8] or, if upon the sale of the property of a deceased person, a bidder announces that he is purchasing for the benefit of children or heirs, and thus prevents competition, the purchaser will be held to be a trustee for the benefit of the parties interested in the property.

§ 216. Again, if a testator make a devise, or a grantor a conveyance, upon a secret trust in fraud of the law, or for a purpose forbidden by law, or contrary to public policy, those interested may bring a bill alleging the secret trust, and the fraud upon the law, and the persons to whom the devise or conveyance was made

[1] Drury *v.* Hook, 1 Vern. 412; Cole *v.* Gibson, 1 Ves. 507; Debenhan *v.* Ox, 1 Ves. 277; Smith *v.* Aykwell, 3 Atk. 566; Smith *v.* Bruning, 2 Vern. 392; Williamson *v.* Gihon, 2 Sch. & L. 357; Roberts *v.* Roberts, 3 P. Wms. 76.

[2] Hartwell *v.* Hartwell, 4 Ves. 811; Morris *v.* McCulloch, Amb. 432; 2 Ed. 190; Writhingham *v.* Burgoyne, 2 Anst. 900; Harrington *v.* Duchattel, 1 Bro. Ch. 124.

[3] Robinson *v.* Cox, 9 Mod. 263; Walker *v.* Perkins, 3 Burr, 1568; 1 Bla. 517; Rex *v.* Inhabitants of Northwingfield, 1 B. & Ad. 912; Winebrinner *v.* Weiseger, 3 Monr. 35; Travinger *v.* McBurney, 5 Cow. 253; Cusack *v.* White, 3 Const. Ct. R. 284.

[4] Marshall *v.* Baltimore & Ohio Railw. 16 How. 153.

[5] Robinson *v.* Gee, 1 Ves. 251; Gray *v.* Mathias, 5 Ves. 286; Franco *v.* Bolton, 3 Ves. 370.

[6] St. John *v.* St. John, 11 Ves. 535; Reynell *v.* Sprye, 1 De G., M. & G. 660.

[7] Smith *v.* Bruning, 2 Vern. 392; Morris *v.* McCulloch, Amb. 432.

[8] Kinard *v.* Hiers, 2 Rich. Eq. 423; Lloyd *v.* Currin, 3 Humph. 462.

must answer, notwithstanding the statute of frauds.[1] If such fraudulent trust appear by the answer,[2] or by any clear and explicit proof in opposition to the answer,[3] a trust will be declared and enforced in favor of those interested in the estate, or in the event of the failure of the illegal trust. In all cases of actual fraud parol evidence is admissible, otherwise a fraud put in writing would always escape.[3]

§ 217. Another large class of constructive trusts arises from purchases or conveyances from trustees, or other persons holding a fiduciary relation to property. It is a universal rule, that if a man purchases property of a trustee, with notice of the trust, he shall be charged with the same trust, in respect to the property, as the trustee from whom he purchased.[4] And even if he pays a valuable consideration, with notice of the equitable rights of a

[1] Muckleston *v.* Brown, 6 Ves. 52; Podmore *v.* Gunning, 7 Sim. 644; Chamberlain *v.* Agar, 2 V. & B. 259; Stickland *v.* Aldridge, 9 Ves. 516; Edwards *v.* Pike, 1 Ed. 267; Walgrave *v.* Tebbs, 2 K. & J. 313; Robinson *v.* King, 6 Ga. 550.

[2] Cottingham *v.* Fletcher, 2 Atk. 155; Bozon *v.* Statham, 1 Ed. 508; Bishop *v.* Talbot, cited 6 Ves. 60; Adlington *v.* Cann, 3 Atk. 141; Paine *v.* Hall, 18 Ves. 473; 1 Ed. 515, n. (a).

[3] How *v.* Camp, Walk. Ch. 427; Stickland *v.* Aldridge, 9 Ves. 520; Pring *v.* Pring, 2 Vern. 99.

[4] Le Neve *v.* Le Neve, Amb. 436; 3 Atk. 646; 1 Ves. 64; 2 Lead. Ca. Eq. 23 and notes; Merry *v.* Abney, 1 Ch. Ca. 38; Potter *v.* Sanders, 6 Hare, 1; Kennedy *v.* Daly, 1 Sch. & L. 355; Crofton *v.* Ormsby, 2 Sch. & L. 583; Ferras *v.* Cherry, 2 Vern. 384; Daniels *v.* Davidson, 16 Ves. 249; Brooke *v.* Bulkeley, 2 Ves. 498; Jennings *v.* Moore, 2 Vern. 609; 2 Bro. P. C. 278; Birch *v.* Ellames, 2 Anst. 427; Mackreth *v.* Symmons, 15 Ves. 349; Grant *v.* Mills, 2 V. & B. 306; Saunders *v.* Dehew, 2 Vern. 271; Mansell *v.* Mansell, 2 P. Wms. 681; Wigg *v.* Wigg, 1 Atk. 382; Dunbar *v.* Tredennick, 2 B. & B. 319; Pawlett *v.* Atty.Gen. Hardr. 465; Burgess *v.* Wheate, 1 Ed. 195; Adair *v.* Shaw, 1 Sch. & L. 262; Mead *v.* Orrery, 3 Atk. 238; Bony *v.* Smith, 1 Vern. 149; Phayre *v.* Peree, 3 Dow. 129; Wormley *v.* Wormley, 8 Wheat. 421; Oliver *v.* Piatt, 3 How. 333; Caldwell *v.* Carrington, 9 Peters, 86; Wright *v.* Dame, 22 Pick. 55; Clarke *v.* Hackerthorn, 3 Yeates, 269; Peebles *v.* Reading, 8 S. & R. 495; Reed *v.* Dickey, 2 Watts, 459; Hood *v.* Fahnestock, 1 Barr, 470; Wilkins *v.* Anderson, 1 Jones, 399; Denn *v.* McKnight, 6 Halst. 385; Murray *v.* Ballou, 1 John. Ch. 566; Bailey *v.* Wilson, 1 Dev. & Bat. 182; Massey *v.* McIlwaine, 2 Hill, Eq. 426; Benzien *v.* Lenoir, 1 Car. L. R. 504; Pugh *v.* Bell, 1 J. J. Marsh. 403; Liggett *v.* Wall, 2 A. K. Marsh. 149; Truesdell *v.* Calloway, 6 Miss. 605; Suydam *v.* Martin, Wright, 384; Winged *v.* Lefebury, 1 Eq. Ca. Abr. 32; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Case *v.* James, 29 Beav. 512; Cary *v.* Eyre, 1 De. G., J. & S. 149.

third person, he shall hold the property subject to the equitable interests of such person.[1] Of course, a mere *volunteer*, or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, *whether he have notice or not;* for in such case no wrong or pecuniary loss can fall upon him, in compelling him to execute the trust to which the property that came to him without consideration was subject. Such purchases from trustees, whether for value or not, are fraudulent, and equity will follow the property and fasten the original trust upon it, for the security of the *cestui que trust*, or other person holding an equitable interest.[2] The rule applies not only to express trusts, or those expressly declared by written instruments, but it applies to constructive trusts, or those trusts that arise from fraud. Thus, if a party procures a conveyance of property from another by fraud, he shall be held to be a constructive trustee; and, if he sells such property to a third person who has full knowledge or notice of the fraud, such third person will be equally held as a trustee.[3] After a purchase is once made from a trustee with notice of the trust, the person taking the title cannot bar the interest of the *cestui que trust* by buying in other interests, or by levying a fine or suffering a recovery, obtaining a judgment, or by procuring the assignment to himself of outstanding mortgages or terms.[4] Having once taken with notice of the trust, he is a trustee in law, and a trustee cannot defeat the interests of his *cestui que trust;* on the contrary, all the interest that the trustee, or constructive trustee, shall thus buy in, will inure to the benefit of the title for the *cestui que trust.*[5]

§ 218. Of course, the opposite proposition is also true, that a purchaser for a valuable consideration without actual or constructive notice of the trust, holds the property discharged of the interest of the *cestui que trust.* It is thus stated on great authority: "A purchaser, *bona fide* without notice of any defect in his title at the time he made the purchase, may buy in a statute or mortgage, or any other incumbrance, and if he can defend himself at law by any such incumbrance bought in, his adversary shall never be

[1] Ibid. [2] Ibid.

[3] Pye *v.* George, 1 P. Wms. 128; Saunders *v.* Dehew, 2 Vern. 271; Mansell *v.* Mansell, 2 P. Wms. 681.

[4] Moloney *v.* Kernan, 2 Dr. & W. 31; Brook *v.* Bulkeley, 2 Ves. 498.

[5] Boney *v.* Smith, 1 Vern. 145; Kennedy *v.* Daly, 1 Sch. & L. 37.

aided in a court of equity for setting aside such incumbrance, for *Equity will not disarm a purchaser, but assist him;* and precedents of this nature are very ancient and numerous; viz., where the court hath refused to give any assistance against a purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another." And it may be added that nothing is clearer than that a purchaser for valuable consideration without notice of a prior equitable right, obtaining the *legal* estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well known maxim that *where equities are equal the law shall prevail.*[1] But while a purchaser for value without notice may lay hold upon any plank to save himself, he cannot, after notice of the trust, take any conveyances from the trustee of outstanding legal interests; for that is a breach of the trust, and he cannot commit a breach of the trust to protect himself.[2] But a purchase of an equitable interest only, although for a valuable consideration and without notice, cannot

[1] Bassett *v.* Nosworthy, Ca. t. Finch, 102; 2 Lead. Ca. Eq. 1 & notes; Jerrard *v.* Saunders, 2 Ves. Jr. 457; Goleborn *v.* Alcock, 2 Sim. 552; Sanders *v.* Deligne, Freem. 123; Fagg's Case, 1 Vern. 52; 1 Ch. Ca. 68; Harcourt *v.* Knowel, 2 Vern. 159; Siddon *v.* Charnells, Bunb. 298; Jones *v.* Powles, 3 M. & K. 581; Willoughby *v.* Willoughby, 1 T. R. 763; Blake *v.* Hungerford, Pr. Ch. 158; Charlton *v.* Low, 3 P. Wms. 328; *Ex parte* Knott, 11 Ves. 609; Shine *v.* Gough, 1 B. & B. 436; Bowen *v.* Evans, 1 Jon. & La. 264; Boone *v.* Chiles, 10 Pet. 177; Watson *v.* Le Roy, 6 Barb. 485; Walwyn *v.* Lee, 9 Ves. 24; Varick *v.* Briggs, 6 Paige, 325; Demorest *v.* Wyncoop, 3 John. Ch. 147; Dan *v.* McKnight, 6 Halst. 385; Howell *v.* Ashmore, 7 Stockt. 82; Heilner *v.* Imbrie, 6 S. & R. 401; Mundine *v.* Pitts, 14 Ala. 84; Tompkins *v.* Powell, 6 Leigh, 576; Woodruff *v.* Cook, 1 Gill & J. 270; Whittick *v.* Kane, 1 Gill & J. 202; High *v.* Batte, 10 Yerg. 335; Jones *v.* Zollicoffer, 2 Taylor, 214; Owings *v.* Mason, 2 A. K. Marsh. 384; Halstead *v.* Bank of Kentucky, 4 J. J. Marsh. 554; Blight *v.* Banks, 6 Mon. 198; Hughson *v.* Mandeville, 4 Des. 87; Goodtitle *v.* Cummings, 8 Blackf. 179; Maywood *v.* Lubcock, 1 Bail. Eq. 382; Brown *v.* Budd, 2 Cart. 442; Fletcher *v.* Peck, 6 Cranch, 36; Alexander *v.* Pendleton, 8 Cranch, 462; Vattier *v.* Hinds, 7 Pet. 252; Dana *v.* Newhall, 13 Mass. 498; Connecticut *v.* Bradish, 14 Mass. 296; Trull *v.* Bigelow, 16 Mass. 406; Boynton *v.* Rees, 8 Pick. 29; Gallatian *v.* Erwin, Hopk. 48; 8 Cow. 36; Bumpus *v.* Platner, 1 John. Ch. 213; Griffith *v.* Griffith, 9 Paige, 315; Mott *v.* Clark, 9 Barr, 399; Brackett *v.* Miller, 4 W. & S. 102; Filby *v.* Miller, 1 Casey, 264; Rutgers *v.* Kingsland, 3 Halst. Ch. 178, 658; Holmes *v.* Stout, 3 Green, Ch. 492; City Council *v.* Paige, Spear, Ch. 159; Lacy *v.* Wilson, 4 Munf. 413; Curtis *v.* Lanier, 6 Munf. 42.

[2] Saunders *v.* Dehew, 2 Vern. 271; Freem. 123; Allen *v.* Knight, 5 Hare, 272.

prevail against a legal title. In law the legal title must always prevail, and in equity the legal title will prevail if the equities are equal.[1]

§ 219. This protection of a *bona fide* purchaser for value without notice is clear and certain, but it is hedged about with great care. *It is said to be a shield to protect, and not a sword to attack.* It is surrounded with restrictions, so that it may not become a cloak for fraud. The defendant in a suit in equity must clearly and unequivocally swear in his answer that he is a purchaser for value without notice,[2] and he must set forth all the particulars of the purchase, and the title, or pretended title of the person from whom he purchased.[3] He must show an actual conveyance and not merely an agreement for a conveyance;[4] and it must be shown that the consideration money named in the deed was paid in good faith. It is not enough that the consideration was secured to be paid; nor is a recital of payment in the deed sufficient: there must be an actual payment.[5] Then he must also make an explicit denial of notice of the title which is attempted to be set up. A denial of knowledge of the particular person who might assert such title is not sufficient;[6] notice must be positively and affirmatively denied, and not

[1] Snelgrove *v.* Snelgrove, 4 Des. 274; Daniel *v.* Hollingshead, 16 Ga. 196; Larrow *v.* Beam, 10 Ohio, 148; Jones *v.* Zollicoffer, 2 Taylor, 214; Brown *v.* Wood, 6 Rich. Eq. 155; Blake *v.* Heyward, 1 Bail. Eq. 208; Shirras *v.* Caig, 7 Cranch, 48; Jones *v.* Jones, 8 Sim. 633; Pensonneau *v.* Bleakley, 14 Ill. 15; Boone *v.* Chiles, 10 Pet. 177; Kramer *v.* Arthurs, 7 Barr, 165; Wailes *v.* Cooper, 24 Miss. 208; Sergeant *v.* Ingersoll, 7 Barr, 340; 3 Harris, 343; Flagg *v.* Mann, 2 Sumn. 486, 556; Cottrell *v.* Hughes, 15 C. B. 532; Vatteir *v.* Hinde, 7 Pet. 252; Parsons *v.* Jury, 1 Yerg. 296; Gallion *v.* McCaslin, 1 Blackf. 91; Marles *v.* Cooper, 22 Miss. 208.

[2] Sugd. V. & P. 507; Marshall *v.* Frank, 8 Pr. Ch. 480; 1 Anst. 14; Blacket *v.* Langlands, Sel. Ca. Ch. 51; Gilb. 58.

[3] Walwyn *v.* Lee, 9 Ves. Jr. 26; Story *v.* Winsor, 3 P. Wms. 279; Head *v.* Egerton, 1 Vern. 246; Trevanion *v.* Morse, 3 Ves. 32, 226; Amb. 421; Jackson *v.* Rowe, 4 Russ. 514; Lanesborough *v.* Kilmaine, 2 Moll. 403; Hughes *v.* Garth, Amb. 421; Page *v.* Lever, 2 Ves. Jr. 450; Dobson *v.* Leadheater, 13 Ves. 230.

[4] Head *v.* Egerton, 1 P. Wms. 281; Brandlyn *v.* Ord, 1 Atk. 571.

[5] Millard's Case, Freem. 43; Wagstaff *v.* Read, 2 Ch. Ca. 156; More *v.* Mayhow, 1 Ch. Ca. 34; 2 Freem. 175; Day *v.* Arundel, Hard. 510; Hardingham *v.* Nichols, 3 Atk. 304; Moloney *v.* Kernan, 2 Dr. & War. 31; Maitland *v.* Wilson, 3 Atk. 814.

[6] Kelsal *v.* Bennett, 1 Atk. 522; Brompton *v.* Barker, cited 2 Vern. 159, is not law.

evasively or inferentially.[1] If particular instances or circumstances of notice or of fraud are alleged, there must be clear, special, and particular denials of each and every circumstance.[2] These stringent rules are necessary for the protection of the equitable interests of one person, where the legal title is in the hands of another.[3]

§ 220. These leading propositions are simple and plain enough, but difficulties frequently arise as to what is a valuable consideration, and whether a purchaser had notice of the equitable estate, and when and how he obtained it. It is well established that a conveyance, to be good against the equitable interest of a *cestui que trust*, must be for a *valuable* consideration, and that a conveyance for a *good* consideration, as for love and affection, is not sufficient.[4] But if the consideration is valuable, it need not be adequate: mere inadequacy of consideration will not defeat a purchase for a valuable consideration without notice; but gross inadequacy of a valuable consideration would be evidence affecting the good faith of the transaction.[5] Marriage is a valuable consideration for a conveyance; but, if a conveyance after marriage is made in pursuance of an agreement before marriage, it must be made clearly to appear.[6] The general definition of a valuable consideration embraces not only some valuable thing or property given or transferred to another, but also some loss of property or right, or the forbearing of some legal right or remedy.[7]

[1] 3 P. Wms. 244, n. (f.) Bran *v.* Marlborough, 2 P. Wms. 492 (6 Res.); Hughes *v.* Garner, 2 Y. & Col. Exch. Ca. 328.

[2] Pennington *v.* Beechey, 2 S. & S. 282; Anon., 2 Ch. Ca. 161; Price *v.* Price, 1 Vern. 185; Hardman *v.* Ellames, 5 Sim. 650; 2 M. & K. 732.

[3] Alexander *v.* Pendleton, 8 Cranch, 462; Hunter *v.* Simrall, 5 Litt. 62; Boone *v.* Chilles, 10 Pet. 177; Bush *v.* Bush, 3 Strob. Eq. 131; Blight *v.* Bank, 6 Mon. 698; Halstead *v.* Bank of Kentucky, 4 J. J. Marsh. 554; Moore *v.* Clay, 7 Ala. 142; Pillow *v.* Shannon, 3 Yerg. 308; Nantz *v.* McPherson, 7 Munf. 599; Dillard *v.* Crocker, 1 Spear, Eq. 20; Vattier *v.* Hinde, 7 Pet. 252; Jackson *v.* Rowe, 2 S. & S. 472; Jones *v.* Powles, 3 M. & K. 581.

[4] Upshaw *v.* Hargrove, 6 Sm. & M. 292; Frost *v.* Beekman, 1 John. Ch. 288; Patton *v.* Moore, 32 N. H. 382; Boone *v.* Baines, 23 Miss. 136; Everts *v.* Agnes, 4 Wis. 343; Swan *v.* Ligan, 1 McCord, Ch. 232.

[5] More *v.* Mayhow, 1 Ch. Ca. 34; Wagstaff *v.* Read, 2 Ch. Ca. 156; Bullock *v.* Sadlier, Amb. 764; Mildmay *v.* Mildmay, cited Amb. 767.

[6] Harding *v.* Hardrett, t. Finch, 9; Lord Keeper *v.* Wyld, 1 Vern. 139.

[7] It is impossible to pursue this subject in all its details and distinctions in a work of this character without exceeding all reasonable limits. The cases will

§ 221. In order that one may claim protection as a *bona fide* purchaser, the money must have been actually paid and the conveyance taken before notice is received of the trust. If the money is secured, but not paid, notice of the trust will convert the purchaser into a trustee,[1] and so if the money is paid, but the conveyance is not executed, the weight of authority is that notice of the trust will destroy the protection of the purchaser.[2] It is held that the money must be wholly paid before notice.[3] This rule proceeds upon the ground, that, as the purchaser is taking the transfer of a title that defeats the equitable right of a third person, he shall be held to take such title subject to all the equities that attach to it at the time it passes. If, therefore, he pays no money at the time the title passes, he has no equity to set up against the equity of a third person, and if he has notice before he pays the money, he pays in his own wrong. And so if he has paid his money, but has not yet taken the title when he receives notice, he takes the title subject to all the equities that attach to it when the conveyance is actually made to him, as he then has a right to refuse the conveyance and to demand back his money.[4] In Pennsylvania, however, it is established that prat-payment of the purchase-money before notice will give the purchaser an equity *pro tanto*.[5] So if a purchaser without notice make improvements on the land, not having paid the purchase-money in

be found most industriously collected in the notes to Basset *v.* Nosworthy, 2 Lead. Ca. Eq. 103–109, and the distinctions and qualifications are fully discussed.

[1] Tourville *v.* Naish, 3 P. Wms. 387; Story *v.* Winsor, 2 Atk. 630; More *v.* Mayhow, 1 Ch. Ca. 34; Jones *v.* Stanley, 2 Eq. Ca. Ab. 685; High *v.* Batte, 10 Yerg. 555; Christie *v.* Bishop, 1 Barb. Ch. 105; Murray *v.* Ballou, 1 John. Ch. 566; Jackson *v.* Cadwell, 1 Cow. 622; Jewett *v.* Palmer, 7 Cow. 65, 265; Heatley *v.* Finster, 2 John. Ch. 15; Harris *v.* Norton, 16 Barb. 264; Patton *v.* Moore, 32 N. H. 382; McBee *v.* Loftes, 1 Strob. Eq. 90; Hunter *v.* Simrall, 5 Lit. 62.

[2] Wigg *v.* Wigg, 1 Atk. 384; 2 Sugd. V. & P. 274.

[3] Wormley *v.* Wormley, 8 Wheat. 421; Wood *v.* Mann, 1 Sumner, 506.

[4] Warner *v.* Winslow, 1 Sand. Ch. 430; Vattier *v.* Hinde, 7 Pet. 252; Bush *v.* Bush, 3 Strob. Eq. 131; Kyle *v.* Tait, 6 Grat. 44; Doswell *v.* Buchanan, 3 Leigh, 362; Dillard *v.* Crocker, 1 Spear, Eq. 20; Duncan *v.* Johnson, 2 Eng. 190; Cook *v.* Bronaugh, 8 Eng. 190; Frost *v.* Beekman, 1 John. Ch. 288; Cole *v.* Scott, 2 Wash. 141.

[5] Youst *v.* Martin, 3 S. & R. 423; Lewis *v.* Bradford, 10 Watts, 67; Bellas *v.* McCarthy, 10 Watts, 13; Juvenal *v.* Jackson, 2 Harris, 519; Uhrich *v.* Beek, 1 Harris, 631; 4 Harris, 499; Paul *v.* Fulton, 25 Mo. 156.

full, he will have an equitable lien on the land for the amount of his expenditures, although he has no defence to a bill to enforce the rights of the *cestui que trust.*[1] This is in analogy to the statutes that give a defendant in a real action a claim for improvements upon an estate, which he has made in ignorance of the title against him.

§ 222. The notice of the trust may be either to the purchaser himself, or to his agent, counsel or attorney. The general rule is that notice to an agent is notice to his principal.[2] The notice, if to an agent, must be to an agent for the purpose of the purchase, and the notice must be to him while engaged in the transaction,[3] for the reason that notice to agents generally, without reference to the particular business in hand, is not binding upon the principal.[4] Notice to a husband is not notice to a wife, unless he is her agent, and is engaged upon the business when he receives the notice.[5] Upon the same principle, knowledge by an executor before the death of his testator is not notice to him after his appointment as executor.[6] It has been held in some cases, that the notice to the

[1] Boggs *v.* Varner, 6 W. & S. 469; Farmers' Loan Co. *v.* Maltby, 8 Paige, 563; Frost *v.* Beekman, 1 John. Ch. 288; Doswell *v.* Buchanan, 3 Leigh, 361; Flagg *v.* Mann, 2 Sumn. 486; Everts *v.* Agnes, 4 Wis. 343.

[2] Hovey *v.* Blanchard, 13 N. H. 145; Aster *v.* Wells, 4 Wheat. 466; Bank of U. S. *v.* Davis, 2 Hill, 451; Griffith *v.* Griffith, 2 Paige, 315; Jackson *v.* Winslow, 9 Cow. 13; Jackson *v.* Sharp, 9 John. 163; Jackson *v.* Leek, 19 Wend. 339; Westerwelt *v.* Hoff, 2 Sand. 98; Barnes *v.* McChristie, 3 Penn. 67; Blair *v.* Owles, 1 Munf. 38; Brotherton *v.* Hutt, 2 Vern. 574; Newstead *v.* Searles, 1 Atk. 265; Le Neve *v.* Le Neve, 3 Atk. 646; 1 Ves. 64; 2 Lead. Ca. Eq. 165, notes; Tunstall *v.* Trappes, 3 Sim. 301; Maddox *v.* Maddox, 1 Ves. 61; Ashley *v.* Bailley, 2 Ves. 368; Bracken *v.* Miller, 4 W. & S. 108; Espin *v.* Pemberton, 3 De G. & J. 547.

[3] Howard Ins. Co. *v.* Halsey, 4 Seld. 271; Bracken *v.* Miller, 4 W. & S. 102; Bank of U. S. *v.* Davis, 2 Hill, 451; Hood *v.* Fahnestock, 8 Watts, 489; Winchester *v.* Baltimore R.R. Co., 4 Md. 231; Preston *v.* Tubbin, 1 Vern. 286; Mountford *v.* Scott, 3 Mad. 34; Warwick *v.* Warwick, 3 Atk. 291; Ashley *v.* Bailley, 2 Ves. 368; Worsley *v.* Scarborough, 3 Atk. 392; Tyler *v.* Webb, 6 Beav. 552; 14 Beav. 14; Finch *v.* Shaw, 19 Beav. 500; 5 H. L. Ca. 905; Fuller *v.* Bennett, 2 Hare, 394.

[4] Ibid.; U. S. Insurance Co. *v.* Schriver, 3 Md. Ch. 381; Fulton Bank *v.* New York Coal Co., 4 Paige, 127; Bank *v.* Payne, 25 Conn. 444; North River Bank *v.* Aymar, 3 Hill, 362; Henry *v.* Morgan, 2 Benn. 497; Ross *v.* Horton, 2 Cushman, 591.

[5] Snyder *v.* Sponable, 1 Hill, 567; 7 Hill, 427.

[6] Gold *v.* Death, Cro. Jac. 381; Hob. 92.

principal, to convert him into a trustee, must be given to him during the progress of the transaction, as he might have known the facts long before and forgotten them.[1] If the first purchaser from the trustee take the property, *bona fide* for value and without notice, all purchasers from him will take the property discharged of the equitable claims, although they have notice of them at the time they purchase of the first purchaser, and such notice to them cannot convert them into trustees.[2] But if the property comes back into the hands of the original trustee, or into the hands of any one affected with the guilt of the original sale, he will be a trustee for the defrauded party, although the property may have passed through several innocent hands.[3]

§ 223. Notice to the purchaser may be either actual or constructive. Actual notice is a knowledge of the facts of the trust brought home to the purchaser, or a knowledge of such facts as should lead him to a knowledge of the actual facts of the case.[4] Constructive notice is a legal presumption of notice unless controlled, and in most cases it is not susceptible of rebuttal, even by evidence that in fact there was no actual knowledge.[5] Thus, by statutes of the several States the recording of a deed is made notice to all subsequent purchasers, though it frequently happens that purchasers have no actual knowledge from the record; but that does not rebut the fact of notice, for the reason that it is their duty to examine the records: they are therefore conclusively affected with notice of all of the record which is legally made, and which it was their duty to examine. *Lis pendens* is constructive notice; that is, a suit pending in the public courts, concerning the title of the property purchased, is constructive notice to the purchaser. Actual pos-

[1] Hamilton *v.* Royse, 2 Sch. & L. 377; 2 Sugd. V. & P. 277; Henry *v.* Morgan, 3 Binn. 497; Boggs *v.* Varner, 6 W. & S. 469; Bracken *v.* Miller, 4 W. & S. 111.

[2] Harrison *v.* Forth, Pr. Ch. 51; Sweet *v.* Southcote, 2 Bro. Ch. 66; Brandlyn *v.* Ord, 1 Atk. 571; Lowther *v.* Charlton, 2 Atk. 242; Lacy *v.* Wilson, 4 Munf. 313; Fletcher *v.* Peck, 6 Cranch, 87; Boone *v.* Chiles, 10 Pet. 187; Truluck *v.* Peoples, 3 Kelly, 446; Griffith *v.* Griffith, 9 Paige, 315; Boynton *v.* Reese, 8 Pick. 329; Mott *v.* Clarke, 9 Barr, 399; Trull *v.* Bigelow, 16 Mass. 406.

[3] Boney *v.* Smith, 1 Vern. 149; Schutt *v.* Large, 6 Barb. 373; Lawrence *v.* Stratton, 6 Cush. 163.

[4] Mayor *v.* Williams, 6 Md. 235.

[5] Rogers *v.* Jones, 8 N. H. 264; Plumb *v.* Fluitt, 2 Anst. 432; Griffith *v.* Griffith, 1 Hoff. 153; Farnsworth *v.* Child, 4 Mass. 637.

session by the *cestui que trust* or some person other than the vendor is constructive notice to the purchaser that there is some claim, title, or possession of the property adverse to his vendor; and this fact should put him upon his inquiry, for if he had inquired he would have discovered the exact title and the equitable claims upon it; he therefore has constructive notice. There are many other facts and circumstances from which courts will presume that a purchaser had notice of the equities attached to an estate.[1]

§ 224. The same general principles affect the sales of property by executors or administrators. Executors can deal with real estate only as they are empowered to do so by the will of testators. Purchasers must therefore look to the will for the power of the executor. If they purchase in good faith from an executor with power to sell, they will take a good title; but if they make a fraudulent or collusive purchase from an executor with full power to sell, they still hold the estate upon the same trusts to which it was subject in the hands of the executor. If there are no powers to sell real estate given to executors in the will, they have no authority to deal with it, unless it is wanted to pay debts or legacies, in which case both executors and administrators must obtain an order or license from the Court of Probate to sell. In such case the purchaser must see that the order of the court was regularly obtained, and that it is properly complied with. Any fraud or collusion on the part of the executor or administrator, in procuring the decree of the court or in the conduct of the sale, would convert the purchaser into a trustee for heirs-at-law or other persons interested.[2] So if an executor or administrator purchases indirectly of himself through a third person, and takes a deed to himself through such third person, the sale will be void, or the estate will be held in trust by such administrator or executor for the heirs-at-law or other persons interested.

§ 225. An executor or administrator generally has full power over the personal estate under his charge. Therefore he may sell the same and give a good title to a purchaser.[3] This is the rule at

[1] It is impossible to state all the distinctions that have been established upon this fruitful source of litigation The principles are most ably stated in the notes to Le Neve *v.* Le Neve, 2 Lead. Ca. Eq. 23.

[2] Brush *v.* Ware, 15 Pet. 93; Brock *v.* Phillips, 2 Wash. 68.

[3] Field *v.* Schieffelin, 7 John. Ch. 155; Rayner *v.* Pearsall, 3 John. Ch. 578;

common law, and it prevails in all States where it is not changed by statute. In some States there are statutes that direct executors or administrators to sell the personal estate of the deceased at public auction, or in such manner as the court having jurisdiction over the administration shall order. In such States, purchasers must see to it that executors and administrators, in making sales, pursue the course marked out for them by the statutes or by the orders of the court, or they will take no title.[1] In all sales by executors and administrators *good faith* is indispensable. If therefore a purchaser knows, or has notice, that a sale by an administrator is fraudulent or collusive, or is a *devastavit*, or is for the purpose of a misapplication of the assets, his title will not be allowed to prevail against the beneficial interests of creditors, specific or residuary legatees, or next of kin or heirs.[2] Equity will examine the transaction; and if circumstances appear sufficient to put the purchaser on his guard or upon his inquiry, the sale will be avoided or the purchaser will be held as a trustee.[3] If the transfer is by way of pledge or sale for the security or payment of the private debt of the administrator, it will be equivalent to full notice of the illegality of the transaction, and fraudulent.[4]

Hertell *v.* Bogert, 9 Paige, 57; Yerger *v.* Jones, 16 How. 37; Miles *v.* Durnford, 2 Sim. (N. S.) 234; Tyrrell *v.* Morris, 1 Dev. & Batt. 559; Hunter *v.* Lawrence, 11 Grat. 117; Bond *v.* Ziegler, 1 Kelley, 324; Crane *v.* Drake, 2 Vern. 616; Ewer *v.* Corbett, 2 P. Wms. 148; Newland *v.* Champion, 1 Ves. 105; Jacomb *v.* Harwood, 2 Ves. 268; Elmlie *v.* McAulay, 3 Bro. Ch. 626; Utterson *v.* Maire, 4 Bro. Ch. 270; 2 Ves. Jr. 95; Scott *v.* Tyler, 2 Dick. 725; Bonney *v.* Ridgard, 1 Cox, 145; Dickson *v.* Lockyer, 4 Ves. 42; Doran *v.* Simpson, 4 Ves. 665; Hill *v.* Simpson, 7 Ves. 152.

[1] Fambro *v.* Gantt, 12 Ala. 305; Bond *v.* Barksdale, 4 Des. 526; Bond *v.* Ziegler, 1 Kelley, 324; Baines *v.* McGee, 1 Sm. & M. 208.

[2] Petrie *v.* Clark, 11 S. & R. 388; Wylson *v.* Moore, 1 M. & K. 337; Cole *v.* Miles, 10 Hare, 179; Saxon *v.* Barksdale, 4 Des. 526; McNair's App. 4 Rawle, 155; Johnson *v.* Johnson, 2 Hill, Eq. 277; Mead *v.* Orrery, 3 Atk. 235; McLeod *v.* Drummond, 14 Ves. 361; 17 Ves. 169; Field *v.* Schieffelin, 7 John. Ch. 155; Colt *v.* Lasnier, 9 Cow. 320; Sacia *v.* Berthoud, 17 Barb. 15; Williamson *v.* Branch Bank, 7 Ala. 906; Swink *v.* Snodgrass, 17 Ala. 653; Garnett *v.* Macon, 6 Call, 361; Dodson *v.* Simpson, 2 Rand. 294; Graff *v.* Castleman, 5 Rand. 204; Parker *v.* Gillian, 10 Yerg. 394; Williamson *v.* Morton, 2 Md. Ch. 94; Lowry *v.* Farmers' Bank, 10 P. L. J. 3; Am. L. J. (N. S.) 111.

[3] McNeillie *v.* Acton, 4 De G., M. & G. 744.

[4] Petrie *v.* Clark, 11 Serg. & R. 388; Field *v.* Schieffelin, 7 John. Ch. 155; Williamson *v.* Morton, 2 Md. Ch. 94; Garrard *v.* R.R. Co., 29 Penn. St. 154;

But if an administrator make a pledge of the assets for a contemporaneous advance of money for the use of the estate, it will be held to be a valid transaction; or if the sale or pledge or mortgage is afterwards made for a previous advance made in good faith for the alleged benefit of the estate, it will be valid.[1] Of course knowledge on the part of the purchaser, that the executor or administrator is dealing with the assets in a fiduciary capacity, is not enough to raise any suspicion, for the reason that it is the duty of the administrator to dispose of the assets and settle the estate; and so a trustee may sell and transfer absolutely the personal property of his trust, if he have power to vary the securities; and if he sells and transfers notes, stocks, or other securities standing in his name as trustee, the purchaser, from that fact alone, cannot be holden as a constructive trustee, although the trustee in fact transfers such securities or order to obtain money for his own personal use. The mere fact that the word trustee is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. If he has such power, a purchaser in *good faith* will be protected, although the trustee use the money for his private purposes.[2] And so if an executor, guardian, or trustee hold certificates of shares in a corporation, he may sell the same, and the corporation would be protected in issuing new certificates to the purchaser, but if the corporation knew that the sale or transfer was a breach of the trust or a *devastavit*, it might be held as a constructive trustee for the persons beneficially interested; but the mere fact that the fiduciary character of the vendor appeared upon the face of the transaction would put the corporation upon no inquiry beyond ascertaining whether he had authority to change the securities.[3]

§ 226. The statute of frauds is no obstacle in the way of proof of an actual or constructive fraud in the sale of property. Lord Hardwicke stated "that the court adhered to this principle, that the statute of frauds should never be understood to protect fraud,

Collinson *v.* Lister, 7 De G., M. & G. 634; Dodson *v.* Simpson, 2 Rand. 294; Williamson *v.* Branch Bank, 7 Ala. 906.

[1] Petrie *v.* Clark, 11 Serg. & R. 388; Miles *v.* Durnford, 2 Sim (N. S.) 234; Russell *v.* Plaice, 18 Beav. 21; 11 Jur. 124; 19 Jur. 445.

[2] Ashton *v.* Atlantic Bank, 3 Allen, 217.

[3] Ibid.

and therefore wherever a case is infected with fraud, the court will not suffer the statute to protect it."[1] Lord Thurlow added, that "the moment you impeach a deed for fraud you must either deny the effect of fraud upon the deed, or you must admit parol evidence to prove it."[2] If this was not so, the law would be reduced to this absurdity,— if a fraud could once succeed in procuring the transaction to be reduced to writing and signed by the parties, it would be protected by the law itself, and there would be no possible means of reaching and correcting the wrong. But in such case the bill must contain a clear and distinct charge of fraud.[3] Therefore, whenever the bill sets out a clear case of fraud, parol evidence will be admitted to prove the case, even if the effect of such evidence is to contradict, vary, alter, or destroy written instruments.[4] So if a bill is brought for relief, on the ground the instrument is framed contrary to the intention of the parties through mistake, accident, surprise, or fraud. In such case, Lord Hardwicke said, "that a mistake could never be proved but by parol evidence, consequently it must be received."[5] But where through mistake of law, or carelessness or inattention, an impor-

[1] Reach *v.* Kennegate, 1 Ves. 125; Young *v.* Peachy, 2 Atk. 258; Walker *v.* Walker, 2 Atk. 98; Hutchins *v.* Lee, 1 Atk. 448; Montacute *v.* Maxwell, 1 P. Wms. 620.

[2] Shelborne *v.* Inchinquin, 1 Bro. Ch. 350; Hare *v.* Sherewood, 1 Ves. Jr. 243; Townshend *v.* Stangroom, 6 Ves. 333; Pym *v.* Blackburn, 3 Ves. 38 n., and see Conolly *v.* Howe, 5 Ves. 701.

[3] Irnham *v.* Child, 1 Bro. Ch. 94; Portmore *v.* Morris, 2 Bro. Ch. 219; Forsyth *v.* Clark, 3 Wend. 637; Gouverneur *v.* Elmendorf, 5 John. Ch. 79; Kennedy *v.* Kennedy, 2 Ala. 571; Skrine *v.* Simmons, 11 Ga. 401; McCalmont *v.* Rankin, 8 Hare, 18.

[4] Young *v.* Peachy, 2 Atk. 257; Thynn *v.* Thynn, 1 Vern. 296; Irnham *v.* Child, 1 Bro. Ch. 93; Cripps *v.* Gee, 4 Bro. Ch. 475; Oldham *v.* Lechford, 2 Vern. 506; Drakeford *v.* Wilks, 3 Atk. 539; Reach *v.* Kennegate, 1 Ves. 125; Amb. 67; Pember *v.* Mathers, 1 Bro. Ch. 52; Wilkinson *v.* Bradfield, 1 Vern. 307; Miller *v.* Cotton, 5 Ga. 346; Christ *v.* Diffenbach, 1 S. & R. 464; Watkins *v.* Stockett, 6 H. & J. 345; Elliott *v.* Connell, 5 Sm. & M. 91.

[5] Baker *v.* Paine, 1 Ves. 457; Towers *v.* Moor, 2 Vern. 98; Langley *v.* Brown, 2 Atk. 203; Townshend *v.* Stangroom, 6 Ves. 328; Taylor *v.* Radd, 5 Ves. 595, 596, n.; Henkle *v.* Royal Insurance Co., 1 Ves. 318; Rogers *v.* Earl, 1 Dick. 294; Barstow *v.* Kilvington, 5 Ves. 593; Hunt *v.* Rousmanier, 8 Wheat. 174; Gower *v.* Sternes, 2 Whart. 75; Keisselbrock *v.* Livingston, 4 John. Ch. 144; Peterson *v.* Grover, 20 Me. 363; Newson *v.* Buffalow, 1 Dev. Eq. 379; Goodell *v.* Freed, 15 Vt. 448; Harrison *v.* Howard, 1 Ired. Eq. 407; Blanchard *v.* Moore, 4 J. J. Marsh. 471; Perry *v.* Pearson, 1 Humph. 431.

tant provision is omitted from a deed, and no fraud is charged or proved, parol evidence cannot be received against the denial of the defendant in his answer to reform, vary or defeat the instrument.[1] Parol evidence, however, is not favorably received by courts in any case, and they will not act upon it against written instruments, unless it is exceedingly clear and certain, and uncontradicted by other evidence.[2] In Pennsylvania, however, a different rule prevails, and parol evidence of the verbal agreements and stipulations upon the faith of which the contract was made, is received in evidence to control its operation or to explain its meaning.[3]

§ 227. The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed, and devised.[4] In the view of a court of equity, he is still the owner of the estate, subject to repay whatever money or other property he may have received from the fraudulent grantee. And so the equitable interest of a purchaser under a contract of sale is of that character that it may be assigned or devised.[5]

§ 228. Time does not bar a direct trust where the relation of

[1] Lemon *v.* Whitely, 4 Russ. 423; Irnham *v.* Child, 1 Bro. Ch. 92; Portmore *v.* Morris, 2 Bro. Ch. 219; Rich *v.* Jackson, 4 Bro. Ch. 614; 6 Ves. 334, n; Jackson *v.* Cator, 5 Ves. 688; How *v.* Sherewood, 1 Ves. Jr. 241; Anon., Skin. 159; Mortimer *v.* Shortall, 2 Dr. & W. 363; Alexander *v.* Crosbie, Ll. & G. 145; London R. Co. *v.* Winter, 1 Cr. & Phil. 57; Garwood *v.* Eldridge, 1 Green, Ch. 146; Lyon *v.* Richmond, 2 John. Ch. 60; Wheaton *v.* Wheaton, 9 Conn. 96; Hunt *v.* Rousmanier, 1 Pet. 1; Parkhurst *v.* Van Cortlandt, 1 John. Ch. 282; Westbrook *v.* Harbeson, 2 McCord, Ch. 112; Dwight *v.* Pomroy, 17 Mass. 303; Robson *v.* Harwell, 6 Ga. 589; Chamness *v.* Crutchfield, 2 Ired. Eq. 148; Movan *v.* Hayee, 1 John. Ch. 339; Ratcliff *v.* Ellison, 3 Rand. 537; Richardson *v.* Thompson, 1 Humph. 151.

[2] Barrows *v.* Greenhough, 3 Ves. 154; Townshend *v.* Stangroom, 6 Ves. 334; Shelborne *v.* Inchinquin, 1 Bro. Ch. 341; Miller *v.* Cotten, 5 Ga. 346. See the whole matter elaborately discussed and all the authorities collected in notes to Woollam *v.* Hearne, 2 Lead. Ca. Eq. 684.

[3] Chalfant *v.* Williams, 35 Penn. St. 212; Clark *v.* Partridge, 2 Barr, 13; 4 Barr, 166; Oliver *v.* Oliver, 4 Rawle, 141; Rearich *v.* Swineheart, 1 Jones, 238; Christ *v.* Diffenbach, 1 S. & R. 464.

[4] Stump *v.* Gaby, 2 De G., M. & G. 623; McKissick *v.* Pickle, 4 Harris, 140.

[5] Stump *v.* Gaby, 2 De G., M. & G. 623; Morgan *v.* Halford, 1 Sm. & Gif. 101; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Malin *v.* Malin, 1 Wend. 625; Clapper *v.* House, 6 Paige, 149; Kent *v.* Mehaffey, 10 Ohio St. 204.

trustee and *cestui que trust* is admitted to exist, but diligence must be used to establish a constructive trust on the ground of fraud. A court of equity will refuse its aid to stale demands, where a party has slept upon his rights, or has acquiesced for a great length of time.[1] And so a constructive trust will be barred by long acquiescence, although the fraud was evident and the relief was originally clear.[2] It is difficult to state as a general proposition what length of time will bar relief from the consequences of a fraud. It is necessarily subject to the equitable discretion of the court, and must depend upon the nature of each case and the circumstances of the parties.

§ 229. Therefore no certain time can be stated as a limit beyond which relief will not be given. In several cases twenty years has been held to be a bar;[3] and so where one had acquiesced for

[1] Smith *v.* Clay, 3 Bro. Ch. 639, n; Cholmondely *v.* Clinton, 1 J. & W. 151; Chalmer *v.* Bradley, 1 J. & W. 59; Beckford *v.* Wade, 17 Ves. 97; Portlock *v.* Gardner, 1 Hare, 594; Hawley *v.* Cramer, 4 Cow. 117; Dobson *v.* Racey, 3 Sandf. Ch. 61; Powell *v.* Murray, 2 Edw. Ch. 644; 10 Paige, 256; Piatt *v.* Vatier, 9 Pet. 405; McKnight *v.* Taylor, 1 How. 161; Wagner *v.* Baird, 7 How. 234; Veasie *v.* Williams, 8 How. 134; Hallett *v.* Collins, 10 How. 174; Hough *v.* Richardson, 3 Story, 659; Gould *v.* Gould, 3 Story, 516; Peebles *v.* Reading, 8 S. & R. 484; Irvine *v.* Robertson, 3 Rand. 549; Colman *v.* Lyne, 4 Rand. 454; Anderson *v.* Burchell, 6 Grat. 405; 2 Story, Eq. Jur. § 1520, notes.

[2] Bonny *v.* Ridgard, cited 4 Bro. Ch. 138; Andrew *v.* Wrigley, 4 Bro. Ch. 124; Blennerhasset *v.* Day, 2 B. & B. 118; Gregory *v.* Gregory, Cowp. 201; Jac. 631; Selsey *v.* Rhoades, 1 Bligh, (N. S.) 1; Champion *v.* Rigby, 1 R. & M. 539; *Ex parte* Granger, 2 Deac. & Ch. 459; Collard *v.* Hare, 2 R. & M. 675; Norris *v.* Neve, 3 Atk. 38; Pryce *v.* Byrn, 5 Ves. 681, cited Campbell *v.* Campbell, 5 Ves. 678, 682; Morse *v.* Royal, 12 Ves. 355; Medlicott *v.* O'Donnell, 1 B. & B. 156; Hatfield *v.* Montgomery, 2 Porter, 58; Bond *v.* Brown, 1 Harp. Eq. 270; Edwards *v.* Roberts, 7 Sm. & M. 544; Peacock *v.* Black, Halst. Eq. 535; Steele *v.* Kinkle, 3 Ala. 352; Smith *v.* Clay, Amb. 645; Bond *v.* Hopkins, 1 Sch. & Lef. 413; Hovenden *v.* Annesley, 2 Sch. & Lef. 630–640; Stackhouse *v.* Barnston, 10 Ves. 466; *Ex parte* Dewdney, 15 Ves. 496; Kane *v.* Bloodgood, 7 John. Ch. 93; Dexter *v.* Arnold, 3 Sumn. 152; Decouche *v.* Savetier, 3 John. Ch. 190; Murray *v.* Coster, 20 John. 576; Prevost *v.* Gratz, 6 Wheat. 481; Hughes *v.* Edwards, 9 Wheat. 489; Elmendorf *v.* Taylor, 10 Wheat. 168; Miller *v.* McIntire, 6 Pet. 61; Sherwood *v.* Sutton, 5 Mason, 143.

[3] Smith *v.* Clay, 3 Bro. Ch. 639, n; Hovenden *v.* Annesley, 2 Sch. & Lef. 636; Stackhouse *v.* Barnston, 10 Ves. 466; Pryce *v.* Byrn, 5 Ves. 681; Ward *v.* Van Bakkelen, 1 Paige, 100; Thompson *v.* Blair, 3 Murph. 593; Farr *v.* Farr, 1 Hill, Eq. 391; Field *v.* Wilson, 6 B. Mon. 479; Bruce *v.* Child, 4 Hawks,

twenty-five years,[1] and twenty-one years,[2] and in another case the lapse of eighteen years was held to be a bar.[3] So a delay of thirty years,[4] of thirty-eight years,[5] of forty-six years,[6] of fifty years,[7] of twenty-seven years,[8] and of seventeen years,[9] has been held to be such *laches*, if unexplained, as would be a bar to a bill for relief. Under the circumstances of other cases, a delay of twelve years,[10] of eleven years,[11] of eighteen years, was held to be no bar.[12] In Michoud *v.* Girod the law was elaborately examined and stated by Mr. Justice Wayne as follows, "that within what time a constructive trust will be barred must depend upon the circumstances of the case.[13] There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it." [14] If there is no fraud chargeable on any party, but a simple mistake or accident is made by which a title is changed, more diligence is required, and acquiescence for a less time will bar the suffering party of his relief. An acquiescence for seventeen years,[15] or for nineteen years,[16] has been held to be fatal to an application for relief.

372; Perry *v.* Craig, 3 Miss. 525; Ferris *v.* Henderson, 12 Penn. St. 54; Bank of U. S. *v.* Biddle, 2 Pars. Eq. 31; Walker *v.* Walker, 16 S. & R. 379; McDowell *v.* Goldsmith, 2 Md. Ch. 370.

1 Blennerhassett *v.* Day, 2 B. & B. 118.

2 Selsey *v.* Rhodes, 1 Bligh (N. S.), 1.

3 Gregory *v.* Gregory, Coop. 201; Jac. 631; Champion *v.* Rigby, 1 R. & M. 539; Roberts *v.* Tunstall, 4 Hare, 257.

4 Harrod *v.* Fountleroy, 3 J. J. Marsh. 548; Phillips *v.* Belden, 2 Edw. Ch. 1; Page *v.* Booth, 1 Rob. Va. 161; Bond *v.* Brown, Harp. Eq. 270.

5 Powell *v.* Murray, 10 Paige, 256.

6 Maxwell *v.* Kennedy, 8 How. 210.

7 Anderson *v.* Barwell, 6 Grat. 405.

8 Hayes *v.* Goode, 7 Leigh, 486.

9 Baker *v.* Read, 18 Beav. 398.

10 Butler *v.* Haskell, 4 Des. 651.

11 Rhinlander *v.* Barrow, 17 John. Ch. 538; Mulhallen *v.* Murum, 3 Dr. & W. 317.

12 Bell *v.* Webb, 2 Gill, 263; Grisby *v.* Mousley, 4 De G. & J. 78.

13 Boone *v.* Chiles, 10 Pet. 177.

14 Michoud *v.* Girod, 4 How. 561; Trevelyan *v.* Charter, 11 Cl. & Fin. 714; Pryn *v.* Byrne, 5 Ves. 681; Malony *v.* L'Estrange, Beat. 406.

15 Hite *v.* Hite, 1 B. Mon. 177.

16 Bruce *v.* Child, 4 Hawks, 372.

§ 230. The statute of limitations is not necessarily controlling, as to the time within which relief is to be sought, in the case of a constructive trnst by reason of fraud. A demand may be stale, and not entitled to relief under the circumstances of the case, although much less than the time allowed by the statute of limitations has elapsed; and so, a party may be entitled to relief although much more than the statute limit has gone by.[1] In some States, however, the statute is applied to constructive trusts, unless they are concealed or undiscovered. In such States, relief must be sought within six years if it is sought by bill in equity to set aside a deed, or to establish a trust.[2] In Pennsylvania the limit is five years.[3] In other States, it has been decided, in analogy to the statute which bars a real action after twenty years, that relief must be sought within the twenty years named in the statute.[4] In South Carolina, it is held that an action to set aside a deed as fraudulent is equivalent to an action for deceit, and must be brought within the limit of the statute for personal actions.[5] But, if the fraud is unknown to the injured party, or is concealed, or he is under disability, or out of the country, or the delay is caused by the defendant,[6] the lapse of time will not be *laches* which bar relief. If a party has knowledge of the fraud, a want of evidence will not excuse his delay,[7] nor will poverty and an inability to prosecute

[1] Mason *v.* Crosby, 1 Wood. & M. 342; Piatt *v.* Vatier, 1 McLean, 146; 9 Pet. 405; Juzan *v.* Toulmin, 9 Ala. 662.

[2] Farnham *v.* Brooks, 9 Pick. 212; Sears *v.* Shafer, 2 Seld. 268; Williamson *v.* Field, 2 Sand. Ch. 534.

[3] Miller *v.* Franciscus, 40 Penn. St. 335; Rider *v.* Maul, 46 Penn. St. 376.

[4] Ware *v.* Van Bakkelen, 1 Paige, 100; Walker *v.* Walker, 16 S. & R. 379; Ferris *v.* Henderson, 12 Penn. St. 54; Bank of U. S. *v.* Biddle, 2 Pars. Eq. 31; Thompson *v.* Blair, 3 Murph. 593; Farr *v.* Farr, 1 Hill, Eq. 391; Perry *v.* Craig, 3 Mis. 525; Field *v.* Wilson, 6 B. Mon. 479; Bruce *v.* Child, 4 Hawks, 372; McDowel *v.* Goldsmith, 2 Md. Ch. 370.

[5] Parkam *v.* McCravy, 6 Rich. Eq. 143; McDonald *v.* May, 1 Rich. Eq. 91; Bradley *v.* McBride, Rich. Eq. Ca. 202 is overruled.

[6] Sears *v.* Shafer, 2 Seld. 268; Richardson *v.* Jones, 3 G. & J. 163; Doggett *v.* Emerson, 3 Story, 700; Callender *v.* Calgrove, 17 Conn. 1; Phalen *v.* Clarke, 19 Conn. 421; Hallett *v.* Collins, 10 How. 174; Rider *v.* Bickerton, 3 Swans. 81, n.; Blannerhassett *v.* Day, 2 B. & B. 118; Trevelyan *v.* Charter, 11 Cl. & Fin. 714; Bowen *v.* Evans, 2 H. L. Ca. 257; Warner *v.* Daniels, 1 W. & M. 111; Murray *v.* Palmer, 2 Sch. & Lef. 487; Aylewood *v.* Kearney, 2 B. & B. 263; Pickett *v.* Loggan, 14 Ves. 215; Purcell *v.* McNamara, 14 Ves. 91; Ferris *v.* Henderson, 12 Penn. St. 49; Michoud *v.* Girod, 4 How. 561.

[7] Parkam *v.* McCravy, 6 Rich. Eq. 114.

the action.[1] If there has been great delay, courts will require very clear evidence to impeach a transaction as fraudulent, and to convert the fraudulent party into a trustee.[2] So, if a great length of time has elapsed, courts will sometimes grant the relief prayed for by setting aside the conveyance, but will decree an account for only six years,[3] or from the time of filing the bill,[4] and without costs.[5]

[1] Roberts *v.* Tunstall, 4 Hare, 357; Maxwell *v.* Kennedy, 8 How. 210; Locke *v.* Armstrong, 2 Dev. & Bat. 147; Perry *v.* Craig, 3 Mis. 516.

[2] Chalmers *v.* Bradley, 1 J. & W. 59; Powell *v.* Murray, 10 Paige, 256; Bowen *v.* Evans, 2 H. L. Ca. 257; Westbrook *v.* Harwell, 2 McCord, Eq. 112; Phillips *v.* Belden, 2 Edw. Ch. 1; Jennings *v.* Broughton, 3 De G., M. & G. 126; Chandos *v.* Brownlow, 2 Ridg. P. C. 397; Montgomery *v.* Hobson, Meigs, 437; Page *v.* Booth, 1 Rob. 161.

[3] Pearce *v.* Newlyn, 3 Mad. 189.

[4] Pickett *v.* Loggan, 14 Ves. 215; Malony *v.* L'Estrange, Beatt. 406; Mulhallan *v.* Murum, 3 Dr. & W. 317.

[5] Pearce *v.* Newlyn, 3 Mad. 189; Attorney-General *v.* Dudley, Coop. 146.

CHAPTER VII.

TRUSTS THAT ARISE BY EQUITABLE CONSTRUCTION IN THE ABSENCE OF FRAUD.

§ 231. It frequently happens that courts of equity construe a trust to arise from the contracts and dealings of parties, although a trust is not within their contemplation, and there is no fraud, actual or constructive. In this respect, courts of equity proceed in a manner, and upon principles entirely unknown to courts of law. Thus, if parties enter into a valid contract for the sale and conveyance of lands, and the vendor neglects or declines to convey, courts of law can only give the vendee an action for damages for a breach of the contract, but the legal title to the property will not be affected: it will still remain in the vendor. A court of equity, however, looks upon that as already done, which was agreed to be done.[1] From the date of the contract it looks upon the beneficial interest as in the vendee, and the legal title only as in the vendor. By construction the vendor holds the legal title in trust for the

[1] Fonbl. Eq. Tr. B. 1, c. 6, § 8.

vendee.[1] Equity proceeds, *in personam*, against the vendor and makes him a trustee, and then orders him to execute the trust by conveying the legal title to the person to whom he has agreed to convey it. The purchaser is in like manner a trustee of the purchase-money, and the court will order him to pay it over, and receive a conveyance of the legal title to the land.[2] And, *a fortiori*, if the purchaser has paid the purchase-money the vendor becomes a mere trustee of the legal title for the purchaser;[3] so if the purchaser has paid part of the purchase-money, the vendor becomes a trustee to the extent of the money paid.[4] If the vendor does not own the land, or some part of that which he agrees to convey, and afterwards obtains the title, he will immediately become a trustee for the purchaser.[5] This equity will not be affected by the death or bankruptcy of either party: if the vendor dies before he has conveyed the land, the legal title will descend to his heirs subject to the trust; and they or his legal representatives will be ordered to execute the trust.[6] But the lien or trust will not exist where the purchaser by his own fault abandons the contract,[7] or where the contract is for any cause illegal.[8] If the purchaser abandons the contract, because the vendor can not fulfil it as agreed upon, as if it is to give a good title, the trust or lien will not continue.[9]

§ 232. Similar to this is the constructive lien or trust in favor

[1] Wall *v.* Bright, 1 J. & W. 500; Green *v.* Smith, 1 Atk. 572; Davie *v.* Beardsham, 1 Ch. Ca. 39; Atcherley *v.* Vernon, 10 Mod. 518; McKay *v.* Carrington, 1 McLean, 50; Crawford *v.* Bertholf, Saxt. 458; Ten Eyck *v.* Simpson, 1 Sandf. Ch. 244; Kerr *v.* Day, 14 Penn. St. 112; Moore *v.* Burrows, 34 Barb. 173; Adams *v.* Green, ib. 176; Wickman *v.* Robinson, 14 Wis. 493.

[2] Green *v.* Smith, 1 Atk. 572; Pollexfen *v.* Moore, 3 Atk. 272.

[3] Waddington *v.* Banks, 1 Brock. 97; Fenno *v.* Sayre, 3 Ala. 458; Brown *v.* East, 5 Mon. 415; Payne *v.* Atterbury, Harring. Ch. 414; Neeson *v.* Clarkson, 4 Hare, 97.

[4] Wythes *v.* Lee, 3 Drew. 396.

[5] Tyson *v.* Passmore, 2 Barr, 122; McCall *v.* Coover, 4 W. & S. 151.

[6] Paul *v.* Wilkins, Toth. 106; Barker *v.* Hill, 2 Ch. R. 113; Winged *v.* Lefebury, 2 Eq. Ca. Ab. 32, pr. 43; Orlebar *v.* Fletcher, 1 P. Wms. 737; Bowles *v.* Bowles, 6 Ves. 95, n.; Whitworth *v.* Davis, V. & B. 545; Tiernan *v.* Roland, 15 Penn. St. 429; Rutherford *v.* Green, 2 Ired. Eq. 121; Jacobs *v.* Lake, ib. 286; Newton *v.* Swazey, 8 N. H. 9; Glaze *v.* Drayton, 1 Dev. 109. In Massachusetts, the Probate Court or the Supreme Judicial Court may authorize the executor or administrator, or the guardian of an insane person to convey in such cases. Gen. Stat. 1860, c. 117, §§ 5, 6.

[7] Dinn *v.* Grant, 5 De G. & Sm. 451.

[8] Ewing *v.* Osbaldiston, 2 My. & Cr. 88.

[9] Wythes *v.* Lee, 3 Drew. 396.

of a vendor for his unpaid purchase-money; for the vendor of land has a lien on the land for the amount of the purchase-money, not only against the vendee himself and his heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase-money remains unpaid. To the extent of the lien, the vendee becomes a trustee for the vendor; and the vendee's heirs, and all other persons claiming under him or them with notice, are construed by courts of equity to be trustees. This doctrine is well established in the jurisprudence of England,[1] and it has been recognized, and acted upon, in many of the United States.[2] The principle upon which the lien depends is this, that

[1] See Mackreth *v.* Symmons, 15 Ves. 329, where Lord Eldon cited and commented upon all the cases previous to that time. See S. C. 1 Lead. Ca. Eq. 336, where the later English cases are quoted and also the American cases. Lemon *v.* Whitely, 4 Rus. 423; Chapman *v.* Tanner, 1 Vern. 267; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Burgess *v.* Wheat, 1 Eden, 211; 1 W. Black. 150.

[2] In Maine the doctrine is entirely rejected as inconsistent with the registry laws and policy of the State. Philbrook *v.* Delano, 29 Me. 415. In New Hampshire the court has left it undecided: Arlin *v.* Brown, 44 N. H. 102, and see Buntin *v.* French, 16 N. H. 592. In Vermont the doctrine was established in an able judgment by Ch. J. Redfield: Manly *v.* Slason, 21 Vt. 271, but abolished by Stat. 1851. In Massachusetts the point is not decided in the State courts: Wright *v.* Dame, 5 Met. 503. Mr. J. Story, in Gilman *v.* Brown, 1 Mason, 191, (1817) said that "nothing can be clearer than that by the law of Massachusetts no lien in any case whatsoever exists upon land for the purchase-money. It has no court of chancery to recognize and enforce such a lien, and the peculiar principles and doctrines of courts of equity have never been adopted into its jurisprudence." Since then the Supreme Judicial Court has full equity powers according to the chancery jurisdiction in England (Stat. 1855). There is now no obstacle to the remedy, if the court should establish the doctrine. In Connecticut it is undecided: Atwood *v.* Vincent, 17 Conn. 575; See Watson *v.* Wells, 5 Conn. 468; Dean *v.* Dean, 6 Conn. 285; Meigs *v.* Dimock, 6 Conn. 458; Chapman *v.* Beardsley, 31 Conn. 115. In New York it is well established: Stafford *v.* Van Renselaer, 9 Cow. 316; Garson *v.* Green, 1 John. Ch. 308; White *v.* Williams, 1 Paige, Ch. 502; Fish *v.* Howland, ib. 20; Warner *v.* Van Alstyne, 3 ib. 513; Shirly *v.* Sugar Ref., 2 Edw. Ch. 505; Dubois *v.* Hall, 43 Barb. 26; Warren *v.* Fenn, 28 ib. 333; Champion *v.* Brown, 6 John. 402. In New Jersey, also, Vandoren *v.* Todd, 2 Green, Ch. 397; Brinkerhoff *v.* Vansciven, 3 Green, Ch. 251; Herbert *v.* Scofield, 1 Stock. Ch. 492. In Pennsylvania the doctrine is rejected, though there may be such a conditional title conveyed, as will give the vendor a preference for the purchase-money over all others claiming under the vendee: Irvine *v.* Campbell, 6 Binn. 118; Stouffer *v.* Coleman, 1 Yeates, 393; Kauffelt *v.* Bower, 7 S. & R. 64; Bear *v.* Whisler, 7 Watts, 147; Semple *v.* Burd, 7 S. & R. 286; Zentmyer *v.* Miltower, 5 Penn. St. 403; Stephens's App., 38 Penn. St. 9; Springer *v.* Walters, 34 Penn. St. 328; Hepburn *v.* Snyder, 3 Penn. St. 72; Megargel *v.* Saul, 3 Whar. 19; Cook *v.* Trimble, 9 Watts. 15; Heist *v.* Baker,

a person who has obtained the estate of another ought not, in conscience, to keep it, and not pay the consideration money in full;

49 Penn. St. 9; Straus's App. ib. 353. In Delaware the point is undecided: Budd *v.* Basti, 1 Harr. 69. In Maryland it is well established: White *v.* Casanave, 1 Har. & J. 106; Ghiselin *v.* Ferguson, 4 Har. & J. 522; Pratt *v.* Van Wyck, 6 Gill & J. 495; Magruder *v.* Peter, 11 Gill & J. 217; Repp *v.* Repp, 12 Gill & J. 341; Moreton *v.* Harrison, 1 Bland, Ch. 491; Carr *v.* Hobbs, 11 Md. 285; Hummer *v.* Schott, 21 Md. 307; Hall *v.* Jones, ib. 439; Bratt *v.* Bratt, ib. 578. In Virginia it was long acted upon: Graves *v.* McCall, 1 Call, 414; Handley *v.* Lyons, 5 Munf. 342; Duvall *v.* Bibb, 4 Hen. & M. 113; Hatcher *v.* Hatcher, 1 Rand. 53; Redford *v.* Gibson, 12 Leigh, 332. But it is now abolished by the code: Yancy *v.* Manck, 15 Grat. 300; Hempfield R.R. Co. *v.* Thornbury, 1 West Va. 261. In North Carolina, after being acted upon for some time, it was overruled: Cameron *v.* Mason, 7 Ired. Eq. 180; Gabee *v.* Sneed, 1 Dev. & B. 333; Wamble *v.* Battle, 3 Ired. Eq. 182; Henderson *v.* Burton, 3 Ired. Eq. 259. In South Carolina it was never acted upon: Wragg *v.* Comptroller Gen., 2 Des. 509. In Georgia it is acted upon: Marine Fire Ins. Co. *v.* Early, Charl. 279; Hampden *v.* Miller, Dud. 120; Mounce *v.* Byars, 16 Ga. 469; Chance *v.* McWharter, 26 Ga. 315; Stile *v.* Griffin, 27 Ga. 504; Mims *v.* Lockett, 23 Ga. 237; Mims *v.* Macon and Western Railroad, Kelly, 333. Also in Florida: Woods *v.* Bailey, 3 Flor. 41. And so in Alabama: Burns *v.* Taylor, 23 Ala. 255; Haley *v.* Bennett, 5 Porter, 452; Roper *v.* McCook, 7 Ala. 318; Griffin *v.* Camack, 36 Ala. 695. So in Mississippi: Trotter *v.* Erwin, 27 Miss. 772; Stewart *v.* Ives, 1 Sm. & M. 197; Tanner *v.* Hicks, 4 Sm. & M. 294; Upshaw *v.* Hargrave, 6 S. & M. 286; Dunlop *v.* Burnett, 5 S. & M. 702; Servis *v.* Beatty, 32 Miss. 52. It is established in Texas: Pinchain *v.* Collard, 13 Tex. 333; Wheeler *v.* Lane, 21 Tex. 583; McAlpin *v.* Burnett, 23 Tex. 649. So in Arkansas: English *v.* Russell, Hemp. 35; Scott *v.* Orbinson, 2 Ark. 202; Shall *v.* Biscoe, 18 Ark. 142. So in Missouri: Marsh *v.* Turner, 4 Mo. 53; McKnight *v.* Brady, 2 Mo. 110; Davis *v.* Lamb, 30 Mo. 441; Bledsoe *v.* Games, ib. 448; Delassus *v.* Poston, 19 Mo. 425. So in Tennessee: Brown *v.* Vanlier, 7 Humph. 239; Eskridge *v.* McClure, 2 Yerg. 84; Marshall *v.* Christmas, 3 Humph. 616; Campbell *v.* Baldwin, 2 Humph. 248; Uzzell *v.* Mack, 4 Humph. 319; Medley *v.* Davis, 5 Humph. 387; Norvell *v.* Johnson, ib. 489; Taylor *v.* Hunter, ib. 569. So in Kentucky: Muir *v.* Cross, 10 B. Mon. 277; Fowler *v.* Rust, 2 A. K. Marsh. 294; Taylor *v.* Alloway, 2 Lit. 216; Mosely *v.* Garrett, 1 J. J. Marsh. 212; Richardson *v.* Baker, 5 J. J. Marsh. 323; Cox *v.* Fenwick, 3 Bibb, 183. So in Ohio: Williams *v.* Roberts, 5 Ohio, 35; Tiernan *v.* Bean, 2 Ham. 383; Magham *v.* Coombs, 14 Ohio, 428; Neil *v.* Kinney, 11 Ohio St. 58. So in Indiana: McCarty *v.* Pruet, 4 Ind. 46; Lagow *v.* Badollet, 1 Blackf. 416; Evans *v.* Goodlett, ib. 246; Merritt *v.* Wiles, 18 Ind. 171; Cox *v.* Wood, 20 Ind. 54. So in Illinois: Trustees *v.* Wright, 11 Ill. 603. So in Michigan: Sears *v.* Smith, 2 Mich. 243; Carroll *v.* Van Renselaer, Harring. Ch. 225. Also in Iowa: Pierson *v.* David, 1 Io. 23; Rakestraw *v.* Hamilton, 14 Io. 147; Patterson *v.* Linder, ib. 414; Tupple *v.* Viers, ib. 515; Grapengether *v.* Fejervary, 9 Io. 163; Hays *v.* Horine, 12 Io. 61. So in Wisconsin: Toby *v.* McAllister, 9

and a third person, who receives the estate with full knowledge that it has not been paid for, ought not, as a matter of equity, to be allowed to keep it without paying for it.[1] It will at once be seen, that, as between the parties, this lien is founded in natural justice.[2] The civil law gave a lien on both real and personal property to the vendor for the purchase-money,[3] and the principle was early introduced into English equity, as to real estate.[4] Courts administer the equity by converting the purchaser into a trustee.[5] They, in effect, say, that if one conveys his land and takes no security for the purchase-money, the purchaser shall be a trustee of the land for the vendor until it is paid.[5]

§ 233. It has been objected that the creation of this lien or trust by courts of equity, is a repeal of the statute of frauds. It is answered, that the raising of such a trust is no more in contravention of the statute than the creation of any other resulting or constructive trust by operation of law upon the acts and contracts of parties, where they do not contemplate or intend a trust.[6] It is further objected, in the United States, that the raising of such trusts is contrary to the policy of the registry laws which require all deeds and liens to be matter of record.[7] But, as between the parties, the raising of a trust to secure the purchase-money, is no more against the policy of the registry laws than is the raising of a resulting trust to secure the actual purchaser, where the deed

Wis. 463. Also in Minnesota: Daughaday *v.* Payne, 6 Min. 443. In Kansas there is no lien: Simpson *v.* Munder, 3 Kansas, 172. The lien exists in California: Truebody *v.* Jacobson, 2 Cal. 269; Taylor *v.* McKinney, 20 Cal. 618; Baum *v.* Grigsby, 21 Cal. 172; Sparks *v.* Hess, 15 Cal. 186; Walker *v.* Sedgwick, 8 Cal. 398; Cahoon *v.* Robinson, 6 Cal. 225; Salmon *v.* Hoffman, 2 Cal. 138; Burtt *v.* Wilson, 28 Cal. 632. The same doctrine is held in the courts of the United States: Chilton *v.* Braiden, 2 Black, 458; Gilman *v.* Brown, 1 Mason, 191; 4 Wheat. 255; Bayley *v.* Greenleaf, 7 Wheat. 46; Bush *v.* Marshall, 6 How. 284; Galloway *v.* Finley, 12 Pet. 264; McLearn *v.* McLellan, 10 Pet. 640; Cole *v.* Scott, 2 Wash. 141.

[1] Hughes *v.* Kearney, 1 Sch. & Lef. 135; Chilton *v.* Braiden, 2 Black, 458.

[2] Inst. Lib. 2, tit. 1, § 41; Blackburn *v.* Gregson, 1 Cox, 100; Chapman *v.* Tanner, 1 Vern. 267.

[3] Mackreth *v.* Symmons, 15 Ves. 337.

[4] Mackreth *v.* Symmons, 15 Ves. 337; Dig. Lib. 18, tit. 1. c. 19, 22, 53; Domat, B. 3, tit. 1, § 5, art. 4.

[5] Ibid.; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Walker Am. Law, 315.

[6] Mackreth *v.* Symmons, 15 Ves. 329; Manly *v.* Slason, 15 Vt. 271.

[7] Philbrook *v.* Delano, 29 Me. 415.

is taken in the name of another, or the raising of a constructive trust where one man has defrauded another of his title. In either case there is a secret trust that does not appear upon the records of the registry. So, as against third persons who take the land with notice that the purchase-money is unpaid, the policy of the registry laws applies in the same manner that it applies to other unrecorded deeds or liens.[1] Thus, if a second purchaser or mortgagee has notice of a prior sale or mortgage for a valuable consideration, he cannot by putting his deed or mortgage first on record, deprive the prior purchaser or mortgagee of his title or security.[2] It is, however, true that many courts have looked upon this trust with disfavor, although they have recognized its existence,[3] and some States have formally abolished it by statute.[3] While other courts deem it highly equitable, and eminently consistent with the most perfect ideas of moral justice.[4]

§ 234. In most cases the *cestui que trust* has an equitable estate in the land to which his trust attaches, an estate which he may sell, assign or devise; but a vendor having only a lien for his purchase-money, has no estate in the land. It is neither *jus in re*, nor *jus ad rem*. It is the mere possibility of a right, until it is established by a final decree of a court in each case.[5] It is not a direct trust in the land itself, but a collateral trust for the security of the debt. It is in fact a remedy for a debt, and not a right of property. It follows, that the remedy can be enforced only so long as the debt can be enforced; that where an action for the purchase-money is gone, the right to enforce the lien, or the lien itself, is gone also. This lien or trust continues so long as the purchase-money remains unpaid, or so long as an action can be maintained for its collection. If the action is barred by the statute of limitations, the remedy to enforce the lien is gone also.[6] In this respect the

[1] Manly *v.* Slason, 21 Vt. 271.

[2] Bayley *v.* Greenleaf, 7 Wheat. 51; Conover *v.* Warren, 1 Gil. 502; Brawley *v.* Catron, 8 Leigh, 527; Moore *v.* Halcombe, 3 Leigh, 600.

[3] Vermont and Virginia, *ut sup.*

[4] Manly *v.* Slason, 21 Vt. 278.

[5] Gilman *v.* Brown, 1 Mason, 21; 1 Lead. Ca. in Eq. 272–275; Williams *v.* Young, 17 Cal. 403; 21 Cal. 227.

[6] Borst *v.* Corey, 15 N. Y. 505; Sheratz *v.* Nicodemus, 7 Yerg. 9; Trotter *v.* Erwin, 27 Miss. 772; Addams *v.* Hefferman, 9 Watts, 530; Alexander *v.* McMurray, 8 Watts, 504. But in Maryland it was held to be a direct trust and property in the land like a mortgage which could be enforced after the personal

vendor's lien differs from a mortgage, which may be enforced against the land after all right to enforce the debt against the mortgagor is barred by the statute of limitations, or by his discharge in Bankruptcy. If a *cestui que trust* conveys his equitable estate in land, he will have the same lien upon it for the purchase-money as in the case of a legal estate.[1]

§ 235. The lien exists, notwithstanding the deed recites[2] or acknowledges[3] that the consideration is paid, and notwithstanding a receipt of the payment is indorsed upon the back of the deed,[4] if in fact it is not paid. And if the consideration is not to be paid until after the death of the grantor, and then only upon a contingency, as if no claim for dower is made in the mean time, the lien will arise;[5] but if the consideration of the sale is something other than money, as if the vendor makes the sale for the consideration of his future support, no lien will arise;[6] nor if in consideration that his debts are paid;[7] nor if the amount of the consideration is uncertain and unliquidated.[8] Nor if it appears that the consideration is that the vendee shall enter into covenants to do certain things.[9] If a note or bond is taken for the consideration, and include any thing other than the price of the land sold, the lien will not attach.[10]

obligation of the vendee was gone. Moreton *v.* Harrison, 1 Bland, 491; Lingan *v.* Henderson, ib. 236. And see Relfe *v.* Relfe, 34 Ala. 500.

[1] Iglehart *v.* Armiger, 1 Bland, 519; Galloway *v.* Hamilton, 1 Dana, 576; Lignon *v.* Alexander, 7 J. J. Marsh. 288; Stewart *v.* Hatton, 3 J. J. Marsh. 178. But see Bayley *v.* Greenleaf, 7 Wheat. 46; Schnebly *v.* Ragan, 7 Gill & J. 120.

[2] Thornton *v.* Knox, 6 B. Mon. 74; Mackreth *v.* Symmons, 15 Ves. 337; Hughes *v.* Kearney, 1 Sch. & Lef. 135; Winter *v.* Anson, 3 Russ. 488; 1 Sim. & S. 434; Saunders *v.* Leslie, 2 B. & B. 514.

[3] Gilman *v.* Brown, 1 Mason, C. C. 214; Sheratz *v.* Nicodemus, 7 Yerg. 9; Ewbank *v.* Poston, 5 Mon. 287; Redford *v.* Gibson, 12 Leigh, 344; Tribble *v.* Oldham, 5 J. J. Marsh. 144.

[4] Ibid.

[5] Redford *v.* Catron, 8 Leigh, 528.

[6] Arlin *v.* Brown, 44 N. H. 105; McCandlish *v.* Keen, 13 Grat. 615; Brawley *v.* Catron, 8 Leigh, 528; McKillip *v.* McKillip, 8 Barb. 552.

[7] Chapman *v.* Beardley, 3 Conn. 115.

[8] Ibid.

[9] Buckland *v.* Pocknell, 13 Sim. 406; Dixon *v.* Gayfere, 17 Beav. 421; 21 Beav. 118; Clarke *v.* Boyce, 3 Sim. 499; Parrott *v.* Sweetland, 3 My. & K. 655. In Alabama the lien was held to arise in case of an exchange of lands. Burns *v.* Taylor, 23 Ala. 255.

[10] McCandlish *v.* Keen, 13 Grat. 605; James *v.* Bird, 8 Leigh, 51.

§ 236. Where a vendor takes security for the purchase-money, it is often a difficult question to determine whether he has thereby abandoned or waived his lien. Much of the litigation upon vendor's liens has arisen over this question, — whether the lien was abandoned or not by the parties. Of course, it is a pure question of fact or intention. By the civil law, the taking of any kind of security was an abandonment of the lien upon the property; this rule has not prevailed in England. The rule in England is, that *prima facie* the vendor has a lien for the purchase-money: the presumption in favor of this lien continues until it is displaced by satisfactory evidence that the lien has been abandoned or extinguished. The burden is on the vendee to repel the presumption. The taking of security by the vendor is evidence upon that question, more or less satisfactory according to the nature of the security taken and the circumstances under which it is taken.[1] It has been held that the taking of a mortgage on another estate was not conclusive evidence that the lien was abandoned;[2] and so, bills or notes indorsed by third persons, or bonds with a surety, are not necessarily conclusive evidence that the vendor in taking them waives his lien.[3] It may be, in such cases, that the vendor accepted them as evidences of the amount of the purchase-money and debt, or as security in addition to his lien. But, if the security taken is totally distinct and independent, it will be very strong evidence that it was intended to be substituted in place of the lien;[4] and if is in any way inconsistent with the continued existence of the lien,

[1] Nairn *v.* Prowse, 6 Ves. 759; Mackreth *v.* Symmons, 15 Ves. 342; Garson *v.* Green, 1 John. Ch. 308; Lewis *v.* Caperton, 8 Grat. 148; Plowman *v.* Riddle, 14 Ala. 169; Hughes *v.* Kearney, 1 Sch. & Lef. 136; Saunders *v.* Leslie, 2 B. & B. 514; Bradford *v.* Marvin, 2 Flor. 463.

[2] Ibid.; Saunders *v.* Leslie, 2 B. & B. 514.

[3] Hughes *v.* Kearney, 1 Sch. & Lef. 135; Gibbons *v.* Baddall, 2 Eq. Ab. 682; Grant *v.* Mills, 2 Ves. & B. 306; Cooper *v.* Spottiswood, Taml. 21; *Ex parte* Peake, 1 Madd. 349; *Ex parte* Loring, 2 Rose, 79; Saunders *v.* Leslie, 2 B. & B. 514; Winter *v.* Anson, 3 Russ. 488; 1 S. & S. 434; Fawell *v.* Heelis, Amb. 724; Frail *v.* Ellis, 17 Eng. L. & Eq. 457; Buckland *v.* Pocknell, 13 Sim. 406; Blair *v.* Bromley, 5 Hare, 542; 2 Phil. 354; Hewitt *v.* Loosemore, 9 Hare, 449; Kyles *v.* Tait, 6 Grat. 44; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Coppin *v.* Coppin, 2 P. Wms. 291; Clark *v.* Royle, 3 Sim. 499; Elliott *v.* Edwards, 3 Bos. & P. 181.

[4] Ibid.; Gilman *v.* Brown, 1 Mason, 191; Cood *v.* Pollard, 9 Price, 544; 10 Price, 109; Parrott *v.* Sweetland, 3 My. & K. 655; Nairn *v.* Prowse, 6 Ves. 752; Mackreth *v.* Symmons, 15 Ves. 342.

it will, of course, be conclusive evidence that the lien was abandoned or extinguished.[1] Lord Eldon, after a careful review of the authorities, came to the conclusion that every case depended upon its own peculiar facts and circumstances; that different judges would have determined the same case differently; and that there was no general rule that was satisfactory; and he adds, "If I had found it laid down in distinct and inflexible terms, that when the vendor takes security for the consideration he has no lien, that would be satisfactory."[2]

§ 237. In the United States, the rule that Lord Eldon said would be satisfactory, substantially prevails. Thus, if the vendor does any act which manifests an intention to rely upon any security independent of the lien, he will be held to have waived it;[3] as if he accept a mortgage on other property,[4] or a bond or note with a third person as surety[5] or indorser,[6] or if he takes a pledge of stock as collateral,[7] he will be held to have waived his lien. So if he takes a mortgage on the same land sold for part of the purchase-money, or for the whole,[8] he will be held to have waived his lien for the remainder.[9] But in these cases the presumption that

[1] Manly v. Slason, 21 Vt. 271; Hallack v. Smith, 3 Barb. 267; *Ex parte* Parkes, 1 Glyn & Jam. 228.

[2] Mackreth v. Symmons, 15 Ves. 342.

[3] Blackburn v. Gregson, 1 Bro. Ch. 424, and notes by Perkins; Buntin v. French, 16 N. H. 592; Coit v. Fougera, 36 Barb. 195; Griffin v. Blanchard, 17 Cal. 70; Phelps v. Conover, 25 Ill. 309; Selby v. Stanley, 4 Min. 65; Hane v. Van Deusen, 32 Barb. 92; Parker v. Sewell, 24 Tex. 238; Dibble v. Mitchell, 15 Ind. 435.

[4] Richardson v. Ridgely, 8 Gill & J. 87; White v. Dougherty, 1 Mart. & Y. 309; Young v. Wood, 11 B. Mon. 123; Mattix v. Weand, 19 Ind. 151; Harris v. Harlan, 14 Ind. 104; Shelby v. Perrin, 18 Tex. 515; Camden v. Vail, 23 Cal. 633; Hadley v. Pickett, 25 Ind. 450.

[5] Boon v. Murphy, 6 Blackf. 272; Williams v. Roberts, 5 Ohio, 35; Mayham v. Coombes, 14 Ohio, 428; Wilson v. Graham, 5 Munf. 297; Francis v. Hazelrigg's Ex'rs, Hardin, 48; Way v. Patty, 1 Carter, 102; Burger v. Potter, 32 Ill. 66; Sears v. Smith, 2 Mich. 243; Porter v. Dubuque, 20 Io. 440.

[6] Foster v. Trustees, 3 Ala. 302; Gilman v. Brown, 1 Mason, 191; 4 Wheat. 255; Marshall v. Christmas, 3 Humph. 616; Burke v. Gray, 6 How. (Miss.) 527; Conover v. Warren, 1 Gilm. 498; Bradford v. Marvin, 2 Flor. 463.

[7] Lagow v. Badollet, 1 Blackf. 416.

[8] Little v. Brown, 2 Leigh, 355; Hadley v. Pickett, 25 Ind. 450. But see to the contrary, Boos v. Ewing, 17 Ohio, 520.

[9] Brown v. Gilman, 4 Wheat. 291; Fish v. Howland, 1 Paige, 30; Phillips v. Saunderson, 1 S. & M. 465. Even if the mortgage is void. Camden v. Vail, 23 Cal. 633; Way v. Patty, 1 Ind. 102.

the vendor intended to waive his lien by taking such securities may be rebutted by any satisfactory evidence that it was not intended that the lien should be waived.[1] On the other hand, the presumption of a lien may be rebutted, though no security is taken, by satisfactory evidence that it was intended that the lien should not be relied on.[2] But, generally, the mere taking of the vendee's note, or bond, or bill, or check,[3] or the renewal of these evidences of debt,[4] will not be sufficient evidence that the vendor intended to waive his lien.[5] But any conduct in the vendor that makes it unjust, unfair, or inequitable for him to insist upon the lien, will discharge it.[6] If worthless securities are fraudulently imposed upon the vendor he will retain his lien.[7]

§ 238. It has been said before, that the lien for the purchase-money is not an estate in the land, nor is it a charge on the land, but it is an equity between the parties, their representatives or privies in law or estate, to be resorted to in case of failure of payment by the vendee. It is a possibility that may be perfected by proceedings in equity, into an actual estate or interest in the land.[8] Having such a character, it is generally considered to be a personal privilege in the vendor, which descends to his heirs or representatives with the debt for the purchase-money, but which cannot be

[1] Mims *v.* Macon and Western R.R. 3 Kelly, 333; Campbell *v.* Baldwin, 2 Humph. 248; Kyles *v.* Tait, 6 Grat. 48; Tiernan *v.* Thurman, 14 B. Mon. 277; Sears *v.* Smith, 2 Mich. 243; Daughaday *v.* Paine, 6 Min. 443.

[2] Clark *v.* Hunt, 3 J. J. Marsh. 553; Phillips *v.* Saunderson, 1 S. & M. 462; Redford *v.* Gibson, 12 Leigh, 332; Scott *v.* Orbinson, 21 Ark. 202.

[3] Honore *v.* Bakewell, 6 B. Mon. 67; Baum *v.* Grigbsy, 21 Cal. 172; Walker *v.* Sedgwick, 8 Cal. 398.

[4] Mims *v.* Lockett, 23 Ga. 237.

[5] Cox *v.* Fenwick, 3 Bibb, 183; Evans *v.* Goodlet, 1 Blackf. 246; Taylor *v.* Hunter, 5 Humph. 569; Garson *v.* Green, 1 John. Ch. 308; White *v.* Williams, 1 Paige, 502; Clark *v.* Hunt, 3 J. J. Marsh. 553; Thornton *v.* Knox, 6 B. Mon. 74; Aldridge *v.* Dunn, 7 Blackf. 249; Ross *v.* Whitson, 6 Yerg. 50; Tompkins *v.* Mitchell, 2 Rand. 428; Truebody *v.* Jacobson, 2 Cal. 269; Pinchain *v.* Collard, 13 Tex. 333; Sheratz *v.* Nicodemus, 7 Yerg. 9; Manly *v.* Slason, 2 Vt. 271.

[6] Redford *v.* Gibson, 12 Leigh, 343; Fowler *v.* Rust, 2 Marsh. 294; Clark *v.* Hunt, 3 J. J. Marsh. 558; Phillips *v.* Saunderson, 1 S. & M. 462; McCown *v.* Jones, 14 Tex. 682; Scott *v.* Orbinson, 21 Ark. 202; Clamer *v.* Rawlings, 9 S. & M. 122; Lynch *v.* Dearth, 2 Penn. 101.

[7] Coit *v.* Fougera, 36 Barb. 195; Toby. *v.* McAllister, 9 Wis. 463.

[8] Young *v.* Williams, 17 Cal. 403; 21 Cal. 227; Keith *v.* Horner, 32 Ill. 524.

assigned to a third person, with or without the bond, note, bill, or check which the vendee gave for the consideration.[1] If one of several purchasers pays the whole purchase-money, he does not thereby secure a lien on his co-purchasers' shares;[2] nor does a lien accrue to a third person who loans the purchase-money to the vendee and takes his note therefor;[3] but if it is agreed by the vendor that a note for the purchase-money shall be given to a third person, it seems that the vendor's lien will go with the note.[4] If the note given to the vendor for the purchase-money is indorsed by him, and afterwards paid by him, his lien will revive and attach to it.[5] If a surety to the vendee's note or bond for the purchase-money is obliged to pay the debt, he will be subrogated to the vendor's lien, and will have a right to have it enforced for his benefit.[6] If a vendor having a lien on real estate for his purchase-

[1] Dixon *v.* Dixon, 1 Md. Ch. 220; Wellborn *v.* Williams, 8 Ga. 258; Green *v.* Demoss, 10 Humph. 371; Walker *v.* Williams, 30 Miss. 165; Briggs *v.* Hill, 6 How. (Miss.) 362; Shall *v.* Biscoe, 18 Ark. 142; Brush *v.* Kinsley, 14 Ohio, 20; Horton *v.* Horner, 14 Ohio, 437; Sheratz *v.* Nicodemus, 7 Yerg. 9; Gann *v.* Chester, 5 ib. 205; White *v.* Williams, 1 Paige, 502; Hallock *v.* Smith, 3 Barb. 267; Green *v.* Crockett, 2 Dev. & Bat. Eq. 390; Moreton *v.* Harrison, 1 Bland, 491; Webb *v.* Robinson, 14 Ga. 216; Dickinson *v.* Chase, 1 Morris (Io.) 492; Jackman *v.* Hallock, 1 Ohio, 318; Tiernan *v.* Beam, 2 Ohio, 383; Clairhorn *v.* Crockett, 3 Yerg. 27; Briggs *v.* Planters' Bank, 1 Freem. Ch. 574; Iglehart *v.* Amiger, 1 Bland, 519; Hayden *v.* Stuart, 4 Md. Ch. 280; Hall *v.* Maccubbin, 6 Gill & J. 107; Baum *v.* Grigsby, 21 Cal. 172; Lewis *v.* Covillaud, ib. 178; Williams *v.* Young, ib. 227; Keith *v.* Horner, 32 Ill. 524; Richards *v.* Leaming, 27 Ill. 431; Watson *v.* Bane, 7 Md. 117; Dixon *v.* Dixon, 1 Md. Ch. 220. But in Alabama, Texas, Kentucky, Indiana, and Iowa, a different rule prevails. In those States, the assignment of the note given for the purchase-money carries with it to the assignee the vendor's lien. Roper *v.* McCook, 7 Ala. 318; White *v.* Stover, 10 Ala. 441; Grigsby *v.* Hair, 25 Ala. 327; Griffin *v.* Camack, 36 Ala. 695; Murray *v.* Able, 18 Tex. 515; McAlpin *v.* Burnett, 19 Tex. 497; Moore *v.* Raymond, 15 Tex. 554; Edwards *v.* Bohannon, 2 Dana, 98; Honore *v.* Bakewell, 6 B. Mon. 67; Lagow *v.* Badollet, 1 Blackf. 417; Brumfield *v.* Palmer, 7 ib. 227; Fisher *v.* Johnson, 5 Ind. 492; Kern *v.* Hazlerigg, 11 Ind. 443; Rakestraw *v.* Hamilton, 14 Io. 147; Pierson *v.* David, 1 Clarke, 23.

[2] Glasscock *v.* Glasscock, 17 Tex. 480.

[3] Stansell *v.* Roberts, 13 Ohio, 148; Skeggs *v.* Nelson, 25 Miss. 88; Crane *v.* Caldwell, 14 Ill. 468.

[4] Dryden *v.* Frost, 3 My. & Cr. 670. In this case the third person was a prior mortgagee and had the title-deeds in his possession. Colcord *v.* Seamonds, 5 B. Mon. 265.

[5] 1 Lead. Ca. in Eq. 368.

[6] Kleiser *v.* Scott, 6 Dana, 137; Welch *v.* Parran, 2 Gill, 329; Ghiselin *v.*

money enforces his debt against the personal assets of a deceased vendee, and thereby deprives creditors or legatees of the deceased vendee of the chance of being paid their debts or legacies, equity will substitute them in the place of the vendor, or will marshal the assets in order to do justice to all.[1]

§ 239. This equitable lien or trust prevails against the purchaser, his heirs, and all persons claiming under him or them with notice that the purchase-money is unpaid.[2] It prevails against the right of dower of the widow of the vendee,[3] also against a voluntary donee, or a purchaser without notice,[4] as also against a purchaser for value, if he had notice that the purchase-money remained unpaid.[5] If the purchaser from the vendee has not paid over the purchase-money, equity will attach the lien or trust to the money

Ferguson, 4 Har. & J. 522; Magruder *v.* Peter, 11 Gill & J. 228; Burke *v.* Chrisman, 3 B. Mon. 50; Freeman *v.* Mebane, 2 Jones, Eq. 44; Jordan *v.* Hudson, 11 Tex. 82; Eddy *v.* Traver, 6 Paige, 521; *In re* McGill, 6 Barr, 504; Kinney Ex'rs *v.* Harvey, 2 Leigh, 70; Haffey *v.* Birchetts, 11 Leigh, 83; Schermerhorn *v.* Barhydt, 9 Paige, 30; Tompkins *v.* Mitchell, 2 Rand. 428; Melery *v.* Cooper, 2 Bland, 199.

[1] 2 Sug. V. & P. 873–878 (7th Am. ed.), where the cases are collected and commented on.

[2] Hearle *v.* Botelers, Cary, Ch. 25; Mackreth *v.* Symmons, 15 Ves. 329; Gibbons *v.* Baddall, 2 Eq. Ca. Ab. 682; Walker *v.* Preswick, 2 Ves. 622; Elliot *v.* Edwards, 3 Bos. & P. 181; Winter *v.* Anson, 3 Russ. 493; Garson *v.* Green, 1 John. Ch. 308; Warner *v.* Van Alstyne, 3 Paige, 513; Wade *v.* Greenwood, 2 Robin. 475; Ewbank *v.* Poston, 5 Mon. 285; Neil *v.* Kinney, 11 Ohio St. 58.

[3] Warner *v.* Van Alstyne, 3 Paige, 513; Wilson *v.* Davison, 2 Rob. 385; Ellicott *v.* Welch, 2 Bland, 243; Nazareth, &c. *v.* Lowe, 1 B. Mon. 257; Fisher *v.* Johnson, 5 Ind. 492; Crane *v.* Palmer, 8 Blackf. 120; Williams *v.* Wood, 1 Humph. 408; Besland *v.* Hewett, 11 S. & M. 164.

[4] Upshaw *v.* Hargrave, 6 S. & M. 286; High *v.* Batte, 10 Yerg. 186, 335; Mounce *v.* Byars, 16 Ga. 469; Burlingame *v.* Robbins, 21 Barb. 327; Hallock *v.* Smith, 3 Barb. 267.

[5] Wilcox *v.* Calloway, 1 Wash. 38; Graves *v.* McCall, 1 Call, 414; Redford *v.* Gibson, 12 Leigh, 332; Wright *v.* Woodland, 10 Gill & J. 388; Ghiselin *v.* Ferguson, 4 Har. & J. 522; Mounce *v.* Byars, 11 Ga. 180; Thornton *v.* Knox, 6 B. Mon. 74; Honore *v.* Bakewell, ib. 67; Tiernan *v.* Thurman, 14 B. Mon. 279; Eskridge *v.* McClure, 2 Yerg. 84; Sheratz *v.* Nicodemus, 7 Yerg. 9; Pierce *v.* Gates, 7 Blackf. 162; Brumfield *v.* Palmer, ib. 227; McKnight *v.* Brady, 2 Mo. 110; Briscoe *v.* Bronaugh, 1 Tex. 326; Pintard *v.* Goodloe, Hemp. 527; Amory *v.* Reilly, 9 Ind. 490; Manly *v.* Slason, 21 Vt. 271; Hallock *v.* Smith, 3 Barb. 267; Cator *v.* Pembroke, 1 Bro. Ch. 302; Ewbank *v.* Poston, 5 Mon. 291; McAlpin *v.* Burnett, 19 Tex. 497; Pierson *v.* David, 1 Clarke, 23; Grapengether *v.* Fejervary, 9 Io. 163; Merritt *v.* Wells, 18 Ind. 171.

in his hands.[1] But a *bona fide* purchaser for value from the vendee, without notice, will take the estate unaffected by the trust or lien ;[2] or if by intermediate conveyances through persons who have notice, the estate finally comes to a *bona fide* purchaser for value without notice, it will be discharged of the lien.[3] A *bona fide* purchaser is defined to be one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside ;[4] of course, a mortgagee without notice for a new consideration comes within this definition.[5] So, a conveyance or mortgage to individual creditors without notice is held to prevail against the lien, as where the equities are equal the legal title prevails.[6] But the lien prevails against assignees in bankruptcy or insolvency, and against a general assignment by a failing debtor, in trust for all his creditors. In these cases the vendees are looked upon as volunteers, and as such, they have the rights only of the debtor himself.[7] Notice to the agent of the purchaser is notice to the pur-

[1] Ripperdon *v.* Cozine, 8 B. Mon. 465.

[2] Bayley *v.* Greenleaf, 7 Wheat. 46; Clark *v.* Hunt, 3 J. J. Marsh. 553; Duval *v.* Bibb, 4 Hen. & M. 113; Wood *v.* Bank of Kentucky, 5 Mon. 194; Blights, &c., *v.* Bank, &c., 6 Mon. 192; Taylor *v.* Hunter, 5 Humph. 569; Stewart *v.* Ives, 1 S. & M. 197; Carnes *v.* Hubbard, 2 S. & M. 108; Dunlop *v.* Burnett, 5 S. & M. 702; Work *v.* Brayton, 5 Ind. 396; Carter *v.* Bank of Georgia, 24 Ala. 37; Bradford *v.* Harper, 25 Ala. 337; Webb *v.* Robinson, 14 Ga. 216; Champion *v.* Brown, 6 John. Ch. 402; Collier *v.* Harkness, 26 Ga. 362; Selby *v.* Stanley, 4 Miss. 65; Scott *v.* Orbinson, 21 Ark. 202.

[3] Boon *v.* Barnes, 23 Miss. 136.

[4] Ibid.

[5] Duval *v.* Bibb, 4 Hen. & M. 113; Wood *v.* Bank of Kentucky, 5 Mon. 194; Clark *v.* Hunt, 3 J. J. Marsh. 553; Growing *v.* Behn, 10 B. Mon. 383.

[6] Bayley *v.* Greenleaf, 7 Wheat. 56; Mitford *v.* Mitford, 9 Ves. 100; Moore *v.* Holcombe, 3 Leigh, 597; Webb *v.* Robinson, 14 Ga. 216; Dunlop *v.* Burnett, 5 S. & M. 702; Johnson *v.* Cawthorn, 1 Dev. & Bat. 32; Harper *v.* Williams, ib. 179; Roberts *v.* Rose, 2 Humph. 145; Gann *v.* Chester, 5 Yerg. 205; but see Brown *v.* Vanlier, 7 Humph. 239; Shirley *v.* Sugar Ref., 2 Edw. 505; Repp *v.* Repp, 12 Gill & J. 341; Ringgold *v.* Bryan, 3 Md. Ch. 488; Aldridge *v.* Dunn, 7 Blackf. 249; but see Chance *v.* McWortee, 26 Ga. 315.

[7] Mitford *v.* Mitford, 9 Ves. 100; Fawell *v.* Heelis, Amb. 726; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Grant *v.* Mills, 2 Ves. & B. 306; *Ex parte* Peake, 1 Madd. 356; Chapman *v.* Tanner, 1 Vern. 267; Bayley *v.* Greenleaf, 7 Wheat. 54; Green *v.* Demoss, 10 Humph. 371; Brown *v.* Heathcote, Atk. 160; Simond *v.* Hilbert, 1 Russ. & My. 729; Jewson *v.* Moulson, 2 Atk. 417; Scott *v.* Surman, Willes, 402; Warrall *v.* Morlar, 1 P. Wms. 459.

chaser,[1] and if the vendor remain in possession it will be sufficient to put a purchaser upon his inquiry and is constructive notice,[2] and any fact that would put a reasonable man upon his inquiry will affect the purchaser with notice.[3] So, if a purchaser knows that a part of the purchase-money is unpaid he is put upon his inquiry; [4] and such purchaser is bound to take notice of all the recitals in the deed to the vendee.[5]

§ 240. A person may also become a trustee by construction in the absence of fraud, where a trust is created, but if no trustee is appointed,[6] or the trustee named is incapable of taking,[7] or refuses to act,[8] or dies,[9] or the office becomes vacant in any other way; [10] in all such cases every person to whom the trust property comes, by reason of there being no trustee, will be treated as a trustee, and he may be ordered to account, and to convey the property to such other persons as trustees as the court may appoint.[11] As where a man makes a devise in trust by his will, but names no trustee, the land descends to his heirs, but in trust for the purposes named in the will; and his heirs would be required to account for the property, and to convey the same to such trustees as the court might appoint.[12] Courts of equity have inherent jurisdiction over all

[1] Mounce v. Byars, 11 Ga. 180; Frail v. Ellis, 17 Eng. L. & Eq. 457.

[2] Ringgold v. Bryan, 3 Md. Ch. 488; Hamilton v. Fowlkes, 16 Ark. 340; Hopkins v. Garrard, 6 B. Mon. 67.

[3] Frail v. Ellis, 17 Eng. L. & Eq. 457; Briscoe v. Bronaugh, 1 Tex. 328.

[4] Manly v. Slason, 21 Vt. 271.

[5] Kilpatrick v. Kilpatrick, 23 Miss. 124; Thornton v. Knox, 6 B. Mon. 74; Woodward v. Woodward, 7 B. Mon. 116; McRemmon v. Martin, 14 Tex. 318; Tiernan v. Thurman, 14 B. Mon. 277; Honore v. Bakewell, 6 B. Mon. 67; Hutchinson v. Patrick, 22 Tex. 318; McAlpin v. Burnett, 23 Tex. 649.

[6] White v. White, 1 Bro. Ch. 12.

[7] Sonley v. Clockmakers' Co., 1 Bro. Ch. 81; *Ex parte* Turner, 1 Bailey, Ch. 395.

[8] King v. Donnelly, 5 Paige, 46; Hawley v. James, 5 Paige, 318; De Peyster v. Clendinning, 8 Paige, 295; Lee v. Randolph, 2 Hen. & M. 12; *Ex parte* Kunst, 1 Bailey, 489; Dawson v. Dawson, Rice, 243; Field v. Arrowsmith, 3 Humph. 448.

[9] Dunscomb v. Dunscomb, 2 Hen. & M. 11.

[10] Gibson's Case, 1 Bland, 138.

[11] Ibid.; Cushney v. Henry, 4 Paige, 345; McIntire School v. Zan. Canal, &c., 9 Hare, 203; White v. Hampton, 13 Io. 259; McKennan v. Phillips, 6 Whart. 571; Boykin v. Ciples, 2 Hill, Eq. 200; Wilson v. Towle, 36 N. H. 129; Pool v. Cummings, 20 Ala. 563; Griffith v. Griffith, 5 B. Mon. 113.

[12] Stone v. Griffin, 3 Vt. 400.

matters of trust and trustees, and they never allow a trust to fail for want of a trustee.[1] So if a party forbidden by law to convey his property to some person standing in a certain relation to him, as if a husband who cannot convey to his wife should make an absolute conveyance directly to her, the conveyance would not pass the legal title, but equity would construe it into a declaration of trust, and the husband into a trustee for the wife.[2] Therefore if, upon the death of the trustee without heirs, the legal title should escheat to the Crown or the State, equity would follow the property and execute the trust by the appointment of new trustees or otherwise.[3]

§ 241. Another instance of a constructive trust without fraud is where a person receives the trust property from the trustee without notice of the trust, by way of voluntary gift or without paying a valuable consideration. If such person had notice of the trust, it would be a fraud to receive the trust fund even if he paid a valuable consideration, and he would be held as a constructive trustee;[4] but if he paid a valuable consideration without notice, he would hold the property unaffected by the trust.[5] And if he receives the property without paying a valuable consideration, and without notice, equity holds the absence of a consideration as equivalent to notice, and construes the taker into a trustee, and liable as such to the same extent as the trustee from whom he took it.[6] But if a person comes into possession of the trust property, not by, under, or through the trustee, but against him, as by disseising or ousting him, he will not be bound by the trust, although he have notice of it; for the disseisor creates a title for himself paramount to the title of the trustee,[7] and all outstanding terms attending the inheritance will attend the title of the disseisor until he is dispossessed by some other paramount title.[8] In States where registry laws are in force, the registry of a deed from a grantor who had no right to the land is not constructive notice to the true owner

[1] McCartney *v.* Bostwick, 32 N. Y. 53; Vidal *v.* Girard, 2 How. 128.

[2] Huntly *v.* Huntly, 8 Ired. Eq. 250; Garner *v.* Garner, Busbee, Eq. 1.

[3] Stat. 4 & 5 Will. IV. c. 23; Hughes *v.* Wells, 9 Hare, 749; 13 Eng. L. & Eq. 389.

[4] *Ante*, § 220.

[5] *Ante*, §§ 217, 218.

[6] Mansell *v.* Mansell, 2 P. Wms. 691; Pye *v.* George, 1 P. Wms. 128.

[7] Finch's Case, 4 Inst. 85; Sugd. Gilb. Uses, 429.

[8] Reynolds *v.* Jones, 2 S. & S. 206.

that such deed has been made, and it is constructive notice only to subsequent purchasers under the same grantor.[1]

§ 242. Analogous to the gift or sale of the trust property by trustees, is the right of dealing with its property by a corporation. A corporation holds its property in trust, *first* to pay its creditors, and *second* to distribute to its stockholders *pro rata*. If therefore a corporation should dissolve, and divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom its property had come into trustees, and would compel them to account for the property and contribute to the payment of the debts of the corporation to the extent of its property in their hands.[2] In England the doctrine of constructive trusts is not enforced against the Bank of England in regard to its stock standing upon its books; the bank is bound to recognize only the person who has the legal title.[3] But Chief-Justice Torrey said that the decisions as to the Bank of England were exceptions depending upon the policy of the acts of parliament in reference to the bank, and that certainly none of the English cases convey the idea that, upon general principles of law, a bank is not bound to notice a trust of its own stocks, and must look only at the legal estate.[4] In the United States it is well established, that if a corporation, that requires a transfer of its stock to be made by its own officers upon its own books, permits a transfer to be made, by an executor, trustee or guardian, of stock held by such persons in a fiduciary capacity, such corpora-

[1] Bates *v.* Norcress, 14 Pick. 225; Tilton *v.* Hunter, 11 Shep. 29; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Keller *v.* Nutz, 5 S. & R. 246; Woods *v.* Farmene, 7 Watts, 382; Crockett *v.* McGuire, 10 Mis. 34.

[2] Mumma *v.* Potomac Co., 8 Pet. 281; Vose *v.* Grant, 15 Mass. 515; Spear *v.* Grant, 16 Mass. 9; Wood *v.* Dümmer, 3 Mason, 308; 2 Story, Eq. Jur. § 1252.

[3] Pearson *v.* B'k of Eng. 2 Bro. Ch. 529; Hartga *v.* B'k of Eng. 3 Ves. 55; B'k of Eng. *v.* Parsons, 5 Ves. 665; Austin *v.* B'k of Eng., 522; B'k of Eng. *v.* Lunn, 15 Ves. 583; Bristed *v.* Williams, 3 Hare, 235; Humberstone *v.* Chase, 2 Y. & C. 209; Franklin *v.* B'k of Eng., 9 B. & C. 156; B'k of Eng. *v.* Moffat, 3 Bro. Ch. 260; Pearson *v.* B'k of Eng., 2 Cox, 178; Rider *v.* Kidder, 10 Ves. 369; Ripley *v.* Waterworth. 7 Ves. 440; Stat. 4 W. & M. c. 3, § 10; 5 W. & M. c. 20, § 20; 1 Geo. I. St. 2, c. 19, § 12; 30 Geo. II. c. 19, § 49; 7 Will. 4 & 1 Vic. c. 26; 8 & 9 Vic. c. 97; Lewin on Trusts, 32 (2d Am. ed.).

[4] Lowry *v.* Commercial B'k, 3 Banker's Mag. 201; 10 Penn. Law Jur. (3 Am. L. J. N. S.) 111.

tion, knowing the trust, and that the transfer is made for purposes other than such trust, will be held in equity as a constructive trustee of the stock thus wrongfully conveyed, and will be liable to make it good to the *cestui que trust*.[1] And if a corporation negligently enter the names of the parties upon its books, in such manner that the stock is improperly transferred, it will be liable as a constructive trustee.[2] Accordingly a corporation has a right to require from all fiduciary holders of stock evidence of their authority to make the transfer.[3] It has been held that the mere addition of the word *trustee*, without any reference to the terms of the trust or the persons of the *cestuis que trust*, is not sufficient notice to a bank to render it liable in case the stock is wrongfully transferred by the holder;[4] and it is said that, as a guardian has a right to sell the personal property of his ward, a corporation is not liable if he wrongfully transfers the stock on its books.[5] If purchasers of stock in a corporation have notice that their vendors are trustees, they will be held as constructive trustees; and if the certificates are passed over to the purchaser with the word *trustee* added to the name of the seller, the purchaser is bound to inquire into the particulars of the trust, and he has such notice as will bind him as a trustee if the sale was wrongfully made.[6] But if the purchaser does not see the certificates of the stock in the seller's hands, as if the seller himself transfers the stock upon the books of the company, and brings to the purchaser new certificates that he is entitled to so many shares, the purchaser would not be affected with notice, and would not be held as a trustee.[7]

[1] Mechanics' B'k *v.* Seton, 1 Pet. 299; Porter *v.* B'k of Rutland, 19 Vt. 410; Albert *v.* Savings B'k, 1 Md. Ch. Dec. 407; 2 Md. 160; Farmers' B'k *v.* Wayman, 5 Gill, 356; Atkinson *v.* Atkinson, 8 Allen, 15.

[2] Farmers' B'k *v.* Wayman, 5 Gill, 356.

[3] Bayard *v.* Farmers' & Mech. Nat. B'k, 2 Leg. Int. 164.

[4] Albert *v.* Savings B'k, 1 Md. Ch. Dec. 407; 2 Md. 160. But see to the contrary, Walsh *v.* Stille, 2 Pars. Eq. 17.

[5] B'k of Virginia *v.* Craig, 6 Leigh, 339. But see Atkinson *v.* Atkinson, 8 Allen, 15. In the last case, however, the transfer was after the removal of the guardian, and the appointment of another in his place.

[6] Walsh *v.* Stille, 2 Pars. Eq. 17; Reeder *v.* Barr, 4 Ham. 446; Simons *v.* S. W. Railway B'k, 2 Am. Law Reg. 546; Atkinson *v.* Atkinson, 10 Allen, 15.

[7] Lowry *v.* Commercial B'k, 3 Bankers' Mag. 2111; 10 Penn. Law Jour. 111; Albert *v.* Savings' B'k, 2 Md. 160; Atkinson *v.* Atkinson, 10 Allen, 15.

§ 243. Again if one receives a conveyance of lands absolute in form, but really as security for a debt, he will hold the legal title in trust for the grantor after the payment of the debt, and before a reconveyance.[1] In England, upon the death of the mortgagee, the mortgage debt goes to his personal representatives, but the fee in the mortgaged real estate descends to his heirs, if not otherwise disposed of, but his heirs hold it upon a constructive trust, as security for the debt, which has gone to his executors or administrators.[2] In nearly all the United States, both the debt and the mortgage security are chattel interests, and go to the executors or administrators, and not to the heirs,[3] and payment of the mortgage debt discharges the mortgage; but while the mortgagee is in possession, he is a constructive trustee up to the time that the mortgagor's equity of redemption expires, and he is bound to account for the rents and profits in due course of administration.[4] It has even been thought that he is liable for the rents and profits after he has transferred his mortgage;[5] but, as he has a right to assign his mortgage without notice to the mortgagor, it would seem that he would not be liable for any thing after he had assigned his mortgage and the possession.[6]

§ 244. At common law, if a testator appointed his debtor to be the executor of his will, the debt was extinguished, on the ground that, as the executor could not maintain an action against himself, the remedy was gone, and where the remedy is gone, the debt is gone.[7] Equity, however, construes the debtor, although he is executor, to be a trustee, and the creditors, legatees, and next of kin of the testator can enforce the trust by compelling the executor to account for the amount of the debt due from him to the testator.[8] In most

1 Baldwin *v.* Bannister, 3 P. Wms. 251; Poole *v.* Pass, 1 Beav. 600; Cru. Dig. tit. 15; Mort. c. 3, § 5; tit. 15, c. 2, § 39.

2 Ellis *v.* Guavas, 2 Ch. Ca. 60; Chase *v.* Lockerman, 11 G. & J. 185.

3 See Greenleaf's Cruise, Dig. tit. 15, c. 2, §§ 39, 40, and notes; 4 Kent, 160, 194.

4 Coppring *v.* Cooke, 1 Vern. 270; Bentham *v.* Haincourt, Pr. Ch. 30; Parker *v.* Calcroft, 6 Madd. 11; Hughes *v.* Williams, 12 Ves. 493; Maddocks *v.* Wren, 2 Ch. R. 109.

5 Venables *v.* Foyle, 1 Ch. Ca. 3.

6 Ringham *v.* Lee, 15 Sim. 400; *Re* Radcliffe, 22 Beav. 201.

7 2 Williams, Ex'rs, 1129; 2 Story, Eq. Jur. § 1209.

8 Berry *v.* Usher, 11 Ves. 90; Simpson *v.* Gutteridge, 13 Ves. 264; Carey *v.* Goodinge, 3 Bro. Ch. 111; Errington *v.* Evans, 2 Dick. 456; Flud *v.* Rumsey,

of the United States this matter is regulated by statute, and the executor may be required by the Probate Court to put the amount of his debt to the testator into his inventory, or the Court of Probate may require the executor to charge himself with the amount of his debt in his account.[1] And so legatees and distributees may become constructive trustees for creditors of the estate, if the executor or administrator, by accident or mistake, pays over or distributes the estate before all debts are paid. The executor may be sued at law in such case by the creditor, and he may recover over against the persons to whom he has paid the estate. In equity, however, creditors can follow the fund liable for their debts into the hands of the persons to whom it has come and treat them as constructive trustees, as they are not entitled to any thing out of the estate till the debts are first satisfied.[2]

§ 245. A person may become a trustee by construction, by intermeddling with, and assuming the management of, property without authority. Such persons are trustees *de son tort*, as persons who assume to deal with a deceased person's estate without authority are administrators *de son tort*. Thus an administrator has no right to interfere with the real estate of an intestate unless it is wanted to pay debts, and if he assume to act in relation to the real estate as a trustee, those interested may treat him as such, and he cannot demur to a bill charging him with neglect of duty, and praying for his removal.[3] If one enters upon an infant's lands, and takes the rents and profits, he may be charged as a guardian or trustee,[4] and so if one takes personal property.[5] If a deceased person holds money or other property in trust for another, and his heir,

Yel. 160; Phillips *v.* Phillips, Freem. 11; 1 Ch. Ca. 292; Brown *v.* Selwyn, Cas. t. Talb. 203; 3 Bro. P. C. 607; 2 Story, Eq. Jur. § 1209.

[1] Pusey *v.* Clemson, 9 S. & R. 204; Griffith *v.* Chew, 8 S. & R. 32; Hill on Trustees, 172, notes (4th Am. ed.).

[2] 2 Story, Eq. Jur. §§ 1250–1251; Russell *v.* Clark, 7 Cranch, 69; McCall *v.* Harrison, 1 Brock. 126; Buck *v.* Swazey, 35 Me. 52; Riddle *v.* Mandeville, 5 Cranch, 329; Anon., 1 Vern. 162; Newman *v.* Barton, 2 Vern. 205; Noel *v.* Robinson, 1 Vern. 94; White School House *v.* Post, 31 Conn. 240; Boddy *v.* Lefevere, 1 Hare, 602.

[3] Le Fort *v.* Delafield, 3 Edw. 31; McCoy *v.* Scott, 2 Rawle, 222; Schwartz's Estate, 14 Penn. St. 42; People *v.* Houghtaling, 7 Cal. 348.

[4] Wyllie *v.* Ellice, 1 Hare, 505; Drury *v.* Connor, 1 H. & G. 220; Bloomfield *v.* Eyre, 8 Beav. 250.

[5] Chaney *v.* Smallwood, 1 Gill, 367; Goodhue *v.* Barnwell, Rice, Eq. 198.

executor, administrator, or other person assume possession of such property, a constructive trust will be imposed upon them.[1] During the possession and management by such constructive trustees they are subject to the same rules and remedies as other trustees;[2] and they cannot avoid their liability by showing that they were not in fact trustees,[3] nor can they set up the statute of limitations.[4] Of course, such unauthorized persons will always be liable to be deprived of the possession at the suit of those beneficially interested, and they will be liable for all the costs, expenses, and damages which their unauthorized intermeddling may have occasioned. Still there may be cases where an unauthorized person may interfere from necessity to preserve and protect the property. In such cases courts of equity have power to do exact justice by decrees as to costs, compensation, and other similar matters. In all cases a person beneficially interested coming into equity must do equity, and join all who have interfered with the possession; and he cannot proceed against one alone as at law for a trespass, and compel one to bear the whole burden of the wrongful intrusion.[5]

§ 246. If an agent is employed by a trustee and thus comes into possession of the property, he will be accountable to his employer, and will not be responsible as a constructive trustee.[6] But if such agent should act fraudulently or collusively he might be made a trustee by construction, and as such, accountable to the *cestui que trust*.[7]

§ 247. Where a person has possession of title-deeds or other

[1] White School House *v.* Post, 31 Conn. 240; People *v.* Houghtaling, 7 Cal. 348.

[2] Wilson *v.* Moore, 1 My. & K. 127.

[3] Rackham *v.* Siddall, 1 Mac. & G. 607; 2 Hall & T. 44; 16 Sim. 297; Hope *v.* Liddell, 21 Beav. 183.

[4] Goodhue *v.* Barnwell, Rice, Eq. 198.

[5] Wyllie *v.* Ellice, 6 Hare, 515; Phene *v.* Gillon, 5 Hare, 5.

[6] Keane *v.* Robarts, 4 Mad. 332; Nickolson *v.* Knowles, 5 Mad. 47; Myler *v.* Fitzpatrick, 6 Mad. 360; Davis *v.* Spurling, 1 R. & M. 64; Tam. 199; Crisp *v.* Spranger, Nels. 109; Saville *v.* Tancred, 3 Swans. 141; Fyler *v.* Fyler, 3 Beav. 550; Maw *v.* Pearson, 28 Beav. 196; Lockwood *v.* Abdy, 14 Sim. 437; *Ex parte* Burton, 3 Mont. D. & De Gex, 364; *Re* Bunting, 2 Ad. & Ell. 467.

[7] Fyler *v.* Fyler, 3 Beav. 550; Att'y-Gen. *v.* Leicester, 7 Beav. 171; Hardy *v.* Caly, 33 Beav. 365; Bridgman *v.* Gill, 24 Beav. 302; Portlock *v.* Gardner, 1 Hare, 606; *Ex parte* Woodin, 3 Mont. D. & De G. 399; Bodenham *v.* Hoskyns, 2 De G., M. & G. 903; Panell *v.* Hurley, 2 Coll. 241; Alleyne *v.* Darcy, 4 Ir. Ch. 199; 5 Ir. Ch. 56.

documents in relation to property, and other persons are interested in the same property, and claim title through or under the same papers, the person having the possession of the papers is a constructive trustee for the other persons interested in the same property, and a court of equity will compel him to produce the deeds or papers at the suit of those claiming an interest in the common property.[1]

[1] Lewin on Trusts, 156, 157 (5th Lond. ed.).

CHAPTER VIII.

TRUSTS THAT ARISE BY CONSTRUCTION FROM POWERS.

§ 248. The nature of powers that imply a trust.
§ 249. Court will execute such powers as trusts.
§§ 250, 251. Instances of powers which the court will execute as trusts.
§ 252. Instances of powers that are not trusts.
§ 253. Where the power is too uncertain.
§ 254. The power must be executed as given, or it will remain a trust to be executed by the court.
§§ 255, 256. In what manner the court will execute a trust arising out of a power.
§ 257. Whether courts will distribute *per stirpes* or *per capita.*
§ 258. And whether to those living at the death of donor or of the donee.

§ 248. PROPERTY is sometimes given to a person with a power to dispose of it for a particular purpose, or to a particular class of persons, or to certain persons to be selected or designated by the donee from a particular class. If the donee executes the power and disposes of the property, or designates or selects the persons who are to take under the gift, it goes as directed, and there is no great room for doubt or question; but if the donee refuses or neglects to execute the power it becomes a grave inquiry whether the persons in whose favor the power might have been executed have any interest in the property, or any remedy for the non-exercise of the power by the first taker or donee. In dealing with the cases that have arisen upon these inquiries, courts have distributed powers into *mere powers*, and *powers coupled with a trust*, or *powers which imply a trust.*[1] *Mere powers* are purely discretionary with the donee: he may or may not exercise or execute them at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead and place, if for any reason he leaves the powers unexecuted.[2] If the donee executes the powers, but executes them in a defective manner, courts may aid the execution and supply the defects, but they cannot exercise or execute mere naked powers conferred upon a donee.[3] It is different with

[1] Brown *v.* Higgs, 8 Ves. 574.
[2] Greenough *v.* Welles, 10 Cush. 576.
[3] Wilkinson *v.* Getty, 13 Io. 157; Arundell *v.* Philpot, 2 Vern. 69; Tompkyn

powers coupled with a trust, or powers which imply a trust. In this class of cases the power is so given that it is considered *a trust* for the benefit of other parties; and when the form of the gift is such that it can be construed to be a *trust*, the power becomes *imperative*, and *must* be executed. Courts will not allow a clear trust to fail for want of a trustee; nor will they allow a trust to fail by reason of any act or omission of the trustee; therefore, courts will not allow a trust to fail, or to be defeated by the refusal or neglect of the trustee to execute a power, if such power is so given that it is reasonably certain that the donor intended that it should be exercised. There are mere powers and mere trusts. There are also powers which the party to whom they are given is intrusted with and required to execute. Courts consider this last kind of power to partake so much of the character of a trust to be executed, that they will not allow it to fail by the failure of the donee to execute it, but will execute it in the place of the donee.[1] Lord Hardwicke

v. Sandys, 2 P. Wms. 228 n.; Bull *v.* Vardy, 1 Ves. Jr. 272. And even if a party intended to execute a power, but is prevented by sudden death, the court will not execute the power. Pigott *v.* Penrice, Com. 250; Gilb. Eq. 138; Sugd. on Powers, 392.

[1] Burgess *v.* Wheate, 1 Wm. Black. 162; Sugd. on Pow. 393–398; Lucas *v.* Lockhart, 10 Sm. & Mar. 466; Harrison *v.* Harrison, 2 Grat. 1; Greenough *v.* Welles, 10 Cush. 576; Erickson *v.* Willard, 1 N. H. 217; Brown *v.* Higgs, 8 Ves. 574. In this case Lord Eldon said, if the power be one which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts this principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interest of those for whose benefit he is called upon to execute it. In Attorney-General *v.* Downing, Wilm. 23, Ld. Ch. J. Wilmot said, as to the objection that those powers are personal to the trustees, and by their deaths become unexecutable, they are not *powers* but *trusts*, and there is a very essential difference between them. *Powers* are never imperative: they leave the acts to be done at the will of the party to whom they are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. The court supplies the *defective execution* of powers, but never the *non-execution* of them; for they are not meant to be *optional*. But a person who creates a trust means it shall be executed *at all events*. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, the court assumes the office. There is some personality in every choice of trustees, but this personality is *res unius ætatis*, and if the trust cannot be ex-

observed, that such powers ought rather to be called trusts than powers.[1]

§ 249. In all cases where parties have an *imperative power or discretion* given to them, and they die in the testator's lifetime,[2] or decline the trust or office,[3] or disagree as to the execution of it,[4] or do not execute it before their death,[5] or if from any other circumstance,[6] the exercise of the power by the party intrusted with it becomes impossible, the court will imply a trust, and will put itself in the place of the trustee, and will exercise the power by the most equitable rule. And the court will act retrospectively in executing these powers as *quasi* trusts;[7] and although there may be great difficulties and impracticabilities in the way, yet the court will exercise the power and enforce the trust:[8] for, if the trust or power can by *any possibility* be exercised by the court, the non-execution by the party intrusted shall not prejudice the party beneficially interested, or the *cestui que trust*.[9]

§ 250. In some cases the donor makes a direct gift to one party, but subjects the gift to the discretion or power of some previous taker or other party; as if a donor limit a fund "upon trust for the children of A. as B. shall appoint." In such case the children of A. take a vested interest in the subject of the gift, liable to be divested by the exercise of the power by B. Therefore, on the failure of the power, the children of A. become as absolutely enti-

ecuted through the *medium* which was in the primary view of the testator, it must be executed through the *medium* which the constitution has substituted in his place. Brook *v.* Brook, 3 Sm. & Gif. 280; Withers *v.* Yeadon, 1 Rich. Ch. 324; Miller *v.* Meetch, 8 Barr, 417; Gibbs *v.* Marsh, 2 Met. 243; Grimke *v.* Grimke, 1 Des. Eq. 375 n.

[1] Godolphin *v.* Godolphin, 1 Ves. 23.

[2] Maberly *v.* Turton, 14 Ves. 499; Attorney-General *v.* Downing, Wilm. 7; Amb. 550; Attorney-General *v.* Hickman, 2 Eq. Ca. Ab. 193.

[3] Izod *v.* Izod, 32 Beav. 242; Doyley *v.* Attorney-General, 2 Eq. Ca. Ab. 194; Gude *v.* Worthington, 3 De G. & Sm. 389.

[4] Wainwright *v.* Waterman, 1 Ves. Jr. 311; Moseley *v.* Moseley, t. Finch, 53.

[5] Harding *v.* Glyn, 1 Atk. 469; Croft *v.* Adam, 12 Sim. 639; Hewett *v.* Hewett, 2 Eden, 332; Flanders *v.* Clark, 1 Ves. 10; Grieveson *v.* Kirsopp, 2 Keen, 653.

[6] Attorney-General *v.* Stephens, 3 M. & K. 347.

[7] Maberley *v.* Turton, 14 Ves. 499; Edwards *v.* Grove, 2 De G., F. & J. 222.

[8] Pierson *v.* Garnet, 1 Bro. Ch. 46.

[9] Brown *v.* Higgs, 5 Ves. 505.

tled as if the discretion or power had never been given to B.[1] But while the exercise of the power is possible, the donee of it may exercise his discretion in favor of any that he may select; he may select those who are living at the donor's death, or those living at his own death.[2] In other cases an estate is vested in a donee "upon trust to dispose of it among the children of A." Here the children of A. take nothing directly by way of the gift, but their interest must come to them through the medium of the power. If the trust is to dispose of it equally among the children of A., the bequest, though in form a power, is equivalent to a simple gift.[3] If the donee may distribute or dispose of it *unequally* among the children of A., and no distribution or disposition is made by him, the court will execute the power, and distribute the fund *equally* among the objects of it.[4] In other cases the property is vested in a donee with a discretion as to the objects to which, and also as to the proportions in which, it is to be given over. Of course the first question to be determined in all such cases is, Did the donor intend to give a *mere power*, or did he create a trust, or will the court imply a trust? Lord Cottenham stated the general rule deduced from the cases as follows: "When there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class. When such an intention appears, the case arises, as stated by Lord Eldon in Brown *v.* Higgs,[5] of the power being so given, as to make it the duty of the donee to execute it; and, in such case, the court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit."[6]

[1] Davy *v.* Hooper, 2 Vern. 665; Jones *v.* Torin, 6 Sim. 255; Fenwick *v.* Greenwell, 10 Beav. 412; Hockley *v.* Mawbey, 1 Ves. Jr. 143, 149, 150; Madoc *v.* Jackson, 2 Bro. Ch. 588; Falkner *v.* Wynford, 9 Jur. 1006.

[2] Lambert *v.* Thwaites, Law R. 2 Eq. 151; Woodcock *v.* Renneck, 4 Beav. 190; affirmed, 1 Phil. 72.

[3] Rayner *v.* Mowbray, 3 Bro. Ch. 234; Phillips *v.* Garth, ib. 64.

[4] Hands *v.* Hands, 1 T. R. 437, note; Pope *v.* Whitcomb, 3 Mer. 698; *Re* White's Trust, 1 John. 656; Finch *v.* Hollingsworth, 21 Beav. 112; Brown *v.* Pocock, 6 Sim. 257; Grieveson *v.* Kirsopp, 2 Keen, 656; Walch *v.* Wallinger, 2 R. & M. 78; Tam. 425.

[5] 8 Ves. 574.

[6] Burrough *v.* Philcox, 5 My. & Cr. 92; Witts *v.* Boddington, 3 Bro. Ch. 95; 5 Ves. 503; Harding *v.* Glyn, 1 Atk. 469.

§ 251. Thus where a testator gave an estate "to A. upon trust (subject to certain charges), to employ the remainder of the rent for such children of B. as A. should think most deserving, and that will make the best use of it, or for the children of his nephew, C., if any there are, or shall be;" and A. having died in the testator's lifetime, it was held to be a trust in favor of all the children of B. and C.[1] So where a testator directed certain property to remain until certain contingencies, and then gave life-estates in the property to two of his children, with remainder to their issue, and declared that in case his two children had no issue, the same should be disposed of by the survivor by will among his nephews and nieces or their children, or either of them, or to as many of them as his surviving child should think proper, it was held to be a trust in favor of the nephews and nieces and their children, subject to the power of selection and distribution by the surviving child.[2] So where a testator gave to B. in tail, and if she had no issue, she was to settle the estate upon such person as she thought fit by will "confiding" in her not to transfer the estate from his nearest family, it was held to be a trust for the heir, who was the nearest family or relation within the meaning of the will.[3] And where a testator gave his property to his son *in trust* to apply the income to the use of himself and family, and to give by deed or will all beyond what he should so apply, unto all or any child or children of his own in such proportions and in such manner as he should see fit. His son died having devised the property to his wife with directions to his executors to act under the will of his father; it was held to be a trust coupled with a power to appoint at his discretion among his children, that the power could not be delegated, that the son's will was not an execution of the power, and that his children took equally under their grandfather's will.[4] Where a man gave his property "wholly" to his wife to be disposed of by her and divided among his children at her discretion, the children took under the will and not as her heirs, in default of any distri-

[1] Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 574; 18 Ves. 192; 2 Sugd. on Pow. 176; Longmore *v.* Broom, 7 Ves. 124; Jones *v.* Torin, 6 Sim. 255; Prevost *v.* Clark, 2 Mad. 458; Penny *v.* Turner, 2 Phil. 473; Fordyce *v.* Bridges, 2 ib. 497; White's Trusts, John. 658.

[2] Burrough *v.* Philcox, 3 My. & Cr. 73.

[3] Griffiths *v.* Evans, 5 Beav. 241.

[4] Withers *v.* Yeadon, 1 Rich. Eq. 324.

bution by her.[1] And where a testator gave his estate to his wife during her life, and gave all the remainder to his two brothers A. and B., who were also his executors, "with full confidence that they will dispose of such residue among our brothers and sisters and their children, as they shall judge shall be most in need of the same, this to be done according to the best of their discretion;" it was held to be a trust for the brothers and sisters and their children, to the exclusion of A. and B. and their children; and the court executed the trust, and exercised the powers.[2] Where a testator gave his wife certain property, and desired *her* "to give the same unto and among *such* of the testator's relations as she should think most deserving and approve of," after the death of the wife without appointing, the court decreed a trust, and divided the property equally among the relations.[3] Where a tenant for life "is desired to give it among his children as he should think fit,"[4] or the "residue is to be disposed of among her children as she shall think proper,"[5] or where after the death of testator's wife the gift "is to such of his grandchildren as she should appoint,"[6] it was held to be a trust for selection or distribution, and in default of the exercise of the power the court enforced it as a trust and distributed it equally among all the objects named.[7]

§ 252. But where a testator empowered his wife to give away £1000 of his estate at her death, £100 to A., £100 to B., and the rest by her will, and she died without having executed the power, it was held to be a mere power, and no trust, and the court refused to carry it into effect.[8] So where a testator gave £30,000 to his wife for life, to be distributed at her decease to and

[1] Collins *v.* Carlisle, 7 B. Mon. 14.

[2] Bull *v.* Bull, 8 Conn. 47; see Gilbert *v.* Chapin, 19 Conn. 351; Harper *v.* Phelps, 21 Conn. 257.

[3] Harding *v.* Glyn, 1 Atk. 469.

[4] 2 Sugd. on Pow. 181.

[5] Kemp *v.* Kemp, 5 Ves. 849.

[6] Witts *v.* Boddington, 3 Bro. Ch. 95.

[7] Whitehurst *v.* Harker, 2 Ired. Ch. 292; Fowler *v.* Hunter, 2 Y. & J. 506; Longmore *v.* Brown, 7 Ves. 124; Salusbury *v.* Denton, 3 K. & John. 529; Kennedy *v.* Kingston, 2 J. & W. 431; Davy *v.* Hooper, 2 Vern. 665; Maddison *v.* Andrew, 1 Ves. 57; Hockley *v.* Mawbey, 1 Ves. Jr. 143; Croft *v.* Adam, 12 Sim. 639; Brown *v.* Pocock, 6 Sim. 257; McNeilledge *v.* Galbrath, 8 Ser. & R. 43; Harrison *v.* Harrison, 2 Grat. 1; Frazier *v.* Frazier, 2 Leigh, 642; Cruse *v.* McKee, 2 Head, 1.

[8] Bull *v.* Vardy, 1 Ves. Jr. 279; *In re* Eddowes, 1 Dr. & Sm. 395.

amongst such of his children and in such manner and proportion as she should appoint, it was held to be a mere power which the court could not execute in default of an appointment by her.[1]

§ 253. If the power to be executed is so uncertain as to its objects, that a court of equity cannot say what particular person or persons or class of persons are to take an interest under it as a trust, it will be considered a mere power which cannot be carried into effect;[2] or if the subject-matter to be affected by the power is too uncertain to be dealt with by the court, a trust will not be implied.[3] And where there is an express limitation of the property over in case the power is not executed, of course no trust can be implied.[4]

§ 254. The general rule is, that the power given must be strictly executed as given, or it will remain as a trust for the person or class in whose favor it is given; thus if the donee is to dispose of the property to such persons of a particular class, as she shall select in a last will and testament, and the disposition is made by a deed, the power is not executed, and it will be construed into a trust for the whole class, or will go over, if there is a gift over in default of an appointment or execution of the power.[5] So if the power is attempted to be executed in favor of a person or a class, outside of the persons or classes in whose favor it is given, the

[1] Marlborough *v.* Godolphin, 2 Ves. 61; 5 Ves. Jr. 506. In this case Lord Hardwicke drew a distinction between a gift "amongst my children as A. should appoint," which he considered a trust, and a gift "among *such* of my children as A. should appoint," which he considered a mere power. This distinction, however, is not now acted upon. Crossling *v.* Crossling, 2 Cox, 396, is to the same effect as Marlborough *v.* Godolphin. These cases have not been expressly overruled, but they have not been followed in the later cases, and if they were to come before the courts at the present day, it is probable that they would be held to be implied trusts, and not mere powers, as courts will if possible construe such bequests into gifts to the parties to be benefited. Hill on Trust. 69; 2 Sugd. on Powers, 181; Brown *v.* Pocock, 6 Sim. 257.

[2] Stubbs *v.* Sargon, 2 Keen, 255; Ommanny *v.* Butcher, 1 T. & R. 260; Wheeler *v.* Smith, 9 How. 79; Robinson *v.* Allen, 11 Grat. 785; Harper *v.* Phelps, 21 Conn. 257; Thompson *v.* McKissick, 3 Humph. 631; Ellis *v.* Ellis, 15 Ala. 296.

[3] Gibbs *v.* Marsh, 2 Met. 243.

[4] Pritchard *v.* Juinchant, Amb. 126; 5 Ves. 596, n.; 2 Sugd. on Pow. 183; Lines *v.* Durden, 5 Flor. 51.

[5] Moore *v.* Dimond, 5 R. I. 121; Bentham *v.* Smith, 1 Cheev. 33 (2d part); Haslen *v.* Kean, 2 Taylor, 279; Christy *v.* Pulliam, 17 Ill. 59.

execution will be bad, and it will remain as a trust for all those in whose favor it was given.[1] Where the power is to distribute among a certain class, something must be given to each one or the execution of the power is bad.[2] And the donee of the power cannot execute it in favor of himself or his family, unless the terms of the power specially authorize him so to do.[3] Nor can he delegate the power or the execution of it to others.[4]

§ 255. Generally, if the power is left unexecuted by the donee, the court will execute it as a trust, by dividing the fund equally among the objects or persons in favor of whom it was given, or from whom the selection might have been made, on the ground that *equality is equity*.[5] But if the donor of the power lays down any rule by which the *donee* or trustee is to be governed in his selection and distribution of the fund, it is said the court will place itself in the position of the trustee. If the discretion of the trustee is to be founded upon, or measured by, a state of facts which the court can inquire into and apply as effectually as a private person could, it "can look with the eyes of the trustee," and can substitute its own judgment for that of the individual. Lord Hardwicke said in a case before him, "Here a rule is laid down; the trustees are to judge of the occasions and necessities of the family; the court can judge of such necessity; that is a judgment to be made from existing facts, so that the court can make the judgment as well as the trustee, and, when informed by evidence of the necessity, can judge what is equitable and just on this necessity," and his Lordship referred the case to a master to

[1] Jarnagin *v.* Conway, 2 Humph. 50; Knight *v.* Garborough, Gilmer, 27; Little *v.* Bennett, 5 Jones, Eq. 156; Lippincott *v.* Ridgway, 3 Stockt. 526; Varrell *v.* Wendell, 20 N. H. 431.

[2] Ibid.; Lippincott *v.* Ridgway, 2 Stockt. 164; 3 ib. 526; Booth *v.* Alington, 39 Eng. L. & Eq. 250. It seems that this is not the rule in Pennsylvania. Graeff *v.* De Turk, 44 Penn. St. 527.

[3] Bostick *v.* Winton, 1 Sneed, 524; Cruse *v.* McKee, 2 Head, 1; Holt *v.* Hogan, 5 Jones, Eq. 82; Bull *v.* Bull, 8 Conn. 47.

[4] Singleton *v.* Scott, 11 Io. 589; Haslen *v.* Kean, 2 Taylor, 279; Withers *v.* Yeadon, 1 Rich. Eq. 324.

[5] Doyley *v.* Attorney-General, 2 Eq. Ca. Ab. 195; Longmore *v.* Broom, 7 Ves. 124; Salusbury *v.* Denton, 3 K. & J. 493; Izod *v.* Izod, 32 Beav. 249; Gray *v.* Gray, 13 Ir. Ch. 404; Fordyce *v.* Brydges, 2 Phil. 497; Penny *v.* Turner, ib. 493; Whithurst *v.* Harker, 2 Ired. Ch. 492; Kennedy *v.* Kingston, 2 J. & W. 431; Frazier *v.* Frazier, 2 Leigh, 642; Cruse *v.* McKee, 2 Head, 1; Davy *v.* Hooper, 2 Vern. 665.

report the facts, and decreed a distribution according to the necessities found.[1] This doctrine has been acted upon in similar cases.[2] In others, the courts have said that it was "impossible to distinguish between degrees of poverty," and that they would not attempt to apply the discretion given to the *donee* of the power, but would divide the fund equally.[3] This conflict of authority leaves the question open for further discussion. It would seem that there is no impossibility in the nature of things "in distinguishing between degrees of poverty," or in deciding what class of persons or relations come within the description, and should take under the gift of the donor. Lord Hardwicke's observations are just, and can be acted upon by courts. It is not so much a question whether courts of equity can exercise the discretion given to the trustee, as whether it is consistent with the dignity of courts to inquire into the relative necessities of a testator's relations, or whether they have the time to enter into such inquiries. So far as the dignity of courts is concerned, they may well remember that they are created to administer justice and equity to the people, and that no inquiries or decrees that can be successfully made are inconsistent with their position or duties.[4]

§ 256. If the donee of the power or trustee is to *select* from the donor's *relations* those to whom he is to give the property in the execution of the power, he may select from the whole circle of relations whether near or distant;[5] but if the power is to *distribute* to the donor's relations, then the donee must confine himself to the relations that are so near that they would take under the statute of

[1] Gower *v.* Mainwaring, 2 Ves. 87. Mr. Belt's edition has a misprint, the court *cannot judge*.

[2] Liley *v.* Hey, 1 Hare, 581; Hewett *v.* Hewett, 2 Ed. 332; Maberly *v.* Turton, 14 Ves. 499; Bull *v.* Bull, 8 Conn. 48.

[3] McNeilledge *v.* Galbrath, 8 S. & R. 43; Harrison *v.* Harrison, 2 Grat. 1; Withers *v.* Yeardon, 1 Rich. Ch. 324.

[4] Upon the general subject of bequests to poor or necessitous relations, see Attorney-General *v.* Buckland, 1 Ves. 231; Amb. 71; Anon., 1 P. Wms. 327; Widmore *v.* Woodroffe, Amb. 636; Brunsden *v.* Woolredge, Amb. 507; Mahon *v.* Savage, 1 Sch. & Lef. 111; Green *v.* Howard, 1 Bro. Ch. 33.

[5] Grant *v.* Lynham, 4 Russ. 292; Brown *v.* Higgs, 5 Ves. 501; Cruwys *v.* Colman, 9 Ves. 324; Swift *v.* Gregson, 1 T. R. 435, note f; Salusbury *v.* Denton, 3 K. & J. 536; Supple *v.* Lowson, Amb. 729; Harding *v.* Glyn, 1 Atk. 469; Mahon *v.* Savage, 1 Sch. & Lef. 111. Brunsden *v.* Woolredge, Amb. 507, seems inconsistent with the other authorities.

distributions.[1] Courts have adopted the rule of the statute of distributions as a convenient rule in such cases, to prevent such gifts from being void for uncertainty. If the power devolves upon the court as a trust, whether it is one of *selection* or *distribution*, the court will act upon the rule of the statute of distributions,[2] unless the donor has himself established some rule of *selection* or distribution which the court can act upon.[3] And the same rule applies if the donor uses the word family.[4] A gift to *nearest relations* or next of kin, must be administered in the same way.[5] But it is said that a power of selection will be implied in the donee in the case of relations, where it would not have been implied in the case of children.[6]

§ 257. Intimately connected with this subject is the inquiry whether courts will execute the power of distribution among the persons intended, by distributing *per capita* or *per stirpes*. Upon this matter it is to be observed that courts have adopted the statute of distributions as a convenient rule to point out the *relations* intended by a donor, when he uses that word in a gift. The only reason for adopting the rule was to prevent the gift from failing for uncertainty. The rule is used to point out the *persons* intended to take, but the terms of the gift are used to point out the *proportions*. If, therefore, there is no rule in the gift which can apply to determine the proportions, the court will make the distribution *per capita*, and everybody within the rule will take equally as tenants in common.[7] But if the gift is to the *next of kin* of the donor, it

[1] Clapton *v.* Bulmer, 10 Sim. 426; 5 My. & Cr. 108; Attorney-General *v.* Price, 17 Ves. 373, note a; Isaac *v.* Defriez, Amb. 595; Carr *v.* Bedford, 2 Ch. R. 146; Pope *v.* Whitcombe, 3 Mer. 437; Forbes *v.* Ball, 3 Mer. 437. This case seems inconsistent, but the question was whether it was a *power* or a *trust*, and not whether the authority was exceeded.

[2] Bennett *v.* Honywood, Amb. 708; Hutchinson *v.* Hutchinson, 13 Ir. Eq. 332; Gough *v.* Bult, 16 Sim. 45; Cowper *v.* Mantell, 22 Beav. 231.

[3] Ibid.; or unless the gift is in some sense a charity. White *v.* White, 7 Ves. 423; Mahon *v.* Savage, 1 Sch. & L. 111; Attorney-General *v.* Price, 17 Ves. 371; Isaac *v.* Defriez, ib. 373, note a.

[4] Cruwys *v.* Colman, 9 Ves. 319; Grant *v.* Lynham, 4 Russ. 297.

[5] Edge *v.* Salisbury, Amb. 70; Goodinge *v.* Goodinge, 1 Ves. 231.

[6] Spring *v.* Biles, 1 T. R. 435, note (f); Mahon *v.* Savage, 1 Sch. & Lef. 111; Salusbury *v.* Denton, 3 K. & J. 536; Pope *v.* Whitcombe, 3 Mer. 689.

[7] Walker *v.* Maunde, 19 Ves. 427; Thomas *v.* Hole, Ca. t. Talb. 251; Phillips *v.* Garth, 3 Bro. Ch. 64; Stamp *v.* Cooke, 1 Cox, 326; Hinckley *v.* Maclaerns, 1 M. & K. 27; Withy *v.* Mangles, 4 Beav. 358; 10 Cl. & Fin. 215;

will be confined to the *nearest relations*, and those who would take by representation under the statute of distributions will be excluded if there are relations a degree nearer.[1] If the subject-matter of the gift is incapable of division, and is to be bestowed upon some one of a class to be selected by the donee, and no selection is made, the court will notwithstanding execute the power as a trust, if by any possibility it can be done.[2]

§ 258. Another difficult question which courts must decide when they are called upon to execute these powers or trusts, is, whether the fund shall be distributed to the parties in interest living at the donor's death, or to those living at the donee's death. Upon this matter it has been determined that when it appears that the donee is to have his whole life to make the selection or distribution, or if the donee is to have the use of the fund for his life, then the court will distribute it to the parties entitled living at the death of the donee.[3] But if the donee is to make the distribution *immediately*, or as soon as may be, the court, on his death without executing the power, will distribute the fund among those entitled at the death of the donor;[4] and the same rule will be followed if the donee die before the donor.[5] These rules, however, are applicable only when the final beneficiaries take *through the medium* of the power; for, if they take directly by the form of the gift subject to be defeated by the execution of the power, they have a vested interest at the death of the donor, and of course those living at that time will take, if the power is not executed to defeat them.[6] Where the

Green *v.* Howard, 1 Bro. Ch. 33; Pope *v.* Whitcombe, 3 Mer. 689; Rayner *v.* Mowbray, 3 Bro. Ch. 234.

[1] Elmsley *v.* Young, 2 M. & K. 780; Withy *v.* Mangles, 4 Beav. 358; 10 Cl. & Fin. 215.

[2] Moseley *v.* Moseley, R. t. Finch, 53; Clarke *v.* Turner, Freem. 199; Richardson *v.* Chapman, 7 Bro. P. C. 318; Brown *v.* Higgs, 5 Ves. 504.

[3] Cruwys *v.* Colman, 9 Ves. 319; Brown *v.* Pocock, 6 Sim. 257; Bonser *v.* Kinnear, 2 Gif. 195; Birch *v.* Wade, 3 Ves. & B. 198; Walsh *v.* Wallinger, 2 R. & M. 78; Burrough *v.* Philcox, 5 My. & Cr. 72; Woodcock *v.* Renneck, 4 Beav. 190; 1 Phil. 72; Finch *v.* Hollingsworth, 21 Beav. 112; Doyley *v.* Attorney-General, 2 Eq. Ca. Ab. 194, pl. 15; Witts *v.* Boddington, 3 Bro. Ch. 95; Winn *v.* Fenwick, 11 Beav. 438; Tiffin *v.* Longman, 15 Beav. 275; Grieveson *v.* Kirsopp, 2 Keen, 653.

[4] Brown *v.* Higgs, 4 Ves. 708; Longmore *v.* Broom, 7 Ves. 124; Cole *v.* Wade, 16 Ves. 27.

[5] Penny *v.* Turner, 2 Phil. 493; Hutchinson *v.* Hutchinson, 13 Ir. Eq. 332.

[6] Lambert *v.* Thwaites, Law R. 2 Eq. 151.

donee may execute the power by *deed* or *will* at any time during his life, and he dies leaving the power unexecuted, there is a conflict of the authorities upon the question to whom should the court give the funds: Mr. Lewin says that there is an equal conflict of principle.[1]

[1] Doyley *v.* Attorney-General, 2 Eq. Ca. Ab. 195; Harding *v.* Glyn, 1 Atk. 469; Pope *v.* Whitcombe, 3 Mer. 689, are authorities that those living at the death of the donee should take. On the other hand the cases of Hands *v.* Hands, 1 T. R. 437, note; Grieveson *v.* Kirsopp, 2 Keen, 653, are authorities that those living at the death of the donor should take. Mr. Lewin says, p. 600 (5th ed. Lond.). "Upon principle too, as well as upon authority, this question is attended with difficulty. On the one hand, the power may be properly exercised by the donee at any time before his death, and there is no obligation to exercise it earlier, and if any members of the class die before the power is exercised, they, according to the ordinary rule, cease to be objects of it. The donee of the power has an undoubted right to postpone the execution of it until the last moment of his life, and the only default which the court has to supply, is the non-exercise *just before his death;* and that default must, therefore, be supplied in favor of those who were objects at the date of the death of the donee. On the other hand, the donee of the power may exercise it in favor of the class existing at the time of exercise, to the exclusion of those who have died before, and also, where the power is one of selection, to the exclusion of those who may come into *esse* subsequently, but the court cannot act arbitrarily, and cannot show any favor, but must observe equality towards all. Who, then, are the objects of the power? As it was not the duty of the donee of the power to exercise it at one time more than another, the only objects of the power must be all those who might by possibility have taken a benefit under it; that is, those living at the death of the testator, and those who come into being during the continuance of the life-estate; otherwise should all the class predecease the tenant for life (an event not improbable where *children* or some limited class of relations are the objects), there would be a power imperative which is construed a trust, and no *cestui que trust*, a result which, it is conceived, the court would be somewhat unwilling to adopt.

CHAPTER IX.

APPOINTMENT, ACCEPTANCE, DISCLAIMER, REMOVAL, RESIGNATION, SUBSTITUTION, AND NUMBER OF TRUSTEES, AND APPOINTMENT UNDER A POWER.

§ 259. When a trust is created by implication, result, or construction of law from acts of parties, they will be held by the law to the

performance of the trust whether they are willing or unwilling to accept the situation; that is, when a trust is raised by law and thrust upon the conscience of a party, as the result or construction to be put upon his acts, in order to do complete justice, the acceptance or refusal of the party to be charged with the trust cannot alter his legal or equitable liability to act as a trustee, and to do all that is required of him to execute the trust. Subject to this qualification, no one is *compellable* to undertake a trust.[1] In voluntary or express trusts, no title vests in the proposed trustee, by whatever instrument it is attempted to be transferred, unless he expressly or by implication accepts the office, or in some way assumes its duties and liabilities.[2] And though a person may have promised or agreed beforehand to accept a trust, and his name is introduced into the will, conveyance or settlement, yet he may decline to act, and it is proper for him to do so if he finds that his duties are different from what he conceived them to be when he entered into the agreement; or if for any reason he cannot attend to the proper discharge of the office.[3] The refusal to act should be affirmatively shown, either by an express disclaimer, or by such a tacit refusal to act as amounts to an express rejection;[4] for every gift by will or deed is supposed, *prima facie*, to be beneficial to the donee, and therefore the law will presume that every gift, whether in trust or not, is accepted until the contrary is proved.[5] Especially will this presumption prevail after a long lapse of time, as twenty years,[6] or thirty-

[1] Lowry *v.* Fulton, 9 Sim. 123; Robinson *v.* Pitt, 3 P. Wms. 251; Moyle *v.* Moyle, 2 Russ. & M. 715. And he may renounce the trust though such renunciation may deprive a beneficiary of all means of obtaining a benefit intended for him by a testator. Beekman *v.* Bonsor, 23 N. Y. 298.

[2] Maccubbin *v.* Cromwell, 7 Gill & J. 157; Bethune *v.* Dougherty, 21 Ga. 257; King *v.* Donnelly, 5 Paige, 46; Trask *v.* Donaghue, 1 Aik. 370; Burritt *v.* Silliman, 13 N. Y. 93; De Peyster *v.* Clendining, 8 Paige, 295; Bulkley *v.* De Peyster, 26 Wend. 21; Judson *v.* Gibbons, 5 Wend. 224; Cooper *v.* McClun, 16 Ill. 435.

[3] Doyle *v.* Blake, 2 Sch. & Lef. 239; Evans *v.* John, 4 Beav. 35; Smith *v.* Knowles, 2 Grant Ca. 413.

[4] Read *v.* Robinson, 6 Watts & S. 331.

[5] Read *v.* Robinson, 6 Watts & S. 331; Townson *v.* Tickell, 3 B. & Ald. 36; Thompson *v.* Leach, Ventr. 198; Wilt *v.* Franklin, 1 Binn. 502; Wise *v.* Wise, 2 Jon. & La. 412; Eyrick *v.* Hetrick, 13 Penn. St. 494; 4 Kent, 500; 4 Cru. Dig. 404–406; Goss *v.* Singleton, 2 Head, 67; Penny *v.* Davis, 3 B. Mon. 313.

[6] *In re* Uniacke, 1 Jon. & La. 1; Eyrick *v.* Hetrick, 13 Penn. St. 493.

four years,[1] if the trustee has notice, and has not disclaimed, though he may have done nothing in the execution of the trust. And even where a deed was only four years old, and the trustees knew of their appointment, and did not object, Lord St. Leonards held that they could not be allowed to say that they did not assent to the conveyance.[2]

§ 260. If the trust is created by deed, the most obvious, natural, and effectual mode of signifying an acceptance is by signing the deed; but such execution of the deed by the trustee is not necessary.[3] If the trustee acts under the deed in the performance of the trust, he will be held to have accepted, though he has not executed the deed, and he may be liable for a breach of the trust;[4] but if the deed contains special covenants, the trustee cannot be sued upon them, if he has not executed it, though he may have accepted the deed.[5] Nor will the execution of the deed amount to a covenant to execute the trust, if it does not contain words that can be construed into such a covenant at law.[6] But the words *covenant* or *agree* are not necessary for that purpose; the word *declare* will suffice.[7] If there is a breach of the trust, but no execution of the deed other than by an acceptance of it, *a simple contract debt* only is created against the trustee or his estate,[8] but a

[1] *In re* Needham, 1 Jon. & La. 34.

[2] Wise *v.* Wise, 2 Jon. & La. 403–412; Penny *v.* Davis, 3 B. Mon. 314; Lewis *v.* Baird, 3 McLean, 65; Read *v.* Robinson, 6 Watts & S. 338.

[3] Flint *v.* Clinton Co., 12 N. H. 432; Cook *v.* Fryer, 1 Hare, 498; Montfort *v.* Cadogan, 17 Ves. 488; 19 Ves. 638; Small *v.* Ayleswood, 9 B. & Cr. 300; Leffler *v.* Armstrong, 4 Io. 482; Buckridge *v.* Glasse, 1 Cr. & Ph. 131; Bixler *v.* Taylor, 3 B. Mon. 362; Field *v.* Arrowsmith, 3 Humph. 442; Smith *v.* Knowles, 2 Grant, Ca. 413.

[4] Ibid.

[5] Richardson *v.* Jenkins, 1 Drew. 477; Vincent *v.* Godson, 1 Sm. & Gif. 384.

[6] Wynch *v.* Grant, 2 Drew. 312; Courtney *v.* Taylor, 6 M. & Gr. 851; Newport *v.* Bryan, 5 Ir. Ch. 119; Adey *v.* Arnold, 2 De G., M. & G. 433; Marryatt *v.* Marryatt, 6 Jur. (N. S.) 572; Holland *v.* Holland, L. R. 4 Ch. 449.

[7] Richardson *v.* Jenkins, 1 Drew. 477; Saltoun *v.* Hanston, 1 Bing. N. C. 433; Cummins *v.* Cummins, 3 Jon. & La. 64; 8 Ir. Ch. 723; Jenkins *v.* Robertson, Law R. 1 Eq. 123.

[8] Jenkins *v.* Robertson, Law R. 1 Eq. 123; Lockhart *v.* Reilly, 1 De G. & J. 464; Vernon *v.* Vawdry, 2 Atk. 119; Barn. 280; Cox *v.* Bateman, 2 Ves. 19; Kearnan *v.* Fitzsimon, 3 Ridg. P. C. 18. If the trustee execute the deed, and it is a simple acceptance of the trust on his part, the breach of the

breach of covenants under the hand and seal of the trustee creates a *specialty debt*, which in some jurisdictions takes precedence of simple contract debts.[1] This distinction is of no effect in the United States, as in every State, probably, the real estate of a deceased person is equally liable for his debts, however contracted or evidenced. If the trustee executes the deed, he should see to it that the recitals are all correct, otherwise he may be held liable to make them good.[2]

§ 261. Parol evidence of the conversations, acts, and admissions of a party are admissible to prove his acceptance of a trust.[3] Thus if a person, with notice of his appointment to a trust, receives the income of the trust estate;[4] or executes a power of attorney;[5] or signs a joint draft, order, or receipt, to enable some other person to act in administering the estate or the trust;[6] or gives notice to a tenant of the estate to pay rent to him;[7] or brings an action on the footing of the trust;[8] or interferes generally by ordering the trust property to be sold, or by being present at the sale, or by giving any directions implying ownership, or by frequently making inquiries of the acting trustee as to the affairs of the trust,[9] or by

trust is a simple contract debt, for there is no breach of any express covenant. Holland *v.* Holland, L. R. 4 Ch. 449.

[1] Gifford *v.* Manley, For. 109; Mavor *v.* Davenport, 2 Sim. 227; Benson *v.* Benson, 1 P. Wms. 131; Deg *v.* Deg, 2 P. Wms. 414; Turner *v.* Wardle, 7 Sim. 80; Bailey *v.* Ekins, 2 Dick. 632; Cummins *v.* Cummins, 3 Jon. & La. 64; Primrose *v.* Bromley, 1 Atk. 89; Wood *v.* Hardisty, 2 Coll. 542, commented upon Law Rep. 1 Eq. 125.

[2] Gore *v.* Bowser, 3 Sm. & Gif. 6; Chaigneau *v.* Bryan, 1 Ir. Ch. 172; 8 Ir. Ch. 251; Story *v.* Gape, 2 Jur. (N. S.) 706; Bliss *v.* Bridgewater (cited Lewin on Trusts, 166, 5th ed.). But in Fenwick *v.* Greenwell, 10 Beav. 418, the Master of the Rolls refused to allow the recital of a representation to bind the trustees.

[3] Urch *v.* Walker, 3 My. & Cr. 703; James *v.* Frearson, 1 N. C. C. 375; 1 Y. & C. Ch. Ca. 370; Doe *v.* Harris, 16 M. & W. 517.

[4] Conyngham *v.* Conyngham, 1 Ves. 522.

[5] Harrison *v.* Graham, 1 P. Wms. 241, n.; 1 Wms. Ex'rs, 151; Hanbury *v.* Kirkland, 3 Sim. 265; Christian *v.* Yancey, 2 P. & H. (Va.) 240.

[6] Broadhurst *v.* Balguy, 1 Y. & C. Ch. Ca. 16; Sadler *v.* Hobbs, 2 Bro. Ch. 114; Doyle *v.* Blake, 2 Sch. & Lef. 231.

[7] Montfort *v.* Cadogan, 17 Ves. 487.

[8] Ibid.; O'Neill *v.* Henderson, 15 Ark. 235; Pond *v.* Hine, 21 Conn. 519; Penny *v.* Davis, 3 B. Mon. 314.

[9] James *v.* Frearson, 1 Y. & C. Ch. Ca. 375; Shepherd *v.* McEvers, 4 John. Ch. 136.

not objecting when the instrument of trust is read to him,[1] — all these acts may be shown by parol, as evidence tending to prove an acceptance, and the evidence will be more or less conclusive according to the circumstances of each case. The general rule is, that *every voluntary interference* with the trust property will stamp a person as an acting trustee,[2] unless such *interference* can be *plainly* referred to some other ground of action than to an acceptance of the trust, as by showing that such person acted, in interfering, as the mere agent of an acting trustee.[3] The mere fact that a person named as trustee in a deed takes the custody of the deed until another trustee can be appointed is not an acceptance, because his acts are plainly referable to another ground of action.[4] While parol evidence is competent to show whether a supposed trustee has or has not accepted the trust, it is not *competent*, in behalf of the trustee, to prove by such evidence the conversations or declarations of the settlor in order to show what property was subject to the trust.[5] A trustee should take care that his acts in relation to the trust fund are *plainly referable* to some certain ground of action; for if his acts are *ambiguous*, or it is doubtful whether he intended to accept, or to act in some other capacity, the doubt will be against him, and he will be construed to have accepted the trust and all its responsibilities.[6]

§ 262. At common law an executor was said to derive his authority from the will, and not from the appointment of the Probate Court.[7]

[1] James *v.* Frearson, 1 Y. & C. Ch. Ca. 375; Chidgey *v.* Harris, 16 M. & W. 517; Butler *v.* Baker, 3 Co. 26 a; Hanson *v.* Worthington, 12 Md. 418.

[2] White *v.* Barton, 18 Beav. 192; Harrison *v.* Graham, cited Churchill *v.* Hobson, 1 P. Wms. 241 n. (y); Cummins *v.* Cummins, 8 Ir. Eq. 723; Doyle *v.* Blake, 2 Sch. & Lef. 231; Malzy *v.* Edge, 2 Jur. (N. S.) 80; Lewis *v.* Baird, 3 McLean, 56; Maccubbin *v.* Cromwell, 7 Gill & J. 157; Penny *v.* Davis, 3 B. Mon. 313.

[3] Stacey *v.* Elph, 1 M. & K. 195; Lowry *v.* Fulton, 9 Sim. 115; Dove *v.* Everard, 1 R. & M. 281; Taml. 376; Orr *v.* Newton, 2 Cox, 274; Balchen *v.* Scott, 2 Ves. Jr. 678; Carter *v.* Carter, 10 B. Mon. 327; Judson *v.* Gibbons, 5 Wend. 224.

[4] Evans *v.* John, 4 Beav. 35; Smith *v.* Knowles, 2 Grant, Ca. 413.

[5] Doyle *v.* Blake, 2 Sch. & Lef. 240.

[6] Read *v.* Truelove, Amb. 417; Chaplin *v.* Givens, 1 Rice, Eq. 154; Doe *v.* Harris, 16 M. & W. 517; Lowry *v.* Fulton, 9 Sim. 115; Conyngham *v.* Conyngham, 1 Ves. 522; Montgomery *v.* Johnson, 11 Ir. Eq. 476.

[7] Toller's Ex'rs, 95.

Therefore most of the acts of persons nominated to execute wills were valid before the probate of the will.[1] Thus persons appointed by a testator in his will to administer his estate, and execute the trusts created by such will, might assume the trusts and proceed in the execution of them, without presenting the will for probate;[2] and the same evidence might be used to show that a trustee under a will had accepted such trust, and had assumed its responsibilities, as was admissible to show that a trustee under a deed had accepted the office.[3] But in nearly all the United States there are statutes upon the subject which require that wills shall be presented for probate, and that executors and trustees under them shall give bonds for the faithful discharge of their duties. Where such statutes are in force, executors or trustees have no power or authority to act without appointment by the Probate Court, and a refusal or neglect to qualify by giving bonds will be considered a refusal and disclaimer of the trust.[4] In the absence of such statutes, if a person named as executor procures probate of the will, he will thereby constitute himself executor with all the liabilities attached to the office,[5] and if the same person is appointed executor and trustee, probate of the will by him will be an acceptance of the trusts.[6] But the same person may

[1] Easton *v.* Carter, 5 Exch. 8; Venables *v.* East Ind. Co., 2 Exch. 633; Toller's Ex'rs, 46, 47; Mitchell *v.* Rice, 6 J. J. Marsh. 625.

[2] Ibid.; Vanhorne *v.* Fonda, 5 John. Ch. 403.

[3] Conyngham *v.* Conyngham, 1 Ves. 522; Doyle *v.* Blake, 2 Sch. & Lef. 231; James *v.* Frearson, 1 Y. & C. Ch. Ca. 370; Maccubbin *v.* Cromwell, 7 Gill & J. 157; Godwin *v.* Yonge, 22 Ala. 553; Latimer *v.* Hanson, 1 Bland, 51; Flint *v.* Clinton Co., 12 N. H. 432; Chaplin *v.* Givens, 1 Rice, Eq. 133; Baldwin *v.* Porter, 12 Conn. 473.

[4] Luscomb *v.* Ballard, 5 Gray, 403; Monroe *v.* James, 4 Munf. 195; Trask *v.* Donaghue, 1 Aik. (Vt.) 373; Carter *v.* Carter, 10 B. Mon. 327; Mitchell *v.* Rice, 6 J. J. Marsh. 625; Robertson *v.* Gaines, 2 Humph. 381; Johnson's App. 9 Barr, 416; Simpson's App. ib.; Wood *v.* Sparks, 1 Dev. & Bat. 396; Miller *v.* Meetch, 8 Barr, 417; Roseboom *v.* Moshier, 2 Denio, 61; Williams *v.* Cushing, 34 Me. 370; Deering *v.* Adams, 37 Me. 265; Hanson *v.* Worthington, 12 Md. 418; Knight *v.* Loomis, 30 Me. 208; Groton *v.* Ruggles, 17 Me. 137; Sawyer's App. 16 N. H. 459; Gaskill *v.* Gaskill, 7 R. I. 478.

[5] Booth *v.* Booth, 1 Beav. 125; Ward *v.* Butler, 2 Moll. 533; Styles *v.* Guy, 1 Mac. & G. 431; Scully *v.* Delaney, 2 Ir. Eq. 165; and see Balchen *v.* Scott, 2 Ves. Jr. 678; Peeble's App. 15 Ser. & R. 39; Worth *v.* McAden, 1 Dev. & Bat. Eq. 209; Cummins *v.* Cummins, 3 Jon. & La. 64; Hanson *v.* Worthington, 12 Md. 418.

[6] Mucklow *v.* Fuller, Jac. 198; Williams *v.* Nixon, 2 Beav. 472; Clarke *v.*

be appointed both executor and trustee under a will in such a manner that he may accept one of the offices and decline the other. As if a man is appointed executor, and *as* executor is to act as a trustee, in such case the probate of the will, and qualification as executor, will be an acceptance of the trust.[1] But if from the will it appears that the testator intended to give his trustees a distinct and independent character, probate of the will by the executors will not make them trustees, unless they also accept the trust and qualify themselves according to law.[2] The conditions of bonds of administrators are to administer the estate according to law. Bonds of executors are conditioned to administer an estate according to the will, though a condition to administer according to law is the same thing, because by law they are to administer according to the will. If, therefore, by the terms of the will the executor, *as executor*, is to keep the estate, or any portion of it, in his hands, and is to deal with it as a trustee, his bond will be held as security for the faithful performance of his duties, though such duties are much larger and different from those of an ordinary executor.[3] If, however, the will contemplates that the executor, *as such*, is to perform only the ordinary duties of an executor, and that when the estate is settled by him, another duty is to arise to be performed, either by him or by another, then the bond of the executor is not security for those further duties, but the person to perform them must accept the office, and give a bond for their performance.[4] It may be further observed, that an executor will be considered as holding a legacy in his capacity as executor, unless the will clearly shows that the testator

Parker, 19 Ves. 1; Cummins *v.* Cummins, 3 Jon. & La. 64; Hanson *v.* Worthington, 12 Md. 418; Baldwin *v.* Porter, 12 Conn. 473.

[1] De Peyster *v.* Clendining, 8 Paige, 295; Hanson *v.* Worthington, 12 Md. 418; Williams *v.* Conrad, 30 Barb. 524; Mucklow *v.* Fuller, Jac. 198; Booth *v.* Booth, 1 Beav. 125; Williams *v.* Nixon, 2 Beav. 472; Ward *v.* Butler, 2 Moll. 533; Wilson's Estate, 2 Penn. St. 325.

[2] De Peyster *v.* Clendining, 8 Paige, 295; Worth *v.* McAden, 1 Dev. & Bat. 209; Judson *v.* Gibbons, 5 Wend. 226; Williams *v.* Cushing, 34 Me. 370; Deering *v.* Adams, 37 Me. 265; Hanson *v.* Worthington, 12 Md. 418; Knight *v.* Loomis, 30 Me. 204; Wheatley *v.* Badger, 7 Penn. St. 459.

[3] Saunderson *v.* Stearns, 6 Mass. 37; Prescott *v.* Pitts, 9 Mass. 376; Hall *v.* Cushing, 9 Pick. 395; Dorr *v.* Wainwright, 13 Pick. 328; Towne *v.* Ammidown, 20 Pick. 325; Perkins *v.* Moore, 16 Ala. 9; State *v.* Nicols, 10 Gill & J. 27; Wilson's Estate, 2 Penn. St. 325.

[4] Knight *v.* Loomis, 30 Me. 204.

intended that he should hold it in the character of a trustee.[1] But after the lapse of twenty years the law will presume that an estate was fully administered, and that thereafter the executor held the funds as trustee.[2] So, if it appears that the executor made an actual final settlement of the estate as executor, he will be presumed to hold subsequently as a trustee.[3]

§ 263. If the same person is both executor and trustee, it is sometimes difficult to determine whether, in a particular case, he is acting as executor or trustee. In England, the rule seems to be that if the executor assents to the legacy, if it is specific, or if part of the assets are clearly set apart and appropriated by him to answer a particular legacy, he will be considered to hold the fund as trustee for that trust, and not as executor.[4] In jurisdictions where executors and trustees are required to qualify and give bonds, it has been held that an executor, who is also a trustee under the will, cannot be considered as holding any part of the assets as trustee, until he has settled his account at the probate office as executor, and has been credited with the amount as executor with which he is afterwards to be charged as trustee.[5] In other cases it has been held that the change of property from the executor to the trustee, where they are the same persons, may be shown by some *authoritative and notorious act;*[6] but that the mere determination of the executor, in his own mind, to hold certain particular property thereafter in trust for a particular legatee under the will, is not such a setting apart as to discharge him from his liability as executor, and to charge him as trustee.[7] Where the executor may thus act in a double

[1] State *v.* Nicols, 10 Gill & J. 27.

[2] Jennings *v.* Davis, 5 Dana, 127.

[3] State *v.* Hearst, 12 Miss. 365.

[4] Dix *v.* Burford, 19 Beav. 409; Brougham *v.* Paulett, 19 Beav. 119; *Ex parte* Dover, 5 Sim. 500; Phillipo *v.* Munnings, 2 M. & Cr. 309; Byrchall *v.* Bradford, 6 Mad. 13; *Ex parte* Wilkinson, 3 Mont. & Ayr. 145; Willmot *v.* Jenkins, 1 Beav. 401.

[5] Hall *v.* Cushing, 9 Pick. 395; Prior *v.* Talbot, 10 Cush. 1; Perkins *v.* Moore, 16 Ala. 9.

[6] Newcomb *v.* Williams, 9 Met. 534; Conkey *v.* Dickinson, 13 Met. 53; Hubbard *v.* Lloyd, 6 Cush. 522; De Peyster *v.* Clendining, 8 Paige, 310; Pyron *v.* Mood, 2 McMull. 288; Hitchcock *v.* Bank of U. S., 7 Ala. 386; Perkins *v.* Moore, 16 Ala. 9.

[7] Miller *v.* Congdon, 14 Gray, 114. The question in this case, was whether the estate or the legatee should suffer a certain loss; but it was not a question whether the executor should bear the loss in person.

capacity, he must account in his capacity as executor, and the sureties on his bond as executor will be liable for the faithful discharge of his duties as such, until he has transferred his account to himself as trustee, and given a bond as trustee.[1] But, at the same time, it is held that if the executor, acting as trustee under such a will, acts with fidelity and due diligence, he and his sureties will not be responsible should any loss happen either to the principal or interest of the trust fund; that is, that his liability in such a case is rather that of a trustee than that of an executor;[2] and if he has acted in good faith in the investment of the legacy, any loss that may occur without his fault will fall upon the legatee or *cestui que trust*, and not upon him nor the estate.[3]

§ 264. The executor of an executor, by accepting the office from his immediate testator, becomes the executor and trustee of his testator's testator. This is the rule in England, where an executor comes into possession of all the assets in the hands of his testator, in whatever capacity such testator held them; and, by accepting the duty of administering the estate of his immediate testator, he accepts the duty of administering all the trusts with which the assets in his testator's hands were charged.[4] This is probably the rule in the United States, modified by our probate statutes. An executor must administer and account for all the assets that come to his hands. If his testator held goods of a previous testator unadministered, or if his testator held assets as a trustee, probate courts may appoint an administrator with the will annexed of the first testator, or a new trustee; and it will be the duty of the executor of the last testator to settle an account with the administrator with the will annexed, or with the new trustee, and to pay over to them the assets that came to his hands. Until such proceedings are had, he will hold such assets upon the same terms and trusts that his testator held them; and it will be his duty to administer them accordingly. The proposition may be briefly stated thus: An executor, in proving the will and in accepting the

[1] Prior *v.* Talbot, 10 Cush. 1.

[2] Hubbard *v.* Lloyd, 6 Cush. 522; Brown *v.* Kelsey, 2 Cush. 248; Dorr *v.* Wainwright, 13 Pick. 332; Right *v.* Cathill, 5 East, 491; Denne *v.* Judge, 11 East, 288.

[3] Ibid.

[4] In the Goods of Perry, 2 Curt. 655; Goods of Beer, 15 Jur. 160; Shep. Touch. by Preston, 464; Wankford *v.* Wankford, Freem. 520; Hayton *v.* Wolfe, ro. Jac. 614; Palm. 156; Hutt. 30.

office from his immediate testator, accepts not only all the trusts imposed by the immediate will under which he acts, but also all the trusts in respect to the assets which come to his hands with which his immediate testator was charged; and he must execute those trusts until he is relieved by a new appointment in the Probate Court, and a settlement and payment over of the assets. He will not be allowed to accept the trusts created by his immediate testator, and to repudiate those with which his testator was himself charged.[1] And so, a trustee cannot limit his acceptance and liability to any particular portion of the trust. For if he acts at all, though he disclaim a part, he will be held to have accepted the entire trust;[2] as if one is appointed trustee of real and personal estate, and he deals with the personal, he will be deemed to have accepted the entire trust;[3] and so, if the same instrument appoints him to two distinct trusts, he cannot divide them.[4]

§ 265. If a person wrongfully interferes with the assets of a deceased person, he may become an administrator or executor *de son tort*. So, if a person by mistake or otherwise assumes the character of trustee, and acts as such, when the office does not belong to him, he thereby becomes a trustee *de son tort*, and he may be called to account by the *cestui que trust* for the assets received under color of the trust.[5]

§ 266. When trustees have accepted the office, they ought to bear in mind that the law knows no such person as a *passive trustee*, and that they cannot sleep upon their trust. If such trustee remains quiet for any reason, and suffers some other to do all the business, and yet executes formal papers, as a power of attorney for the sale of stock, or a release or discharge of mortgages on payment, he is answerable for the money as if he had conducted the business. And further, the trustee should make himself acquainted with the nature and circumstances of the property; for though he is not responsible for any thing that happens before his acceptance of the

[1] Worth *v.* Arden, 1 Dev. & Bat. 199; Mitchell *v.* Adams, 1 Ired. (Law) 298.

[2] Urch *v.* Walker, 3 M. & Cr. 702; Read *v.* Truelove, Amb. 417; Doyle *v.* Blake, 2 Sch. & Lef. 231; Van Horn *v.* Fonda, 5 John. Ch. 403; Champlin *v.* Givens, 1 Rice, Eq. 154; Cummins *v.* Cummins, 3 Jon. & La. 64; Latimer *v.* Hanson, 1 Bland, 51; Flint *v.* Clinton Co., 12 N. H. 432.

[3] Ward *v.* Butler, 2 Moll. 533.

[4] Urch *v.* Walker, 3 M. & Cr. 702.

[5] Pearce *v.* Pearce, 22 Beav. 248; Life Association *v.* Siddall, 3 De G., F. & J. 58; Hennessey *v.* Bray, 33 Beav. 96; Rackham *v.* Siddall, 16 Sim. 297; 1 Mac. & G. 607.

trust,[1] yet if a loss occurs from any want of attention, care or diligence in him after his acceptance, he may be held responsible for not taking such action as was called for.[2]

§ 267. It has been seen that a person named as trustee, either in a deed or will, may decline the office and disclaim the estate.[3] If he does so, he ought to execute an effectual disclaimer without delay, for after a long interval of time it will be presumed that he accepted the office.[4] If a person knows of his appointment, and lies by for a long time, it is for the court to say whether, under all the circumstances, such acquiescence was an assent to the trust.[5] But if a trustee does no act in the office, there is no rule that requires him to disclaim within any particular time. Thus, he may disclaim after sixteen years if the delay can be so explained as to rebut the presumption of an acceptance.[6] A disclaimer will take effect as of the time of the gift, and will prevent the estate from vesting in the trustee disclaiming; therefore, a disclaimer, whenever made, will relate back to the time of the gift, if the party disclaiming has done no act which may be construed into an acceptance. It is therefore immaterial when the mere formal instrument of disclaimer is executed, provided that nothing has intervened to vest the estate in the trustee.[7]

§ 268. If a person has once accepted the office, either expressly or by implication, it is conclusive; and he cannot afterwards, by disclaimer or renunciation, avoid its duties and responsibilities.[8] And the reason is, that, if the estate has once vested in the trustee, it cannot be divested by a mere disclaimer or renunciation, nor can

[1] Greaves *v.* Strahan, 8 De G., M. & G. 291.

[2] England *v.* Downes, 6 Beav. 269, 279; Townley *v.* Bond, 2 Conn. & Laws. 405; James *v.* Frearson, 1 Y. & C. Ch. Ca. 270; Taylor *v.* Millington, 4 Jur. (N. S.) 204; *Ex parte* Greaves, 25 L. J. 53; 2 Jur. (N. S.) 253; Malzy *v.* Edge, 2 Jur. (N. S.) 8.

[3] *Ante*, § 259.

[4] *Ante*, § 259.

[5] Doe *v.* Harris, 16 M. & W. 512; Paddon *v.* Richardson, 7 De G., M. & G. 563; James *v.* Frearson, 1 Y. & C. Ch. Ca. 370.

[6] Noble *v.* Meymott, 14 Beav. 471; Doe *v.* Harris, 16 M. & W. 517.

[7] Stacey *v.* Elph, 1 M. & K. 195–199.

[8] Conyngham *v.* Conyngham, 1 Ves. 522; Reed *v.* Truelove, Amb. 417; Doyle *v.* Blake, 2 Sch. & Lef. 231; Stacey *v.* Elph, 1 M. & K. 195; Cruger *v.* Halliday, 11 Paige. 314; Shepherd *v.* McEvers, 4 John. Ch. 136; Latimer *v.* Hanson, 1 Bland, 51; Jones *v.* Stockett, 2 Bland, 409; Chaplin *v.* Givens, 1 Rice, Eq. 133; Perkins *v.* McGavock, 3 Hay. 265; Drane *v.* Gunter, 19 Ala. 731; Strong *v.* Willis, 3 Flor. 124.

he convey the estate against the consent of the *cestuis que trust* without committing a breach of trust, unless the instrument creating the trust gives him that power, or unless there is the decree of a court to that effect. In such case the trustee may resign the trust, and convey the estate in the manner pointed out in the instrument creating the trust, if it speaks upon that subject; or the trustee may decline the office, and convey the estate to a new trustee, by the agreement of all the parties in interest, if they are competent to act, and consent to the arrangement. But if the parties do not consent, or if there are minor children, married women, insane persons, or others incompetent to act, a trustee, after he has once accepted the office, can only be discharged by decree of a court having jurisdiction, and upon proper proceedings had.[1]

§ 269. If a person accepts a trust and dies, his heir cannot renounce or disclaim it. The acceptance vested the estate in the trustee, and the law at his death cast it upon the heir; and the heir cannot divest or repudiate the estate by a mere disclaimer.[2] But if the heir is so named in the original instrument of trust, that he takes the estate *by purchase*, and not by inheritance or descent, or if he comes in under some arrangement, as a special occupant, he may use his own judgment in accepting or refusing the estate charged with the trust.[3] In most of the United States there are special provisions by statute regulating the resignation of trustees, and the proceedings to be had upon their death, for the preservation of the trust estates and the appointment of new trustees. If a person is appointed trustee and has neither accepted nor disclaimed during his life, it is an open question whether his heir or personal representative can disclaim after his death. The question was raised in Goodson *v.* Ellison,[4] but was left undecided. Mr. Hill thinks that a disclaimer by the heir may be supported on principle.[5] A later case seems strongly to imply that the heir cannot disclaim.[6] If an acting trustee dies, a person named cotrustee with him may disclaim after his death, if the one disclaiming has done no act amounting to an acceptance.[7]

[1] Cruger *v.* Halliday, 11 Paige, 314; Drane *v.* Gunter, 19 Ala. 731; Shepherd *v.* McEvers, 4 John. Ch. 136; Diefendorf *v.* Spraker, 10 N. Y. 246.

[2] Co. Lit. 9 a; 3 Cru. Dig. 318; Humphrey *v.* Morse, 2 Atk. 408.

[3] Creagh *v.* Blood, 3 Jon. & La. 170.

[4] Goodson *v.* Ellison, 3 Russ. 583, 587.

[5] Hill on Trustees, 222 (4th ed.).

[6] King *v.* Phillips, 16 Jur. 1080.

[7] Stacey *v.* Elph, 1 M. & K. 195.

§ 270. It was the clear opinion of Lord Coke, that if a freehold vested in a person by feoffment, grant, or devise, it could not be divested except by matter of record; and this rule was established in order that a suitor might know, with more certainty, who was the tenant to the *præcipe;*[1] but, as a gift is not perfect in law until it is accepted by the assent of the donee, a disclaimer operates as evidence that the donee never assented, and consequently that the estate never vested in him. Accordingly, it is now established that a parol disclaimer is sufficient in all cases of a gift by deed or will of both real and personal estate.[2] And so a trust may be repudiated without an express disclaimer, as by evidence of the conduct of the party amounting to a refusal of the office,[3] or by any conduct inconsistent with an acceptance; and a disclaimer may be presumed after a long neglect to qualify or refusal to act.[4] But the parol expressions of a refusal of the trust, or parol evidence of conduct inconsistent with an acceptance, must be unequivocal, and extend to a renunciation of all interest in the property; for if such refusal or conduct is coupled with a claim to the estate of another character, it will not amount to a disclaimer.[5] But a person would act very imprudently who allowed so important a question, as whether he was a trustee or not, to be a matter of inference and construction from conversations or conduct.[6]

[1] Butler & Baker's Case, 3 Co. 26 a, 27 a; Anon., 4 Leon. 207; Shep. Touch. 285, 452; Bonifant *v.* Greenfield, Godb. 79; Siggers *v.* Evans, 5 El. & Bl. 380.

[2] Townson *v.* Tickell, 3 B. & Al. 31; Stacey *v.* Elph, 1 M. & K. 198; Bonifant *v.* Greenfield, Cro. Eliz. 80; Smith *v.* Smith, 6 B. & Cr. 112; Begbie *v.* Crook, 2 Bing. N. C. 70; 2 Scott, 128; Shep. Touch. 282, 452; Smith *v.* Wheeler, 1 Ventr. 128; Thompson *v.* Leach, 2 Ventr. 198; Rex *v.* Wilson, 5 Man. & R. 140; Small *v.* Marwood, 4 Man. & R. 190; Foster *v.* Dawber, 1 Dr. & Sm. 172; *Re* Ellison's Trust, 2 Jur. (N. S.) 62; Doe *v.* Smith, 9 D. & R. 136; Bingham *v.* Clanmorris, 2 Moll. 253; Peppercorn *v.* Wayman, 5 De G. & Sm. 230; Doe *v.* Harris, 16 M. & W. 517; Thompson *v.* Meek, 7 Leigh, 419; Roseboom *v.* Moshier, 2 Denio, 61; Comm. *v.* Mateer, 16 Ser. & R. 416; Nicolson *v.* Wordsworth, 2 Swans. 369; Adams *v.* Taunton, 5 Mad. 435; Miles *v.* Neave, 1 Cox, 159; Sherratt *v.* Bentley, 1 Russ. & M. 655; Norway *v.* Norway, 2 M. & K. 278; Bray *v.* West, 9 Sim. 429.

[3] Stacey *v.* Elph, 1 M. & K. 195; Ayres *v.* Weed, 16 Conn. 291; Thornton *v.* Winston, 4 Leigh, 152.

[4] Marr *v.* Peay, 2 Murph. 85.

[5] Doe *v.* Smith, 6 B. & C. 112; Judson *v.* Gibbons, 5 Wend. 224.

[6] Stacey *v.* Elph, 1 M. & K. 199; *In re* Tryon, 7 Beav. 496.

§ 271. A disclaimer should be by deed or other writing that admits of no ambiguity, and is certain evidence.[1] And the instrument should be a *disclaimer* and not a *conveyance;* for if the trustee attempts to convey the estate, he may be held to have accepted the trust by the same act which was intended to be a refusal of the office.[2] Although Lord Eldon expressed the opinion, which seems to be the common-sense view, that if the intention of the instrument is to disclaim, it ought to receive that construction, although it is in form a conveyance,[3] but this distinction has not been acted on. A trust may also be disclaimed at the bar of the court and by counsel, or by answer in chancery.[4]

§ 272. If a person is nominated as trustee in a will, and a benefit is also given to him independent of the office, he can claim the testator's bounty, and yet disclaim the burden of the trust,[5] as an executor who is also a legatee may renounce the executorship and yet claim the legacy; but if the benefit is annexed to the office of trustee or executor, and is not a gift to the individual, the person named as executor or trustee cannot claim the benefit if he decline the office.[6] And a trustee who has power, under certain circumstances, to appoint a colleague and successor to execute the trusts, may disclaim the trusts, except the power of nominating other persons to be trustees in place of those originally appointed, and an appointment by one who has never acted except to make the nomination will be held valid.[7]

§ 273. If a person appointed trustee effectually disclaims, it is as if he had never been named in the instrument. All parties are placed in the same situation in respect to the trust property as if his name had not been inserted in the deed or will.[8] Therefore if

[1] Stacey *v.* Elph, 1 M. & K. 199.

[2] Crewe *v.* Dicken, 4 Ves. 97; Urch *v.* Walker, 3 M. & C. 702.

[3] Nicolson *v.* Wordsworth, 2 Swans. 372; Att'y-Gen. *v.* Doyley, 2 Eq. Ca. Ab. 194; Hussey *v.* Markham, t. Finch, 258; Sharp *v.* Sharp, 2 B. & A. 405; Richardson *v.* Hulbert, 1 Anst. 65.

[4] Ladbrook *v.* Bleaden, 16 Jur. 630; Foster *v.* Dawber, 1 Dr. & Sm. 172; *Re* Ellison's Trust, 2 Jur. (N. S.) 62; Hickson *v.* Fitzgerald, 1 Moll. 14; Norway *v.* Norway, 2 M. & K. 278; Sherratt *v.* Bently, 1 R. & M. 655; Legg *v.* Mackrell, 1 Gif. 166; Bray *v.* West, 9 Sim. 429.

[5] Pollexfen *v.* Moore, 3 Atk. 272; Andrew *v.* Trinity Hall, 9 Ves. 525; Talbot *v.* Radnor, 3 M. & K. 524; Warren *v.* Rudall, 1 Johns. & Hem. 1.

[6] Slaney *v.* Witney, L. R. 2 Eq. 418.

[7] *In re* Hadley, 5 De G. & Sm. 67; 9 Eng. L. & Eq. 67.

[8] Townson *v.* Tickell, 3 B. & Al. 31; Begbie *v.* Crook, 2 Bing. N. C. 70;

one of several trustees disclaims, the entire estate will vest in the remaining trustee or trustees;[1] and if all the trustees or a sole trustee disclaim, the estate will vest in the heir subject to the trusts.[2] The settlor must be presumed to have known the effect of a disclaimer by the trustees named by him.[3] It will be seen from this, that a disclaimer operates retrospectively, and vests the estate, *ab initio*, in those trustees only who accept the trust, and, in the absence of an acceptance by any of the trustees, in the heir.[4] It follows, that all the powers and authority vested in the trustees, *as such*, which are incidental or requisite to the execution of the trusts, are vested in those trustees only who accept the office. They may, therefore, grant leases of the trust estate,[5] and sell and convey the same,[6] and give valid receipts for the purchase-money,[7] and the disclaiming trustee need not join in the deeds, nor can his concurrence be required or enforced. And it is immaterial that a disclaiming trustee is expressly named as one of the persons by whom a power connected with the trust is to be exercised:[8] a power given to the trustees, or the *survivor* of them, may be exercised by an *acting* trustee, although the disclaiming trustee is still alive.[9] But if the power is given to the *person* and not to the *office*, a disclaimer by one will not vest the power in the other trustees, so as to enable them to exercise it. Powers that imply a personal confidence in the donee must be exercised by the persons in whom the confidence is placed, and to whom the power is given.[10] Such powers,

Hawkins *v.* Kemp, 3 East, 410; Smith *v.* Wheeler, 1 Ventr. 128; Legett *v.* Hunter, 25 Barb. 81; 19 N. Y. 445; Goss *v.* Singleton, 2 Head, 67.

[1] Ibid.; Bonifant *v.* Greenfield, Cro. Eliz. 80; Denne *v.* Judge, 11 East, 288.

[2] Stacey *v.* Elph, 1 M. & K. 195; Austin *v.* Martin, 29 Beav. 523; Goss *v.* Singleton, 2 Head, 67.

[3] Browell *v.* Reed, 1 Hare, 435.

[4] Peppercorn *v.* Wayman, 5 De G. & Sm. 230; Stacey *v.* Elph, 1 M. & K. 195.

[5] Small *v.* Marwood, 9 B. & Cr. 307; Bayly *v.* Cumming, 10 Ir. Eq. 410.

[6] Cooke *v.* Crawford, 13 Sim. 91; Adams *v.* Taunton, 5 Mad. 435; Crewe *v.* Dicken, 4 Ves. 97; Nicolson *v.* Wordsworth, 2 Swans. 378.

[7] Hawkins *v.* Kemp, 3 East, 410; Smith *v.* Wheeler, 1 Ventr. 128; 2 Ven. & Pur. 850; Vandever's App. 8 Watts & S. 405.

[8] Crewe *v.* Dicken, 4 Ves. 100; Adams *v.* Taunton, 5 Mad. 435.

[9] Sharp *v.* Sharp, 2 B. & Cr. 405; Peppercorn *v.* Wayman, 5 De G. & Sm. 230.

[10] Cole *v.* Wade, 16 Ves. 44; Newman *v.* Warner, 1 Sim. (N. S.) 457; Eaton *v.* Smith, 2 Beav. 236; Att'y-Gen. *v.* Doyley, 2 Eq. Ca. Ab. 194; Walsh *v.* Gladstone, 14 Sim. 2; Wilson *v.* Pennock, 27 Penn. St. 238.

therefore, will not vest by the disclaimer of one in his cotrustees, but will be absolutely gone.[1]

§ 274. If a trustee once accepts the office, he cannot by his sole action be discharged from its duties. Having once entered upon the management of the trust, he must continue to perform its duties until he is discharged in one of three ways: first, he may be removed and discharged, and a new trustee substituted in his place, by proceedings before a court having jurisdiction over the trust; second, he may be discharged, and a new trustee appointed, by the agreement and concurrence of all the parties interested in the trust; and, third, he may be discharged, and a new trustee appointed, in the manner pointed out in the instrument creating the trust, if it makes any provisions upon that subject.[2] Mere abandonment of the trust will not vest the trust property in the hands of his cotrustee, nor relieve a trustee from liability.[3] If a trustee conveys away the trust estate to another, even his cotrustee, and appoints another to execute the trust, the conveyance may pass the naked legal title, but it will have no effect in relieving the original trustee from responsibility, if the transaction is not sanctioned by the decree of a court, or by the consent of all parties interested; and it will transfer no authority to the person thus appointed, except to make him a trustee *de son tort*, if he attempts to interfere with the trust estate.[4]

§ 275. The *cestui què trust*, and all other persons interested in the remainder or reversion of trust property,[5] are entitled to have the custody and the administration of it confided to *proper* persons, and to a proper *number* of persons. Thus if a trustee originally appointed by will die in the testator's lifetime, a new trustee may be appointed by the court to take the trust property,

[1] Eaton *v.* Smith, 2 Beav. 236; Lancashire *v.* Lancashire, 2 Phil. 657; Robson *v.* Flight, 13 Beav. 268.

[2] Craig *v.* Craig, 3 Barb. Ch. 76; Drane *v.* Gunter, 19 Ala. 731; Thatcher *v.* Candee, 3 Keyes (N. Y.), 157; Shepherd *v.* McEvers, 4 John. Ch. 186; Cruger *v.* Halliday, 11 Paige, 319; Ridgeley *v.* Johnson, 11 Barb. 527; Webster *v.* Vandeventer, 6 Gray, 428; Pearce *v.* Pearce, 22 Beav. 248; Sugden *v.* Crossland, 3 Sm. & Gif. 192; Jones *v.* Stockett, 2 Bland, 409; Perkins *v.* McGavock, 3 Hay. 265.

[3] Webster *v.* Vandeventer, 6 Gray, 428; Cruger *v.* Halliday, 11 Paige, 314.

[4] Pearce *v.* Pearce, 22 Beav. 248; Sugden *v.* Crossland, 3 Sm. & Gif. 192; Braybrooke *v.* Inskip, 8 Ves. 417; Chalmers *v.* Bradley, 1 J. & W. 68; Williams *v.* Parry, 4 Russ. 272; Adams *v.* Paynter, 1 Coll. 532; Cruger *v.* Halliday, 11 Paige, 314.

[5] Finlay *v.* Howard, 2 Dr. & W. 490; Cooper *v.* Day, 1 Rich. Eq. 26.

or if the original number of trustees is reduced by death, the *cestui que trust* may call upon the court to appoint new trustees in place of those deceased.[1] So if a trustee disclaims, or refuses to act after having once accepted,[2] or becomes so situated that he cannot effectually execute the office, as by becoming a permanent resident abroad,[3] or by absconding;[4] or if a *female* trustee marry;[5] or if the trustees of a church or chapel embrace opinions contrary to the founder's intentions:[6] or if the trustee becomes bankrupt,[7] or misconducts himself,[8] or deals with the trust fund for his own personal profit and advancement,[9] or commits a breach of trust,[10] or refuses to apply and pay over the income as directed,[11] or

[1] Buchanan *v.* Hamilton, 5 Ves. 722; Hibbard *v.* Lambe, Amb. 309; Webb *v.* Shaftesbury, 7 Ves. 487; Millard *v.* Eyre, 2 Ves. Jr. 94; De Peyster *v.* Clendining, 8 Paige, 296; Dixon *v.* Horner, 12 Cush. 41; Mass. Gen. Hos. *v.* Amory, 12 Pick. 445.

[2] Wood *v.* Stane, 8 Price, 613; Moggeridge *v.* Grey, Nels. 42; Anon., 4 Ir. Eq. 700; Travell *v.* Danvers, Finch, 380.

[3] O'Reilly *v.* Alderson, 8 Hare, 101; *Re* Redwick, 6 Ir. Eq. 561; Com., &c., *v.* Archbold, 11 Ir. Eq. 187; Lill *v.* Neafie, 31 Ill. 101. And where the *cestui que trust* was prohibited by law from coming into the State, the court, on the trustee's petition, discharged him, and appointed one living in the same State with the *cestui que trust.* *Ex parte* Tunno, 1 Bailey, Ch. 395.

[4] Millard *v.* Eyre, 2 Ves. Jr. 94; Gale's Peti., R. M. Charlt. 109; *Re* Mais, 16 Jur. 608.

[5] Lake *v.* Lambert, 4 Ves. 592; *Re* Kaye, L. R. 1 Ch. 387. By chap. 409 of the Acts of 1869, a married woman in Massachusetts may be appointed executrix, administratrix, guardian, or trustee, with the written assent of her husband; and the marriage of a single woman who holds such trusts shall not extinguish her authority, but her sureties on petition may be discharged, and she may be required to give new ones.

[6] Att'y-Gen. *v.* Pearson, 7 Sim. 309; Att'y-Gen. *v.* Shore, 7 Sim. 317; Rose *v.* Crockett, 14 La. An. 811. If individuals pay their own money, and take a deed to themselves in trust for a parish, the courts will not appoint a trustee to fill a vacancy; but if the parish paid the money, the court will appoint. Draper *v.* Minor, 36 Mo. 290.

[7] Bainbrigge *v.* Blair, 1 Beav. 495; *In re* Roche, 1 Con. & Laws. 306; Com., &c., *v.* Archbold, 11 Ir. Eq. 187; Harris *v.* Harris, 29 Beav. 107; *Re* Bridgman, 1 Dr. & Sm. 164.

[8] Mayor of Coventry *v.* Att'y-Gen., 7 Bro. P. C. 235; Buckeridge *v.* Glasse, 1 Cr. & Ph. 126; Thompson *v.* Thompson, 2 B. Mon. 161.

[9] *Ex parte* Phelps, 9 Mod. 357; Clemens *v.* Caldwell, 7 B. Mon. 171.

[10] Thompson *v.* Thompson, 2 B. Mon. 161; Mayor of Coventry *v.* Att'y-Gen., 7 Bro. P. C. 235; Att'y-Gen. *v.* Drummond, 1 Dr. &. W. 353; 3 Dr. & W. 162; Att'y-Gen. *v.* Shore, 7 Sim. 309 n.; *Ex parte* Greenhouse, 1 Mad. 92.

[11] *Ex parte* Potts, 1 Ash. 340.

if he fails to invest as directed,[1] or permits a cotrustee to commit a breach of trust,[2] or if he loans the trust funds on personal security, although the *cestui que trust* approves of it; [3] or if trustees of a mortgage for the security of bond-holders of a railroad or other corporation refuse to foreclose or take other steps; [4] or if a trustee make a grossly unreasonable claim upon the trust property adverse to the *cestui que trust;* [5] or if a husband, trustee for his wife, abandons and deserts her or treats her with cruelty; [6] or if a municipal corporation, holding property upon special trusts, is abolished; [7] or if a trustee becomes an habitual drunkard; [8] or a lunatic: [9] or if there is any other good cause,[10] as if the trust fund is in danger of being lost for want of care and attention by the trustee,[11] — in all these and similar cases, the old trustees may be removed, and new ones substituted in their room. And in a suit for the purpose, it will not be impertinent nor scandalous to charge the trustee with misconduct, or to impute to him a corrupt or improper motive, or to allege that his behavior is vindictive towards the *cestui que trust;* but it will be impertinent, and may be scandalous, to charge *general* malice or general personal hostility.[12] If the court have jurisdiction of the subject-matter, mere irregularity in the proceedings or in the appointment will not make it void in a collateral proceeding, nor can the regularity of the proceedings or of the appointment be inquired into in a collateral suit; such appointment must stand until it is reversed by a proceeding for the purpose in the same case.[12]

[1] Clemens *v.* Caldwell, 1 B. Mon. 171.

[2] *Ex parte* Reynolds, 5 Ves. 707.

[3] Johnson *v.* Simpson, 9 Barr, 416.

[4] Matter of Merchants' Bank, 2 Barb. S. C. 446.

[5] Cooper *v.* Day, 1 Rich. Ch. 26.

[6] Boaz *v.* Boaz, 36 Ala. 334; Fisk *v.* Stubbs, 30 Ala. 355; Smith *v.* Oliver, 31 Ala. 139; Abernathy *v.* Abernathy, 8 Flor. 243. But if the wife deserts the husband without cause, though the husband may be at some fault, it is no cause for removing him as her trustee. Abernathy *v.* Abernathy, 8 Flor. 243.

[7] Montpelier *v.* East Montpelier, 29 Vt. 12.

[8] Everett *v.* Prythergch, 12 Sim. 367; Bayles *v.* Staats, 1 Halst. Ch. 513.

[9] Matter of Wadsworth, 2 Barb. Ch. 387; *Re* Fowler, 2 Russ. 449; Anon., 5 Sim. 322.

[10] Piper's App., 20 Penn. St. 67; Franklin *v.* Hayes, 2 Swan. 521.

[11] Jones *v.* Dougherty, 10 Ga. 273; Harper *v.* Straws, 14 B. Mon. 57; Holcomb *v.* Coryell, 1 Beas. 289.

[12] Portsmouth *v.* Fellows, 5 Mad. 450; Parsons *v.* Jones, 26 Ga. 644.

[13] Budd *v.* Hiler, 3 Dutch. 43; People *v.* Norton, 5 Selden, 176; Paules *v.* Dilley, 9 Gill, 222.

§ 276. It may be stated generally, that if the conduct or circumstances of the trustees are such as to render it very inconvenient, improper, or inexpedient for them to continue in the trust, the court will exercise its discretion and relieve them, and appoint others in their place, as where the trustees were desirous of being discharged,[1] or were incapable through age and infirmity of acting,[2] or so disagreed among themselves that they could not act,[3] or where cotrustees refuse to act with one of their number,[4] or where the trustees appointed were municipal officers for the time being and are changed yearly,[5] or where a corporation appointed trustee had become subject to a foreign power;[6] in these and the like cases the courts interposed and appointed other trustees. But if there is a controversy, the court will exercise a sound discretion. Mere disagreements between the trustee and *cestui que trust* will not justify a removal;[7] and if a trustee fails in the discharge of his duties from an honest mistake, or mere misunderstanding of them, or from a misjudgment, it is no ground for removal;[8] and if a trustee in good faith refuses to exercise a purely discretionary power in favor of the estate, as to vary the securities, he will not be removed;[9] nor will he be removed for a mere constructive fraud, as for buying the trust property at his own sale;[10] and where a trust was to take effect in the future upon the happening of a certain event, and in the mean time it was to remain passive, the court refused to interfere, and remove the trustee for an alleged misfeasance.[11] In no case ought the trustee to be removed where there is no danger of a breach of trust, and some of the beneficiaries are satisfied with the management.[12]

[1] Bogle *v.* Bogle, 3 Allen, 158; Howard *v.* Rhodes, 1 Keen, 581; Coventry *v.* Coventry, 1 Keen, 758; Greenwood *v.* Wakeford, 1 Beav. 576; Hamilton *v.* Frye, 2 Moll. 458.

[2] Gardner *v.* Downes, 22 Beav. 395; Bennett *v.* Honywood, Amb. 710.

[3] Bagot *v.* Bagot, 32 Beav. 509; Uvedale *v.* Patrick, 2 Ch. Ca. 20.

[4] Uvedale *v.* Patrick, 2 Ch. Ca. 20.

[5] *Ex parte* Blackburne, 1 J. & W. 297; Webb *v.* Neal, 5 Allen, 575.

[6] Attorney-General *v.* London, 3 Bro. Ch. 171.

[7] Clemens *v.* Caldwell, 7 B. Mon. 171; Gibbes *v.* Smith, 2 Rich. Eq. 131.

[8] In matter of Durfee, 4 R. I. 401; Attorney-General *v.* Coopers' Co., 19 Ves. 192; Attorney-General *v.* Caius Coll., 2 Keen, 150.

[9] Lee *v.* Young, 2 Y. & C. Ch. Ca. 532.

[10] Webb *v.* Dietrich, 7 W. & S. 401.

[11] Sloo *v.* Law, 1 Blatch. C. C. 512.

[12] Berry *v.* Williamson, 11 B. Mon. 245.

§ 277. In removing and substituting trustees, the court does not act arbitrarily, but upon certain general principles, and after a full consideration of the case. It always has regard to the wishes of the author of the trust, to be gathered from the instrument of trust; if he has expressed a disapprobation of an individual, the court would refrain from appointing him; and so the court will not appoint a new trustee with a view to the interest of some of the *cestuis que trust*, for the trustee ought to hold an even hand between all parties, and not favor a particular one. Further, the court has regard to the nature of the trust, and to those instrumentalities by which it can best be carried into execution.[1] Accordingly, courts will not substitute trustees upon the mere *caprice* of the *cestui que trust*, and without a reasonable cause,[2] nor will they appoint a trustee out of the jurisdiction without security.[3] There is no absolute rule of law that prevents a *cestui que trust* from being a trustee for himself and others, and the court is sometimes obliged to appoint him; but the arrangement is irregular and sometimes disastrous, and the court will not sanction it if it can be avoided.[4] So a husband may be trustee for a wife, and a wife for a husband,[5] but difficulties frequently grow out of the relation, and the courts have sometimes said that they would not make such appointments.[6] In no case will the court remove old trustees and substitute new ones, unless satisfied of the necessity of the removal, and of the fitness of the new trustee proposed. Nor will the court authorize the new trustees to nominate their successors. There was some doubt and difference of practice at first;[7] but it is now settled, except in charities,[8] that the court

[1] *In re* Tempest, L. R. 1 Ch. 487.

[2] O'Keeffe *v.* Calthorpe, 1 Atk. 18; Pepper *v.* Tuckey, 2 Jon. & La. 95.

[3] *Ex parte* Robert, 2 Strob. 86; Gibson's Case, 1 Bland, 138.

[4] Passingham *v.* Sherborne, 9 Beav. 424; Reid *v.* Reid, 30 Beav. 388; *Ex parte* Clutton, 17 Jur. 988; *Ex parte* Conybeare's Settlement, 1 W. R. 458; Wilding *v.* Bolder, 21 Beav. 222; Craig *v.* Hone, 2 Edw. Ch. 554.

[5] Tweedy *v.* Urquhart, 30 Ga. 446; Livingston *v.* Livingston, 2 John. Ch. 541; Bennett *v.* Davis, 2 P. Wms. 316; Shirley *v.* Shirley, 9 Paige, 363; Jamison *v.* Brady, 6 S. & R. 467; Boykin *v.* Cipples, 2 Hill, Ch. 200; Picquet *v.* Swann, 4 Mason, 455; Griffith *v.* Griffith, 5 B. Mon. 113; Gibson's Case, 1 Bland, 138.

[6] Dean *v.* Sanford, 9 Rich. Eq. 423.

[7] Joyce *v.* Joyce, 2 Moll. 276; White *v.* White, 5 Beav. 221.

[8] Lewin on Trusts, 606 (5th ed.).

will not delegate this part of its jurisdiction to new appointees.[1]

§ 278. If the instrument of trust requires the trustees of a charity to have a particular residence, it is irregular to appoint others not answering that description, provided there are those proper to be trustees.[2] But if it is the custom to appoint such non-residents, the court will not remove them, but will see that vacancies when they occur are properly filled.[3] And, generally, if an irregular appointment has been acquiesced in for a long time, the court will not remove.[4] In making the selection, the inquiry is whether the proposed appointment is proper, not whether it is the most proper.[5]

§ 279. It is laid down in several cases, that if a trustee becomes bankrupt he may be removed,[6] or if he becomes insolvent and compounds with his creditors; and this is on the ground that the *cestui que trust* has a right to have the trust administered by responsible trustees. The English bankrupt act[7] provides, that, if a trustee becomes bankrupt, the chancellor, on petition and due notice, may order the trust estate to be conveyed by the bankrupt, the assignees, and all other persons interested, to such other persons, as the chancellor shall think fit, upon the same trusts. Under this statute it has been determined that the court will exercise its discretion whether to remove the bankrupt or not,[8] but that *prima facie* the bankrupt is to be removed,[9] although he may have obtained his discharge.[10] But the court will not interfere long after the bankruptcy to remove the trustee, if he has obtained his discharge.[11]

[1] Bayley *v.* Mansell, 4 Mad. 226; Brown *v.* Brown, 3 Y. & Col. 395; Bowles *v.* Weeks, 14 Sim. 591; Oglander *v.* Oglander, 2 De G. & Sm. 381; Southwell *v.* Ward, Taml. 314; Holder *v.* Durbin, 11 Beav. 594; overruling White *v.* White, 5 Beav. 221.

[2] Attorney-General *v.* Cowper, 1 Bro. Ch. 439.

[3] Attorney-General *v.* Daugous, 33 Beav. 621; Attorney-General *v.* Clifont, 32 Beav. 596; Attorney-General *v.* Stamford, 1 Phil. 737.

[4] Attorney-General *v.* Cuming, 2 Y. & Col. Ch. Ca. 150.

[5] Lancaster Charities, 7 Jur. (N. S.) 96.

[6] Bainbrigge *v.* Blair, 1 Beav. 495; *In re* Roche, 1 Conn. & Laws. 306; Com. &c., *v.* Archbold, 11 Ir. Eq. 187; Harris *v.* Harris, 29 Beav. 107.

[7] 12 & 13 Vict. c. 106, § 130.

[8] *Re* Roche, 2 Dr. & W. 289; 2 H. L. Ca. 461.

[9] Bainbrigge *v.* Blair, 1 Beav. 495.

[10] Ibid.

[11] *Re* Bridgman, 1 Dr. & Sm. 164.

Generally the insolvency or bankruptcy of a trustee does not disqualify him for the trust,[1] nor does his bankruptcy affect the trust estate in his hands; and his certificate does not discharge him from fiduciary obligations.[2] In the United States trustees are, or may be, required, in the great majority of cases, to give bonds or security for the safety of the trust fund; in all such cases it would seem that the bankruptcy of the trustee would not *per se* render him removable, unless there was some misconduct that rendered it proper for the court to exercise a sound discretion.

§ 280. In Bogle *v.* Bogle,[3] the court determined that one who, without compensation and for no definite time, undertook a trust for the benefit of another was entitled to a decree discharging him, when the further care of the property became inconvenient to him. Generally, trustees who have acted are not entitled, as against the trust estate to refuse at pleasure to continue: they must have some good cause to entitle them to be relieved.[4] If they have received a legacy or other benefit given to them *as trustees*, they cannot be allowed to retire except for good cause,[5] at least without restoring the legacy. It is a good cause for relief if the *cestui que trust* incumber and complicate the estate, and embarrass the trustee in the performance of his duties.[6] But where there is no cause for a discharge, except the wish of the trustee, or his convenience, he ought to pay the costs of the proceeding, and not impose the burden and expense upon the estate;[7] and so if the old trustee is removed for misconduct on his part.[8] But if the trustee has a good reason for his discharge, he will be entitled to his costs out of the estate as between solicitor and client.[9] Courts of equity, by virtue of their general chancery powers, have jurisdiction by bill

[1] Shryock *v.* Waggoner, 28 Penn. St. 430; Turner *v.* Maule, 5 Eng. L. & Eq. 222; *Ex parte* Watts, 4 Eng. L. & Eq. 67.

[2] Belknap *v.* Belknap, 5 Allen, 468.

[3] 3 Allen, 158.

[4] Greenwood *v.* Wakeford, 1 Beav. 576; Cruger *v.* Halliday, 11 Paige, 314; Jones *v.* Stockett, 2 Bland, 409; *Re* Meloney, 2 Jon. & La. 391.

[5] Craig *v.* Craig, 3 Barb. Ch. 76.

[6] Howard *v.* Rhodes, 1 Keen, 481; Coventry *v.* Coventry, 1 Keen, 758; Greenwood *v.* Wakeford, 1 Beav. 576; Hamilton *v.* Frye, 2 Moll. 458.

[7] Matter of Jones, 4 Sandf. Ch. 615; Howard *v.* Rhodes, 1 Keen, 581; Courtenay *v.* Courtenay, 3 Jon. & La. 529.

[8] *Ex parte* Greenhouse, 1 Mad. 92; Howard *v.* Rhodes, 1 Keen, 581.

[9] Coventry *v.* Coventry, 1 Keen, 758; Taylor *v.* Glanville, 3 Mad. 176; Curteis *v.* Chandler, 6 Mad. 123; Greenwood *v.* Wakeford, 1 Beav. 581.

or petition, to accept the resignation of trustees, or to remove them for cause, and to appoint new trustees; and courts of probate in several States have power by statute to remove and appoint new trustees, whether they are created by will or deed.[1] Proceedings are generally commenced directly for the removal and appointment of trustees; but when a bill or petition is already pending for the administration of the trust, the appointment or removal may be made upon motion in those proceedings.[2] And, further, if the trusts created in an instrument are of such a nature that they can be severed without injury to the estate, courts may allow the trustee to resign a part, and will commit that part to other trustees under proper arrangements for security.[3] But courts will not remove trustees against their will from one part of the trust, and leave them burdened with the responsibility of the remainder.[4]

§ 281. If a testator in his will appoint his executor to be a trustee, a court of equity cannot remove him from the executorship, for courts of probate have exclusive jurisdiction over the appointment and removal of administrators and executors; but if the office of trustee is separate from and independent of the office of executor, a court of equity may remove him from the office of trustee, and leave him to act as executor; or if he has completed his duties as executor, and is holding and administering the estate simply as trustee, a court of equity may remove him.[5]

§ 282. Courts of equity, having jurisdiction to remove and appoint trustees,[6] may be applied to, as before stated, either by bill

[1] Bowditch *v.* Bannelos, 1 Gray, 220; King *v.* Donnelly, 5 Paige, 46; De Peyster *v.* Clendining, 8 Paige, 295; Field *v.* Arrowsmith, 3 Humph. 442; McCosker *v.* Brady, 1 Barb. Ch. 329; *In re* Potts, 1 Ash. 340; Matter of Mechanics' Bank, 2 Barb. S. C. 446; Dawson *v.* Dawson, Rice, Eq. 243; Lee *v.* Randolf, 2 H. & Munf. 12.

[2] ——— *v.* Osborne, 6 Ves. 455; Webb *v.* Shaftesbury, 7 Ves. 487; ——— *v.* Roberts, 1 J. & W. 251; *Ex parte* Potts, 1 Ash. 340.

[3] Craig *v.* Craig, 3 Barb. Ch. 76. But where there is a single power of appointment in the trust instrument, though the estates are of a different description, or are held under a different title, or upon different trusts, there is no authority for dividing the trusts, and appointing different sets of trustees for the different estates or trusts. Cole *v.* Wade, 16 Ves. 27; *Re* Anderson, 1 Ll. & G. t. Sugd. 29.

[4] Sturges *v.* Knapp, 31 Vt. 1.

[5] Wood *v.* Brown, 34 N. Y. 339; Leggett *v.* Hunter, 25 Barb. 81; 19 N. Y. 445; Craig *v.* Craig, 3 Barb. Ch. 76; Matter of Wordsworth, 2 Barb. Ch. 381; *Ex parte* Dover, 5 Sim. 500.

[6] Bowditch *v.* Bannelos, 1 Gray, 220, and cases cited last section.

or petition;[1] or, if a bill is already pending for administration of the estate, application may be made in those proceedings by motion.[2] All persons interested in the trust may institute proceedings in their own names, but notice should be given to all other parties in interest.[3] The *cestui que trust* and those directly interested may of course originate the suit,[4] and those interested in remainder or reversion may begin proceedings.[5] The trustees may bring the suit against the *cestuis que trust;*[6] or one or more of several trustees may bring the suit against one or more of their cotrustees, joining the *cestuis que trust* either as plaintiffs or defendants.[7] In all public charities the Attorney-General may begin proceedings by information or petition with or without a relator.[8] But where a settlor had conveyed property to a trustee for himself for life, and at his decease to his issue according to the statute of distributions, and in case of his dying without issue to his nephews, it was held that the trust was only an implied trust for the nephews; that they had no interest in the express trusts for the settlor for life; and that they could not maintain a petition for the removal of the trustee.[9] And where a *cestui que trust* drew an order on the trustees in

[1] Mitchell *v.* Pitner, 15 Ga. 319; *Ex parte* Knust, 1 Bail. Eq. 489; Matter of Van Wyck, 1 Barb. Ch. 565; *Ex parte* Hussey, 2 Whart. 330; *Ex parte* Rees, 3 V. & B. 11; Miller *v.* Knight, 1 Keen, 129; Barker *v.* Peile, 2 Dr. & Sm. 340. This matter is mostly regulated by the statutes of the several States. Although proceedings by statute may be originated by petition, yet the proceedings may be by bill. Barker *v.* Peile, *ut supra.* In some cases it is said that the right to proceed by petition is confined to cases where there is a breach of the trust. *In re* Sanford Charity, 2 Mer. 456; *Re* Livingston, 34 N. Y. 567.

[2] ——— *v.* Osborne, 6 Ves. 455; ——— *v.* Roberts, 1 J. & W. 251; Webb *v.* Shaftesbury, 7 Ves. 487; *Ex parte* Potts, 1 Ash. 340.

[3] Wardle *v.* Hargreaves, 11 Law Jour. (N. S.) Ch. 126.

[4] Bainbrigge *v.* Blair, 1 Beav. 495; Bennett *v.* Honywood, Amb. 708; Buchanan *v.* Hamilton, 5 Ves. 722; Portsmouth *v.* Fellows, 5 Mad. 450; Howard *v.* Rhodes, 1 Keen, 581; Millard *v.* Eyre, 2 Ves. Jr. 94; In Matter of Smith's Settlement, 2 De G. & Sm. 781; *Ex parte* Tunno, 1 Bail. Eq. 395.

[5] Finlay *v.* Howard, 2 Dr. & W. 490; Cooper *v.* Day, 1 Rich. Eq. 26; *Re* Livingston, 34 N. Y. 567; Joyce *v.* Gunnels, 2 Rich. Eq. 260; *Re* Sheppard, 1 N. R. 76, overruling same case, 10 W. R. 704.

[6] Coventry *v.* Coventry, 1 Keen, 758; Greenwood *v.* Wakeford, 1 Beav. 576.

[7] Lake *v.* De Lambert, 4 Ves. 592.

[8] Attorney-General *v.* London, 3 Bro. Ch. 171; Attorney-General *v.* Stephens, 3 M. & K. 347; Attorney-General *v.* Clack, 1 Beav. 467; *Re* Bedford Charity, 2 Swans. 520; Wilson *v.* Wilson, 2 Keen, 251; *Re* Fowey's Charities, 4 Beav. 225.

[9] *In re* Livingston, 34 N. Y. 555; *Ex parte* Brown, Coop. 295.

favor of her children, it was held that this did not give the children such an interest in the funds that they were parties to proceedings for the appointment of new trustees.[1] If a trustee retires, allowing a new trustee to be appointed, without communication with the *cestui que trust*, and a suit is instituted complaining of such appointment, but seeking no relief against such retiring trustee, he is not a necessary party.[2] And if a trustee transfers the property to a new trustee appointed by order of court, he will be bound by the proceedings, though they were irregular and without notice to him.[3] If some of the *cestuis que trust* are minors, they ought to have a guardian *ad litem*, but a new trustee may be appointed.[4]

§ 283. If all the parties are *sui juris*, and consent to the appointment of the new trustee, the court will at once make the appointment, and direct the conveyances to be made.[5] But generally it will be referred to a master to report a proper person to be appointed.[6] Upon the coming in of the master's report, exceptions may be taken to it in the usual manner; but the exceptions must be to the unfitness of the person recommended,[7] and not that some other one is more fit.[8]

§ 284. The appointment of a new trustee is not complete until the property is vested in him; therefore the court usually embraces, in the decree appointing a new trustee, a direction for a proper conveyance to be executed to him alone, or to him jointly with the continuing or remaining trustees, by all the requisite parties, whether remaining trustees, or heirs or representatives of the last survivor, or trustees who have been removed from office.[9] In some States it is provided by statute, that, upon qualification by the newly appointed trustee, the trust estate shall vest in him in like

[1] Hawley *v.* Ross, 7 Paige, 103.

[2] Marshall *v.* Sladden, 7 Hare, 427.

[3] Thomas *v.* Higham, 1 Bail. Eq. 222.

[4] Hunter *v.* Gibson, 16 Sim. 158.

[5] O'Keeffe *v.* Calthorpe, 1 Atk. 18; Young *v.* Young, 4 Cranch, C. C. 499.

[6] Howard *v.* Rhodes, 1 Keen, 581; Buchanan *v.* Hamilton, 5 Ves. 722; Attorney-General *v.* Stephens, 3 M. &. K. 352; Millard *v.* Eyre, 2 Ves. Jr. 94; Seton's Decrees, 249; Matter of Stuyvesant, 3 Edw. Ch. 229; —— *v.* Roberts, 1 J. & W. 251; Attorney-General *v.* Clack, 1 Beav. 474; Attorney-General *v.* Arran, 1 J. & W. 229.

[7] Attorney-General *v.* Dyson, 2 S. & S. 528.

[8] Ibid.

[9] O'Keeffe *v.* Calthorpe, 1 Atk. 18.

manner as it had or would have vested in the trustee in whose place he is substituted.[1] It has been determined that no conveyance is necessary where such statutes are in force, but that the trust estate vests immediately upon the appointment, by virtue of the statute.[2]

§ 285. A trustee may be relieved from his office by the consent of all parties interested, without the decree of a court, even if the instrument of trust is silent upon that subject. But the transaction operates rather as an estoppel of the *cestui que trust* than as an affirmative transfer of power. Thus, no *cestui que trust* who concurs in a breach of trust can afterwards call the trustee to an account for the disastrous consequences;[3] therefore, if a trustee conveys the trust estate to another person, and appoints such other person trustee, and all the *cestuis que trust* execute the conveyances, or otherwise consent to the transaction, they would be for ever precluded from holding the retiring trustee responsible for any delegation of his office, or for any loss that occurred afterwards.[4] But the trustee must see to it that all the *cestuis que trust* are parties to the transaction and concur; for, even in the case of a large number of creditors, each individual must act for himself, or he is not estopped, and the consent of a majority cannot affect the rights of one who did not concur.[5] The trustee must also see to it that all the *cestuis que trust* are *sui juris*, and not married women, infants, or other persons incapable of acting, or of no legal capacity to consent. For if there are such *cestuis que trust*, there can be no discharge and substitution of trustees without the sanction of the court, in the absence of a power in the instrument of trust;[6] or if there may be parties in interest not yet in existence, as if the trust is for children not yet born, there can be no change of trustees by consent. But a *married woman* is considered *sui juris* in respect to her sole and separate estate, where there is no restraint against anticipation or alienation.[7]

[1] Mass. Gen. Stat. c. 100, § 9; Trustees Act, 1850, 12 & 13 Vict. c. 74, § 33, 34, 35, 36.

[2] Parker *v.* Converse, 5 Gray, 341; *Re* Fisher's Will, 1 W. R. 505; Smith *v.* Smith, 3 Dr. 72.

[3] Wilkinson *v.* Parry, 4 Russ. 276.

[4] Ibid.

[5] Colebrook's Case, cited *ex parte* Hughes, 6 Ves. 622; *Ex parte* Lacy, ib. 628–630, n.

[6] Cruger *v.* Halliday, 11 Paige, 314.

[7] Hulme *v.* Hulme, 1 Bro. Ch. 20; Lewin on Trusts, 540, 541 (5th ed.).

§ 286. If there are two or more trustees named in an instrument of trust with power to appoint successors, and they all retire at the same time, they ought not to appoint a single trustee *only* in the place of two or more.[1] In such case the settlor has fixed the number which he thinks necessary for the proper administration and safety of the trust fund; and if a single trustee is appointed and wishes to retire, he ought not to appoint a plurality of trustees, for in such a case he ought not to increase the machinery and expense of the trust contrary to the settlor's intention.[2] But the power may be so drawn that several may be put in place of one, or one in the place of several. Thus where a testator appointed two trustees, and the surviving or continuing trustee or trustees were authorized to appoint one or more persons to be trustee or trustees, in the room of the trustee or trustees so dying, &c., the surviving trustee appointed two new trustees, and the appointment was held by the court to be authorized.[3] So, three trustees have been appointed in place of two,[4] and three have been authorized in place of four,[5] and two in place of one,[6] and four in place of five.[7] In another case, one trustee was appointed by the court in place of two.[8]

§ 287. The duties and powers of trustees cannot be delegated to others unless there is express authority for that purpose given in the instrument creating the trust.[9] It follows, that a power to

[1] Hulme *v.* Hulme, 2 M. & K. 682; Mass. Gen. Hospital *v.* Amory, 12 Pick. 445.

[2] Rex *v.* Lexdale, 1 Burr. 448; *Ex parte* Davis, 2 Y. & C. Ch. Ca. 468; 3 Mont. D. & De G. 304.

[3] D'Almaine *v.* Anderson, Lewin on Trusts, 468 (5th ed.); Hill on Trustees, 182.

[4] Meinertzhagen *v.* Davis, 1 Coll. 335.

[5] Emmet *v.* Clarke, 3 Gif. 32.

[6] Hillman *v.* Westwood, 3 Eq. R. 142.

[7] Corrie *v.* Byrom, Lewin on Trusts, 468 (5th ed.); Hill on Trustees, 181.

[8] Greene *v.* Borland, 4 Met. 330. In this case the appointment was assented to by all parties, and great stress was laid upon that fact. The court might also have said that the proceedings were in a collateral matter, and that, as long as the appointment by a court having jurisdiction stood unreversed, its validity could not be tried in another and distinct proceeding. The case of Greene *v.* Borland is not necessarily inconsistent with Mass. Gen. Hospital *v.* Amory, 12 Pick. 445, decided by the same court.

[9] Selden *v.* Vermilyea, 3 Comst. 336; Wilkinson *v.* Parry, 4 Russ. 272; Adams *v.* Paynter, 1 Coll. 532; Chalmers *v.* Bradley, 1 J. & W. 68; Swarez *v.* Pumpelly, 2 Sand. Ch. 336; Wilson *v.* Towle, 36 N. H. 129; Bailey *v.* Mansel, 4 Mad. 226.

appoint new trustees can seldom or never exist, except in express trusts created by deed or will. The person who creates the trust may mould it into whatever form he pleases; he may therefore determine in what manner, in what event, and upon what condition the original trustees may retire and new trustees may be substituted. All this is fully within his power; and he can make any legal provisions which he may think proper for the continuation and succession of trustees during the continuance of the trust.[1] This power to appoint new trustees in place of the original ones can only be given by the author and creator of the trust. For, in cases where courts are called upon to appoint trustees, authority to appoint successors will not be given, but recourse must be had to the courts *toties quoties*.[2] There is, however, an exception to this rule in case of charitable trusts; for, in such cases, to save costs, and for convenience, courts of equity will not only appoint new trustees to fill vacancies, but they will sanction a scheme for the administration of the charity which provides for the appointment and succession of trustees without a continual recourse to legal proceedings.[3]

§ 288. Every well-drawn instrument, creating trusts intended to continue for any considerable time, should contain authority and power for any of the trustees to relinquish the trust, as well as provisions for filling vacancies occasioned by resignation, death, or incapacity. Such provisions save the cost and trouble of constant applications to courts. In framing these powers, great care should be taken to provide for every possible contingency in which a resignation or new appointment may become convenient or neces-

[1] While the settlor may make such provisions as he may think best for filling vacancies, as a general proposition, yet it has been held that a power reserved to an assignor in a deed of trust for creditors, to appoint new trustees to fill vacancies occurring in the board, was void, as interfering with the rights of creditors. Planck *v.* Schermerhorn, 3 Barb. Ch. 644; Robins *v.* Embry, 1 Sm. & M. Ch. 207.

[2] Wilson *v.* Towle, 36 N. H. 129; Oglander *v.* Oglander, 2 De G. & Sm. 381; Holder *v.* Durbin, 11 Beav. 594; Bowles *v.* Weeks, 14 Sim. 591; Bayley *v.* Mansell, 4 Mad. 226; Southwell *v.* Ward, Taml. 314. A different practice was followed in Joyce *v.* Joyce, 2 Moll. 276; Sampayo *v.* Gould, 12 Sim. 426, and White *v.* White, 5 Beav. 221, but these cases are not authorities now. See Brown *v.* Brown, 3 Y. & Col. 395.

[3] Attorney-General *v.* Winchelsea, 3 Bro. Ch. 373; Attorney-General *v.* Shore, 1 M. & Cr. 394; 12 Sim. 426.

sary. The power should clearly express the cases in which new trustees may be appointed, and embrace every event which can render such an appointment necessary or desirable, as the death of all, any one, or more of the original or substituted trustees, their absence from the country or State, their wish to resign, their original refusal to accept, and their future incapacity or unfitness to discharge the duties; the instrument should also point out clearly by whom and in what manner the new appointments are to be made. Such provisions are extremely convenient, and save much perplexity, expense, and trouble; and where a settlement is to be drawn up under articles, by the direction of the court, it will order such provisions to be inserted as are *just and reasonable*.[1]

[1] Lindow *v.* Fleetwood, 6 Sim. 152; Brewster *v.* Angell, 1 J. & W. 628; Sampayo *v.* Gould, 12 Sim. 426; Belmont *v.* O'Brien, 2 Kern. 394. The following form is approved by both Mr. Lewin and Mr. Hill, as a proper power for the appointment of new trustees: —

"Provided always, and it is hereby further declared, that if the trustees hereby appointed, or any of them, or any future trustees or trustee hereof, shall die (either before or after their or his acceptance of the trusts thereof), go to reside abroad, desire to be discharged from, renounce, decline, or become incapable or unfit to act in the trusts of these presents, while the same trusts or any of them shall be subsisting, then, and in every or any such cases, and so often as the same shall happen, it shall be lawful for the said (*the cestuis que trust [if any] for life*), or the survivors of them, by any writing or writings, under their, his, or her hands or hand, attested by two or more witnesses, and after the decease of such survivor, then for the surviving or continuing trustees or trustee hereof, or the executors or administrators of the then last acting trustee (whether such surviving trustees or trustee, or executors or administrators, respectively, shall be willing to act in other respects or not), by any writing or writings, under their or his hands or hand, attested by two or more witnesses, to nominate and substitute any person or persons to be trustee or trustees hereof, in the place of the trustee or trustees so dying, going to reside abroad, desiring to be discharged, renouncing, declining, or becoming incapable or unfit to act as aforesaid. And that, so often as any new trustee or trustees hereof shall be appointed as aforesaid, all the hereditaments, &c., which shall, for the time being, be holden upon the trusts hereof, shall be thereupon conveyed, assigned, and transferred respectively, in such manner that the same may become legally and effectually vested in the acting trustees hereof for the time being, to and for the same uses, and upon the same trusts, and with and subject to the same powers and provisions as are herein declared and contained of and concerning the same hereditaments and premises respectively, or such of the same uses, trusts, powers, and provisions as shall then be subsisting or incapable of taking effect.

"And that every new trustee, to be from time to time appointed as aforesaid,

Where it is necessary to act under the powers thus given in the instrument of trust, it is of the utmost consequence that there should be an exact compliance with the power and authority as given. For if the circumstances do not justify or demand a new appointment, as contemplated in the instrument of trust, or if there is any irregularity as to the persons by whom the new appointment is made, or as to the manner in which it is made, the retiring trustee will still be liable for any breaches of trust which may be committed, and the new trustee will be incapable of exercising any legal authority over the trust property, and will be a trustee only *de son tort*, if he interfere; and any purchaser of the trust property may find his title utterly worthless.[1] The retiring trustee should be careful not to part with the control of the fund before the new trustee has been actually appointed and qualified, for if he transfer it into the name of the intended trustee, and by some accident the appointment is not completed, the old trustee still remains answerable for the fund.[2]

§ 289. These powers of appointing successors are frequently matters of *personal* confidence reposed in the trustees appointed by the settlor, and they are always matters of general trust and confidence to be strictly executed. Being powers given to third persons over the property of others, they are construed with great strictness, and a great variety of decisions have been made upon the various forms in which the power has been expressed. Questions have arisen: (1.) As to the time, occasion, or event when a new appointment may be made; (2.) As to the person or persons by whom the appointment may be made; (3.) As to the persons who may be appointed; (4.) As to the number of persons who may be appointed; (5.) As to the manner of making the new appointment.

§ 290. It should always be carefully considered whether the circumstances or events are such as the settlor intended for the re-

shall thenceforth be competent in all things to act in the execution of the trusts hereof, as fully and effectually and with all the same powers and authorities to all purposes whatsoever, as if he had hereby been originally appointed a trustee in the place of the trustee to whom he shall, whether immediately or otherwise, succeed."

[1] Adams *v.* Paynter, 1 Col. 532; Walker *v.* Brungard, 13 Sm. & M. 723.

[2] Pearce *v.* Pearce, 22 Beav. 248.

tirement of one or more of the trustees appointed by him, and the substitution of new trustees; thus in a case where the power provided that "in case either of the trustees, the said A. and B., shall happen to die, or desire to be discharged from, or neglect or refuse or become incapable to act in the trust, it shall be lawful for the survivor or survivors of the trustees, so acting, or the executors or administrators of the last surviving trustee by any writing, &c., to nominate a new trustee." *Both* the trustees declining to act, they executed a conveyance to two other persons, as an appointment of them as new trustees under the power; and it was held that the power was not well executed, that the word *survivor* referred to the trustee "continuing to act," that it was the intention of the testator that in case of the death, refusal, or incapacity of *one* of his trustees, the remaining one who had been named by him, and who was the object of his confidence, should have the power of associating with himself some other person, and that the *event* of both declining at the same time was not provided for.[1] Where a settlement upon a chapel contained a power for the appointment of new trustees upon the desertion or removal of any existing trustee, Lord Eldon held that the case of a trustee, who left the trust on account of its being converted by the other trustees to purposes different and distinct from the intention of the settlor, was an event not provided for.[2] But generally where the power to appoint new trustees is given to the *survivor* of several trustees, it may be

[1] Sharp *v.* Sharp, 2 B. & Ad. 405.

[2] Attorney-General *v.* Pearson, 3 Mer. 412. In Morris *v.* Preston, 7 Ves. 547, power was given to a husband and wife, or the survivor, with the *consent* of the *cotrustee* or *trustees*, to appoint any new trustee or trustees, and upon such appointment the surviving cotrustees should convey the estate, so that the surviving trustee or trustees, and the new trustee or trustees, might be jointly concerned in the trusts in the same manner as such surviving trustee and the person so dying would have been in case he were living. No new appointment was made till after the death of both the original trustees. The new appointees having made a sale, the purchaser objected to the title on the ground of the invalidity of their appointment under the power; but the objection was waived without argument. Mr. Sugden regrets that the opinion of the court was not taken. 2 Sugd. on Powers, 529. He has, however, never since acted on the doctrine. As where a similar power was given to a tenant for life of appointing new trustees, one trustee died and the other became bankrupt, and it was objected that the power of appointment was gone, Sir Edward Sugden ruled to the contrary. *Re* Roche, 1 Conn. & Laws. 306, 2 Dr. & War. 287.

legally exercised by the *continuing* trustee upon the resignation or refusal of the others to act.[1]

§ 291. In some earlier cases, it was held that where a power was given to the surviving trustee or trustees to appoint new trustees *in case of the death of either of their* cotrustees, it did not authorize an appointment to fill a vacancy caused by the death of trustees during the *lifetime* of the testator, upon the ground that persons dying in the lifetime of the testator had never *filled the character* of trustees so as to come within the terms of the power;[2] but these are overruled by the later cases, and it may be considered as settled that the surviving trustee or trustees may fill vacancies caused by the death of persons nominated by the testator, whether they die in his lifetime or afterwards.[3] So if the continuing trustee or trustees are to appoint upon the *refusing* or *declining* of any of the original trustees, they may appoint upon the *disclaimer* of any one or more;[4] and so a payment of the trust fund into court, under an order or permission to that effect, is a *refusing* or *declining* by the trustee that authorizes the exercise of the power.[5]

§ 292. If the settlement provides that a new appointment may be made on either of the trustees becoming *unfit*, the power may be exercised if one of them becomes *bankrupt;*[6] but if the word is *incapable* without the word *unfit*, a new appointment cannot be made, for the word *incapable* means personal incapacity and not pecuniary embarrassment,[7] and a bankrupt who had some time be-

[1] Sharp *v.* Sharp, 2 B. & Ad. 405; Eaton *v.* Smith, 2 Beav. 236; Travis *v.* Illingworth, 2 Dr. & Sm. 344; Cooke *v.* Crawford, 13 Sim. 91; Hawkins *v.* Kemp, 3 East, 410.

[2] Walsh *v.* Gladstone, 14 Sim. 2; Winter *v.* Rudge, 15 Sim. 576.

[3] Lonsdale *v.* Beckett, 4 De G. & Sm. 73; *In re* Hadley's Trust, 5 De G. & Sm. 67; 9 Eng. L. & Eq. 67; Noble *v.* Meymott, 14 Beav. 477.

[4] *In re* Roche, 1 Conn. & Laws. 306; Walsh *v.* Gladstone, 14 Sim. 2; Mitchell *v.* Nixon, 1 Ir. Eq. 155; Cook *v.* Ingoldsby, 2 Ir. Eq. 375; Travis *v.* Illingworth, 2 Dr. & Sm. 344.

[5] *Re* William's Settlement, 4 K. & J. 87.

[6] *In re* Roche, 1 Conn. & Laws. 308; 2 Dr. & War. 287.

[7] *Re* Watt's Settlement, 9 Hare, 106; Turner *v.* Maule, 5 Eng. L. & Eq. 222; 15 Jur. 761. A statute in New York provides that administration, &c., shall not be granted to any person who shall be judged *incompetent* by the surrogate to execute the duties of the trust by reason of drunkenness, *improvidence*, or want of understanding. Under this statute it was held that mere *moral turpitude* does not *per se* disqualify, but that professional gambling was such evidence

fore obtained a first-class certificate of discharge was not regarded as coming within the term *unfit*.[1] But where a trustee of property in London had been domiciled in New York for twenty years, he was declared *incapable* within the meaning of the word.[2] Where a power declared that "if the trustees were not deemed *suitable* and *sufficient* to act as trustees by the *cestui que trust*, he might remove them, it was held to be a matter of discretion in the beneficiary to remove the trustees or not."[3]

§ 293. Where a suit is already pending in court for the administration of the trust, the donees of the power to appoint cannot exercise it without first obtaining the court's approval of the person proposed.[4] When it is desired to change the trustees during the pendency of a suit, a motion must be made, and such motion is referred to a master to report upon the person proposed. The master is to regard the power of appointment; but he is not bound to approve the proposed person.[5] If an appointment is made, however, by the old trustees, it is not contempt, nor is it altogether void; but it puts the burden upon those making the appointment of proving, by the strictest evidence, that it was just and proper. If they fail in such proof, the act will be declared null and void.[6]

§ 294. It will at once be seen that the power of appointing other trustees can be exercised only by those to whom it is expressly given. Therefore, if the power is not given to any one, new trustees can be appointed only by the court.[7] So if the power be given to particular persons by name, without saying more, or adding words of survivorship, it must be exercised jointly, and upon the death of one of them the power will be gone.[8] But if a power be given to a class consisting of several persons, as to my "trustees,"

of *improvidence* as *prima facie* to disqualify. Cooke *v.* Lawerne, 1 Barb. Ch. 45; McMahon *v.* Harrison, 2 Seld. 443.

[1] *Re* Bridgman, 1 Dr. & Sm. 164.

[2] Mennard *v.* Welford, 1 Sm. & Gif. 426. The opposite doctrine was previously held in Withington *v.* Withington, 16 Sim. 104; O'Reilly *v.* Alderson, 8 Hare, 101.

[3] Walker *v.* Brungard, 13 Sm. & Mar. 758.

[4] Millard *v.* Eyre, 2 Ves. Jr. 94; Webb *v.* Shaftesbury, 7 Ves. 480; Peatfield *v.* Benn, 17 Beav. 552; Kennedy *v.* Turnley, 6 Ir. Eq. 399; Attorney-General *v.* Clack, 1 Beav. 467; Middleton *v.* Reay, 7 Hare, 106; —— *v.* Roberts, 1 J. & W. 251.

[5] Webb *v.* Shaftesbury, 7 Ves. 487; Middleton *v.* Reay, 7 Hare, 106.

[6] Cape *v.* Bent, 3 Hare, 249; Attorney-General *v.* Clack, 1 Beav. 467; Baker *v.* Lee, 8 H. L. Ca. 495.

[7] Wilson *v.* Towle, 36 N. H. 129.

[8] Co. Lit. 113 a.; 1 Sug. Pow. 141.

"my sons," or "my brothers," and not to individuals by their proper names, the authority will exist in the class, so long as the plural number remains, although it may have been reduced in number by the death or resignation of some;[1] and where a power is given to "my executors" as a class, it may be exercised by a single surviving executor.[2] A power to be exercised by the survivor of two persons cannot be executed by the one dying first,[3] nor even by the two acting together during the lives of both.[4] So a power given to the surviving or continuing trustee to appoint a co-trustee, if *either* of the two decline to act, does not authorize an appointment if *both* decline.[5] So the power of appointment cannot be executed by *heirs*, *personal representatives*, or *assigns* of any trustee, unless the authority is expressly given in the instrument of trust.[6] In these, as in all other cases, the authority will be strictly confined to those persons who answer the precise description. Thus a power given to a trustee, his *heirs*, *executors*, or *administrators*, cannot be executed by a *devisee* or *assignee* of the trustee.[7] It is, however, well established, that a power given to a *surviving* trustee may be executed by a *continuing* or *acting* trustee, although a cotrustee who disclaimed is still living.[8]

§ 295. Upon this principle, the number of parties undertaking to execute a power must come within the exact description given of the number of those who are to execute it; thus, if a power is given to be exercised by a certain specified number, or when they are reduced to a certain number, it cannot be exercised by a less number, and is gone if not exercised

[1] Gartland *v.* Mayott, 2 Vern. 105; Eq. Ca. Ab. 202; 2 Freem. 105; Dyer, 177 a.; Co. Litt. 112 b.; Byam *v.* Byam, 19 Beav. 58; Belmont *v.* O'Brien, 2 Kern. 394; 1 Sug. Pow. 144; McKim *v.* Handy, 4 Md. Ch. 230.

[2] 1 Sug. Pow. 244; Davoue *v.* Fanning, 2 John. Ch. 252.

[3] Bishop of Oxford *v.* Leighton, 2 Vern. 376.

[4] McAdam *v.* Logan, 3 Bro. Ch. 320.

[5] Sharp *v.* Sharp, 2 B. & Ad. 405.

[6] Bradford *v.* Belfield, 2 Sim. 264; Eaton *v.* Smith, 2 Beav. 236; Davoue *v.* Fanning, 2 John. Ch. 252; Titley *v.* Wolstenholme, 7 Beav. 424; Granville *v.* McNeale, 7 Hare, 156; Hall *v.* May, 3 K. & J. 585; Cooke *v.* Crawford, 13 Sim. 91.

[7] Bradford *v.* Belfield, 2 Sim. 264; Cole *v.* Wade, 16 Ves. 27; Cape *v.* Bent, 3 Hare, 245; Ackleston *v.* Heap, 1 De G. & Sm. 640; McKim *v.* Handy, 4 Md. Ch. 230; Mortimer *v.* Ireland, 6 Hare, 196.

[8] Lane *v.* Debenham, 11 Hare, 188; Eaton *v.* Smith, 2 Beav. 236; Sharp *v.* Sharp, 2 B. & A. 405.

before the number is reduced below the number which is named for its execution.[1] But the power may be executed before the trustees are reduced to the lowest number specified, as where a conveyance to twenty-five trustees for a chapel directed that when, by death or otherwise, the number should be reduced to fifteen, a majority of those remaining should make up the number to twenty-five. The number was reduced to seventeen; and twelve, the others dissenting, elected eight new trustees, and it was held a good appointment under the power.[2]

§ 296. A married woman may exercise the power of appointing new trustees, if such power is expressly given to her, as she may exercise any other power given to her in an instrument of trust;[3] but an infant cannot exercise such power unless it is simply collateral.[4]

§ 297. Where the appointment of new trustees is given to the discretion of the acting trustees, courts of equity will not interfere to control the exercise of the discretion if the old trustees act in *good faith*,[5] and if the administration of the trust is not already in the hands of or before the court by a pending suit.[6] Thus the old trustees in a case for the exercise of their discretion may ap-

[1] Att'y-Gen. *v.* Floyer, 2 Vern. 748; Att'y-Gen. *v.* Litchfield, 5 Ves. 825.

[2] Dupleix *v.* Roe, 1 Anst. 86.

[3] *Ante*, § 49.

[4] *Ante*, § 52.

[5] Bowditch *v.* Bannelos, 1 Gray, 220; Hodgson's Settlement, 9 Hare, 118. In Bowditch *v.* Bannelos, above cited, Ch. J. Shaw, said: "But when we say that she (the *cestui que trust*) had power at her pleasure to appoint, we do not mean to say that this was an arbitrary power to appoint a person unfit or unsuitable to execute such a trust, as a minor, an idiot, a pauper, or person incapable of performing the duties. It must be a person of full age, sufficient mental and legal capacity, and in all respects capable of performing the required duties. In case of trust property of real and personal estate, we are not prepared to say whether an alien, not naturalized, and not capable by law to hold real estate, would or would not be a suitable or legal appointment. We think the power was not exhausted by the appointment of the first substitute, but that the same power existed, on every resignation, to appoint a new trustee, pursuant to the original trusts; but that this power, by necessary implication, was limited to the appointment of a person legally capable of executing it." Whether the nomination of her husband on account of the conjugal relation, would have been incompatible with the scope of the whole instrument, and would be a valid objection, or whether the fact that another appointee was a foreigner having no domicile in the United States, an alien not naturalized, would be a valid objection, the court did not decide, because the nominations were withdrawn.

[6] *Ante*, § 293.

point any suitable person. The inquiry in such cases is not whether the person proposed is the *most* suitable, but whether he is suitable.[1] It is generally the duty, however, of trustees to appoint new trustees, who are agreeable to the *cestuis que trust*, and who would administer the fund for their interest; to this end it is generally the duty of the trustees to consult the *cestuis que trust* as to the appointment.[2] And a new appointee ought to consult the *cestuis que trust* before accepting the office.[3] An appointment for the mere purpose of having a particular solicitor employed in the management of the trust ought not to be allowed.[4] Generally the new trustees appointed under a power should be amenable to the jurisdiction of the court, but where the *cestui que trust* resides abroad, it may be proper to appoint trustees in the same jurisdiction with the beneficiary.[5] Though if the court is called upon to exercise the power, it will not appoint trustees out of its jurisdiction.[6] Nor is the appointment of one of the *cestuis que trust* proper, as each of the *cestuis que trust* has a right to a *disinterested* and *impartial* trustee.[7] This rule probably only affects the parties to the trust; for if a *cestui que trust* should be appointed, and should sell the estate under a power of sale, the purchaser would be protected.[8] *Cestuis que trust* are not absolutely incapacitated to take the trusts, and courts themselves sometimes appoint them;[9] but it is not generally desirable. So, near relationship is not a disqualification; but it is almost always better to have a capable person not intimately connected with the *cestuis que trust*.[10] Nor should the donee of a power to appoint nominate himself, for trustees cannot even pay over the assets to one of their own number.[11] It is said, however, that if a trust with power of ap-

[1] *Ante*, § 278.

[2] O'Reilly *v.* Alderson, 8 Hare, 101; Marshall *v.* Sladden, 7 Hare, 428; Peatfield *v.* Benn, 17 Beav. 522.

[3] Ibid.

[4] Marshall *v.* Sladden, 7 Hare, 428.

[5] Meinertzhagen *v.* Davis, 1 Coll. 335; *Ex parte* Tunno, 1 Bail. Eq. 395.

[6] Guibert's Trust, 13 Eng. L. & Eq. 372. But see *Ex parte* Tunno, 1 Bail. Eq. 395.

[7] Passingham *v.* Sherborne, 9 Beav. 424.

[8] Reid *v.* Reid, 30 Beav. 388.

[9] *Ex parte* Clutton, 17 Jur. 988; 21 Eng. L. & Eq. 186; *Ex parte* Conybeare's Settlement, 1 W. R. 458.

[10] Wilding *v.* Bolder, 21 Beav. 222.

[11] ——— *v.* Walker, 5 Russ. 7; Stickney *v.* Sewell, 1 M. & C. 14; Westover *v.* Chapman, 1 Coll. 177.

pointment is committed to trustees and the survivor of them, his executors or administrators, and the trustees all die, the appoint ment is in the executor of the survivor; and, as the instrument of trust declares him to be a proper person to execute the trust, he may appoint himself under the power. Mr. Lewin, however, says that "the exercise of every power should be regulated by the circumstances as they stand at the time, and that the limitation to executors cannot dispense with the *discretion* to be applied afterwards." [1]

[1] Lewin on Trusts, 472 (5th Lond. ed.).

CHAPTER X.

NATURE, EXTENT, AND DURATION OF THE ESTATE TAKEN BY TRUSTEES.

§ 298. It may happen that although words of express trust are used in the grant or bequest of an estate to a trustee, yet no estate vests or remains in the trustee. Thus if A. grants or bequeaths land to B. and his heirs, in trust for C. and his heirs, the trustee, B., will take nothing in the land, but the legal title, as well as the beneficial use, will vest immediately in C;[1] for the statute of uses,[2] so called, executes the possession and the legal title in the same person to whom the beneficial interest is given. As stated in previous sections,[3] a large part of the land in England was at

[1] Austin *v.* Taylor, 1 Eden, 361; Williams *v.* Waters, 14 M. & W. 166; Robinson *v.* Grey, 9 East, 1; Chapman *v.* Blissett, Ca. t. Talbot, 150; Broughton *v.* Langley, 2 Salk. 150; 2 Ld. Raym. 873; Thatcher *v.* Omans, 3 Pick. 521; Upham *v.* Varney, 15 N. H. 466; Kinch *v.* Ward, 2 Sim. & St. 409; and see Doe *v.* Biggs, 2 Taunt. 109; Shapland *v.* Smith, 1 Bro. Ch. 75 and notes.

[2] 27 Henry VIII. c. 10, § 1.

[3] *Ante*, §§ 3, 4.

one time held to uses. The legal title was in one person, but upon the trust and confidence that such person would apply it to the use of some person named, or that such legal owner would permit some other person to have the possession, use, and income of the estate. This system, originating partly in fraud of the law, and partly in the necessities and convenience of the subject, became at last the source of great abuses. To remedy these abuses, the statute of uses was enacted.[1] This statute executes the use by conveying the possession to the use, and transferring the use into possession, thereby making the *cestui que use* complete owner of the estate, as well at law as in equity. It does not abolish the conveyance to uses, but only annihilates the intervening estate, and turns the interest of the *cestui que use* into a *legal* instead of an *equitable* estate.[2] A *use*, a *trust*, and a *confidence* is one and the same thing, and if an estate is conveyed to one person for the use of, or upon a trust for, another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are

[1] *Ante*, §§ 5, 6, 7. And see the preamble of the statute. The first section of the statute was as follows: "That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatsoever it be; that in every such case, all and every such person and persons, and bodies politic that have or hereafter shall have any such use, confidence, or trust in fee-simple, fee-tail, for term of life, or for years, or otherwise, or any use, confidence, or trust in remainder or reverter, shall from henceforth stand and be seised, deemed and adjudged, in lawful seisin estate and possession, of and in the same honors, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes, in the law of and in such like estates, as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them, that have, or hereafter shall have, such use, confidence, or trust after such quality, manner, form, and condition as they had before, in or to the use, confidence, or trust that was in them." Saund. on Uses, 70–82.

[2] Eustace *v.* Seamen, Cro. Jac. 696; 2 Black. Com. 333, 338; Thatcher *v.* Omans, 3 Pick. 529.

used.[1] So absolute is the statute that it will operate upon all conveyances in the words above stated, although it was the plain intention of the settlor that the estate should vest and remain in the first donee; for the intention of the citizen cannot control express enactments of the legislature,[2] or positive rules of property.

§ 299. The statute of uses is in force in most of the United States,[3] but where the statute is not in force either by adoption or by re-enactment, and even where it is expressly repealed and a form of deed is enacted, a knowledge of the law of uses is necessary in order to understand and apply the common forms of conveyance.[4] The statute of uses, and the doctrines it established are so interwoven with the history of every American State, and with the growth of its jurisprudence in regard to real estate, that the law of tenures is necessarily interpreted in America by the precedents established under the statute;[5] and in this branch of the law, as in all others, it is impossible to obtain a clear perception of its present state, without a full knowledge of the successive steps by which the latest development has been reached. The application of the statute has been very much modified in many of the States, but the general idea is still acted upon.[6] Mr. Washburn remarks, that it is not a fair inference that the doctrine of uses would be inapplicable in any State where they are not declared not to exist, either because no case has arisen in the courts of the

[1] Terry *v.* Collier, 11 East, 377; Right *v.* Smith, 12 East, 454; Broughton *v.* Langley, 2 Salk. 679; Ease *v.* Howard, Pr. Ch. 338, 345; Hammerston's Case, Dyer, 166 a. note; Ramsay *v.* Marsh, 2 McCord, 252; Moore *v.* Shultz, 13 Penn. St. 98; Jackson *v.* Fish, 10 John. 456; Parks *v.* Parks, 9 Paige, 107.

[2] Carwardine *v.* Carwardine, 1 Ed. 36; Gregory *v.* Henderson, 4 Taunt. 772. In this case the intent of the testator was loosely talked of, but it was an active trust, as pointed out by Heath, J. Doe *v.* Collier, 11 East, 377; Shapland *v.* Smith, 1 Bro. Ch. 75; 1 Sugd. Ven. 309, 314.

[3] 4 Kent, Com. 299; 1 Green. Cru. tit. 11, Use, c. 3, § 3, note.

[4] Walk. Am. Law, 311; Helfensteine *v.* Garrard, 7 Ohio, 275; 2 Washb. on Real Prop. 152.

[5] 4 Kent, Com. 299–301.

[6] In Maine, a person may convey land by deed acknowledged and recorded, Rev. Stat. 1857, c. 73, § 1. And a deed may be any species of conveyance, not plainly repugnant in terms, and necessary to give effect to the intention of the parties. Emery *v.* Chase, 5 Me. 235. And the statute of uses is in force. Shapleigh *v.* Pilsbury, 1 Me. 271; Emery *v.* Chase, 5 Me. 232; Webster *v.* Cooper, 14 How. 496; Morden *v.* Chase, 32 Me. 329.

In New Hampshire, the form in which lands may be conveyed is fixed by

State to test the question, or because a form of deed not known under the statute of uses may have been declared by the statute

statute. Rev. Stat. But this does not exclude other known forms of conveyance at common law, and the statute of uses is in full force. Exeter *v.* Odiorne, 1 N. H. 232; Chamberlain *v.* Crane, ib. 64; French *v.* French, 3 N. H. 234; Upham *v.* Varney, 15 N. H. 462; Hayes *v.* Tabor, 41 N. H. 526; Bell *v.* Scammon, 15 N. H. 394; Pritchard *v.* Brown, 4 N. H. 397; Dennett *v.* Dennett, 40 N. H. 498.

In Vermont, there is similar legislation as to the form of conveyances; but Chief-Justice Redfield held that the English statute of uses was not in force, for the reason that their court of equity could carry out the intention of parties without the help of the statute. Gorham *v.* Daniels, 23 Vt. 600; Sherman *v.* Dodge, 28 Vt. 26. Mr. Justice Thompson, of the United States court for the district, held the contrary. Soc., &c., *v.* Hartland, 2 Paine, C. C. 536.

In Massachusetts, a deed acknowledged and recorded conveys land without any other ceremony. Gen. Stat. 1860, c. 89, § 1. The form of deed in general use *gives*, *grants*, *bargains*, *sells*, and *conveys*, upon a consideration, limiting the estate to the grantee and his heirs *to their use*. These words prevent a resulting use in the grantor; and it is a conveyance at common law, since the *grantee* and the *cestui que use* is the same person. But if, for any reason, it is necessary, in order to give effect to the conveyance, to construe it as operating under the statute of uses, the court will do so. Cox *v.* Edwards, 14 Mass. 492; Marshall *v.* Fish, 6 Mass. 24; Hunt *v.* Hunt, 14 Pick. 374; Wallis *v.* Wallis, 4 Mass. 135; Pray *v.* Pierce, 7 Mass. 381; Russell *v.* Coffin, 8 Pick. 143; Blood *v.* Blood, 8 Pick. 80; Parker *v.* Nichols, 7 Pick. 111; Gale *v.* Coburn, 18 Pick. 397; Brewer *v.* Hardy, 22 Pick. 376; Thatcher *v.* Omans, 3 Pick. 522; Norton *v.* Leonard, 12 Pick. 157; Newhall *v.* Wheeler, 7 Mass. 189; Chapin *v.* Univer. Soc., 8 Gray, 580; Baptist Soc. *v.* Hazen, 100 Mass. 322; Durant *v.* Ritchie, 4 Mason, 45; North Hampton Bank *v.* Whiting, 12 Mass. 104; Johnson *v.* Johnson, 7 Allen, 197.

In Rhode Island, deeds of bargain and sale, lease and release, and covenants to stand seised, are recognized by statute. Rev. Stat. (1857), p. 335, and the statute of uses would seem to be in partial force. 1 Lomax, Dig. 188; Nightingale *v.* Hidden, 7 R. I. 132.

In Connecticut, the act of acknowledging and recording a deed is held equivalent to livery of seisin: Barrett *v.* French, 1 Conn. 354; but the statute of uses is held to be part of its common law. Bacon *v.* Taylor, Kirb. 368; Barrett *v.* French, 1 Conn. 354; Bryan *v.* Bradley, 16 Conn. 474.

In New York, previous to 1827, the English statute of uses was in full force: Jackson *v.* Myers, 3 John. 388; Jackson *v.* Fish, 10 John. 456; Jackson *v.* Root, 18 John. 79; Jackson *v.* Cary, 16 John. 302; Jackson *v.* Dunsbagh, 1 John. Ca. 91; Jackson *v.* Cadwell, 1 Cow. 622. After that year, the rules of the common law were repealed; all uses and trusts were abolished, except such as were expressly authorized. Every interest in land is declared to be a legal right, and cognizable in a court of law except where it is otherwise provided. A conveyance by *grant*, *assignment*, or devise is substituted for a conveyance to

of a State sufficient to convey lands.[1] It is true that Lord Hardwicke is reported to have said, that the statute of uses had no

uses, and future interests in lands may be conveyed by grant. 3 Rev. Stat. 15 (5 ed.), 4 Kent, 300. It has, however, been determined that if land is granted to one in fee in trust for another, the *cestui que trust* takes the estate absolutely, but subject, however, to such incumbrances as the trustee made upon the estate at the time of the conveyance, as if the trustee should give back a mortgage for the purchase-money, it would be held to be one transaction. Rawson *v.* Lampman, 1 Seld. 456. Nor have these statutes any application to securities by mortgage. King *v.* Merchants' Exchange Co., 1 Seld. 547.

In New Jersey, the statute of uses is substantially re-enacted. Den *v.* Crawford, 3 Halst. 107; Prince *v.* Sisson, 13 N. J. 168.

In Pennsylvania, a statute declares all deeds in a prescribed form equivalent to a feoffment with livery of seisin at common law, and the statute of uses is also in full force. Opinion of the Judges, 3 Binn. 599; Ashhurst *v.* Given, 5 Wat. & Ser. 323; Welt *v.* Franklin, 1 Binn. 502; Sprague *v.* Woods, 4 Wat. & Ser. 192; O'Kinson *v.* Patterson, 1 Wat. & Ser. 395; Hurst *v.* McNeil, 1 Wash. C. C. 70; Franciscus *v.* Reigart, 4 Watts, 118. Indeed, at one time, the Pennsylvania courts carried the application of the statute to an unusual extent, and held that *equitable* were converted into *legal* estates in all cases except active trusts, and even *then* if the purposes of the trust do not furnish a legitimate reason for not executing the trust in the beneficiary. Kuhn *v.* Newman, 26 Penn St. 227; Whichcote *v.* Lyle, 28 Penn. St. 73; Bush's App., 33 Penn. St. 85; Kay *v.* Scates, 37 Penn. St. 31. But these cases were overruled, and the law restored to its former condition in Barnett's App., 46 Penn. St. 392; Shankland's App., 47 Penn. St. 113.

In Delaware, the statute provides that lands may be transferred by deed without livery, and that the legal estate shall accompany the use, and pass with it. Rev. Code (1852), p. 266.

In Maryland, the English statute of uses is the foundation of their conveyances, and their rules of construction of it are nearly similar to the English rules. Lewis *v.* Beall, 4 Harr. & McH. 488; Mason *v.* Smallwood, 4 Harr. & McH. 484; Mathews *v.* Ward, 4 Gill & J. 443; Cheney *v.* Watkins, 1 Harr. & J. 527; West *v.* Biscoe, 6 Harr. & J. 465; Calvert *v.* Eden, 2 Harr. & McH. 331.

In Virginia, the statute of uses was a part of the colonial law; but it was repealed in 1792. Afterwards, in 1819, and in Rev. Code (1849), p. 502, a partial substitute was adopted, by which the possession was transferred to the use only in cases of deeds of bargain and sale, lease and release, and deeds operating by way of covenant to stand seised to uses. If uses or trusts are raised by any other form of conveyance, as by devise, they remain, as before the statute of Henry VIII., mere equitable estates, not cognizable by courts of law. Bass *v.* Scott, 2 Leigh, 359, 1 Lomax, Dig. 188, 2 Mat. Dig. 34; Rowletts *v.* Daniel, 4 Munf. 473; Tabb *v.* Baird, 3 Call, 475; Duvall *v.* Bibb, 3 Call, 362.

In North Carolina, the statute is similar to the statute of Virginia, and the

[1] 2 Washburn on Real Property, 154.

other effect than to add at most three words to a conveyance;[1] Mr. Kent thinks this rather too strongly expressed, and says that

statute of uses has nearly the same application. Rev. Code (1854), p. 270; Den v. Hanks, 5 Ired. 30.

In South Carolina, the statute of uses was re-enacted in terms. 2 Stat. at Large, p. 467; Ramsay v. Marsh, 2 McCord, 252; Redfern v. Middleton, Rice, 464; Kinsler v. Clark, 1 Rich. 170; Chancellor v. Windham, 1 Rich. 161; Laurens v. Jenney, 1 Spears, 356; McNish v. Guerard, 4 Strob. 74.

In Georgia, the form of deed in general use is that of bargain and sale, which operates under the statute of uses. Adams v. Guerard, 29 Ga. 676.

In Florida, there is a statute similar to the statute of Virginia, and the statute of uses is in partial force. Thompson's Dig. p. 178, § 4; 1 Lomax, Dig. 188.

In Alabama the statute of uses is part of the law of the State. Horton v. Sledge, 29 Ala. 478; You v. Flinn, 34 Ala. 411.

In Mississippi, there is a statute similar to the statute of Virginia. How. & Hutch, Dig. p. 349.

In Louisiana, conveyances originated under the civil law, or the code of France.

In Texas, a statute recognizes deeds of bargain and sale, which operate under the statute of uses.

In Arkansas, the mode of conveyance is by deeds of bargain and sale, and of course the statute of uses must be a part of their law.

In Tennessee, the statute of uses is not in force, though deeds good at common law or under the statute of uses are valid to convey estates; but if uses are raised, they remain as before the statute of Henry VIII.

The statute of Kentucky is in nearly the same words as the statute of Virginia, and the statute of uses has the same application. Rev. Stat. p. 279 (ed. 1860).

In Ohio, the statute of uses was never in force, and if trusts or uses are raised by the form of conveyance they remain unexecuted, and mere equitable estates, cognizable only in courts of equity. Williams v. Presbyterian Church, 1 Ohio St. 497; Helfensteine v. Garrard, 7 Ham. 276; Foster v. Dennison, 9 Ohio, 124; Walker, Am. Law, 124; Thompson v. Gibson, 2 Ohio, 439.

In Indiana the statute of uses is enacted in substance. Rev. Stat. (1843), p. 447; Linville v. Golding, 11 Ind. 374.

In Illinois, the statute is very similar to the statute of Virginia, 2 Stat. (1858), p. 959.

In Michigan, the laws are similar to the statutes of New York, by which all uses and trusts are abolished. 2 Comp. Laws (1857), p. 824; Ready v. Kearsley, 14 Mich. 228.

In Missouri, the statute of uses is re-enacted in substance. Rev. Stat. 1845, p. 218; Guest v. Farley, 19 Mis. 147.

In Iowa, uses are recognized, and deeds may operate under the statute of uses. Pierson v. Armstrong, 1 Iowa, 282.

In Wisconsin, the statute is very similar to the statute of New York, and all

[1] Hopkins v. Hopkins, 1 Atk. 591.

the doctrine of the statute has insinuated itself deeply and thoroughly into every branch of the jurisprudence of real property.[1] It seems to have been the intention of the statutes of the various States to supply the want of livery of seisin, and to make all deeds, or other writings executed with certain formalities, equivalent to the old feoffments; therefore, any old and well-established rule of conveyancing ought not to be considered as abolished, in the absence of express provisions to that effect.

§ 300. The statute of uses at the time when it was passed had an immense effect upon the tenures of the realm. Many interests in land which had been merely equitable, and cognizable only according to the rules of equity, became at once legal interests, cognizable in courts of common law. Many persons who were seised of estates to uses, and who only could sue or be sued at law in relation to the same, ceased at once to have any title either at law or equity. Although it is probable that it was the intent of the statute to convert all uses or trusts into legal estates,[2] yet the convenience to the subject of being able to keep the legal title to an estate in one person, while the beneficial interest should be in another, was too great to be given up altogether, and courts of equity were astute in finding reasons to withdraw a conveyance from the operation of the statute.[3] Three principal reasons or rules of construction were laid down, whereby conveyances were excepted from such operation: first, where a use was limited upon a use; second, where a copyhold or leasehold estate, or personal property, was limited to uses; third, where such powers or duties were imposed with the estate upon a donee to uses that it was nec-

uses and trusts are abolished except those specially provided for. Rev. Stat. 1858, p. 529.

In Minnesota, deeds may be in form of bargain and sale, which operate under the statute.

In California, conveyances originated under the old Spanish law, and probably the statute of uses has little or no influence upon the law of the State.

In Kansas, a conveyance to A. to the use of B. vests the estate at once in B., by force of the statute. Bayer *v.* Cockerill, 3 Kan. 292.

[1] 4 Kent, Com. 301.

[2] 1 Green. Cruise, tit. 12, c. 1, § 1.

[3] Mr. Cruise thought that the strict construction put upon the statute by the judges in a great measure defeated its effect. Ib. Mr. Blackstone is of a similar opinion. 2 Black. Com. 336. And Lord Mansfield, in Goodright *v.* Wells, 2 Doug. 744, said that it was not the liberality of courts of equity, but the absurd narrowness of courts of law, resting on literal distinctions, which in a manner repealed the statute of uses, and drove *cestuis que trust* into equity.

essary that he should continue to hold the legal title in order to perform his duty or execute the power.[1] In all of these three instances, courts both of law and equity held that the statute did not execute the use, but that such use remained, as it was before the statute, a mere equitable interest to be administered in a court of equity. These uses, which the statute did not execute, were called trusts, and justify Mr. Cruise's language that "a trust is a use not executed by the statute of 27 Henry VIII."

§ 301. The first two of these rules originated in a strict construction of the technical words used in the statute, which are "where any person is *seised* of any lands or to the use of another." If A. grants lands to B. for the use of C. for the use of D., B. was said to be "seised" of the lands to the use of C.; and the statute immediately executed the use in C. and gave him the legal title. But C. was said not to be "seised" of lands to the use of D., but only of a *use*, therefore the use in C. for D. remained, as it was before the statute, unexecuted.[2] It remained therefore a mere equitable estate or trust cognizable in a court of equity alone. Hence the maxim that a use could not be limited on a use, not that such second use was void, but the statute did not execute it, and it remained a mere equitable interest. Thus, if lands come to A. and his heirs by feoffment, grant, devise, or other assurance, to the use of B. and his heirs, to the use of C. and his heirs; or to the use of C. in fee or for life, with remainders over; or to B. and his heirs in trust to permit C. and D. to receive the rents, — in all these cases, the statute executes the first use only in B. and his heirs, and the legal estate is vested in him, as trustee for the parties beneficially interested.[3]

§ 302. So where lands are conveyed by covenant to stand seised,

[1] Hill on Trustees, 230.

[2] Tyrrell's Case, Dyer, 155 a.

[3] Durant *v.* Ritchie, 4 Mason, 65; Hurst *v.* McNeil, 1 Wash. C. C. 70; Whetstone *v.* Bury, 2 P. Wms. 146; Wagstaff *v.* Wagstaff, 2 P. Wms. 258; Attorney-General *v.* Scott, Forrest, 138; Doe *v.* Passingham, 6 B. & Cr. 305; Jones *v.* Lord Saye & Sele, 1 Eq. Ca. Ab. 383; Marwood *v.* Darell, Ca. t. Hard. 91; Hopkins *v.* Hopkins, 1 Atk. 581; Jones *v.* Bush, 4 Harr. 1; 1 Sand. Uses, 195; 2 Black. Com. 336; Williams *v.* Waters, 14 M. & W. 166; Ramsay *v.* Marsh, 2 McCord, 252; Burgess *v.* Wheate, 1 W. Black. 160; Wilson *v.* Cheshire, 1 McCord, 233. The statute of uses in some of the States, as Virginia, speaks of uses raised by deed. Consequently, it is said that uses raised by devise are not executed, but remain trusts. Judge Lomax, however, denies this construction. 1 Lomax, Dig. 188, 196.

or by bargain and sale, or by appointment under a power, to A. and his heirs, to the use of B. and his heirs, the *legal* estate will vest in A., and B. will take only an equitable interest; for these conveyances do not operate to transfer the seisin to A.[1] They merely raise a use which the statute executes in him, and stops there. Thus, in a deed of bargain and sale, the operation is as follows: the consideration and the bargain raise a use in the bargainee which the statute executes; and thus, under a deed of bargain and sale, the bargainee obtains both the use and the legal title. But no use can be limited and executed on a use. Hence, if A. conveys land to B. to the use of C. by a deed of bargain and sale, the statute will not execute the use in C., but the legal title will remain in B. subject to a trust for C. to be administered in equity; for the consideration and bargain only raise a use in B., which the statute executes, but the use in B. for C. is in the nature of a use limited upon a use, which the statute does not execute.[2]

§ 303. Another technical construction of the word "seised" withdrew all uses or trusts created in copyhold or leasehold estates, and all chattel interests and personal property, from the operation of the statute. The judges resolved in the 22d of Elizabeth that the word "seised" was only applicable to freeholds; consequently no one could be said to be "seised" of a leasehold or other chattel interests in real estate, or of personal property. Therefore, if A. gave leaseholds or personal property to B. for the use of C., the statute did not execute the use, but B. took the *legal* title in trust for C., which trust was not recognized at law, but only in

[1] Johnson *v.* Cary, 16 John. 304; 1 Cruise, Dig. tit. 12, c. 1, § 9; Gilb. on Uses, 67, 347. Mr. Blackstone condemned this rule 2 Black. Com. 336, and Lord Mansfield said that the rule grew up from the absurd narrowness of courts of common law. Goodright *v.* Wells, 2 Doug. 744. And Mr. Greenleaf doubts if the rule that a use cannot be limited upon a use would be generally acted upon in the United States, especially in those States which have declared by statute what formalities shall alone be necessary to pass estates. Green. Cruise Dig. tit. 12, c. 1, § 4, n. (vol. i. p. 380); and see Davis *v.* Hayden, 9 Mass. 514; Flint *v.* Sheldon, 13 Mass. 443; Marshall *v.* Fisk, 6 Mass. 24.

[2] The question has been raised in Massachusetts whether land can be conveyed by deed of bargain and sale to one for the use of another, and create any thing more than a trust for the last beneficiary. Stearns *v.* Palmer, 10 Met. 32; Norton *v.* Leonard, 12 Pick. 152. The general doctrine stated in the text is fully admitted, but it is claimed in answer that the deeds in general use, although in the general form of deeds of bargain and sale, are in fact, by force of the stat-

equity.[1] So tenants by curtesy or in dower cannot stand seised to a use, for they are in by act of law in consideration of marriage and not in privity of estate; but in equity they would be held to execute any trusts charged upon their interests or estates.[2]

§ 304. From these instances, it will be seen that, in order to create a trust, it is necessary to prevent the legal estate from vesting in the *cestui que trust*, and it is necessary that not only the *legal* title, but the *primary use*, should vest in the trustee. Any form of conveyancing that will effect this, notwithstanding the statute, will create a trust; as if a grant or devise be made to a *trustee and his heirs* to the *use of the trustee* and his heirs, or unto and to the use of the trustee and his heirs, the title and the primary use will both be vested in the trustee; and although there is a trust or use over to some other person, yet it will not be affected by the statute, it not being the primary use.[3]

§ 305. The third rule of construction is less technical, and relates to special or active trusts, which were never within the purview of the statute.[4] Therefore if any agency, duty, or power be

utes, equivalent to grants or feoffments, and it is said that if deeds will not operate in the form in which they are drawn, they shall be construed to operate according to the intention of the parties. Higbee *v.* Rice, 5 Mass. 352; Pray *v.* Peirce, 7 Mass. 384; Knox *v.* Jenks, 7 Mass. 494; Russell *v.* Coffin, 8 Pick. 143. The question was left undecided in Norton *v.* Leonard and Stearns *v.* Palmer, *ut supra*, but see the remarks of Chief-Justice Dana, in Thatcher *v.* Omans, 3 Pick. 528. The same question may arise in other States, where their deeds are in form, deeds of bargain and sale.

[1] *Ante*, § 6. Dyer, 369 a; Doe *v.* Routledge, 2 Cowp. 709; Symson *v.* Turner, 1 Eq. Ab. 383; 2 Wooddes. Lect. pp. 295, 297; 1 Cruise, Dig. p. 354, and tit. 12, c. 1; Gilb. Ten. 182; Gilb. Uses, 67 n.; Rice *v.* Burnett, 1 Spear, Eq. 579; Joor *v.* Hodges, Spear, 593; Pyron *v.* Mood, 2 McMullan, 293. In some States, the statutes use the word *possessed* instead of the word *seised*, in which case both real and personal estate and chattel interests would be transferred to the uses raised. Tabb *v.* Baird, 3 Call, 482. But this construction is controverted by Judge Lomax. 1 Lomax, Dig. 196.

[2] 1 Saunders on Uses, 86; 2 Fonbl. Eq. book 2, c. 6, § 1, and notes, p. 140.

[3] Rackham *v.* Siddall, 1 McN. & G. 607; Doe *v.* Passingham, 6 B. & C. 305; Robinson *v.* Comyns, t. Talb. 154; Doe *v.* Field, 6 B. & Ad. 564; Attorney-General *v.* Scott, t. Talb. 138; Hopkins *v.* Hopkins, 1 Atk. 589; Harris *v.* Pugh, 12 Moore, 577; 4 Bingh. 335.

[4] Chapin *v.* Universalist Soc., 8 Gray, 580; Exeter *v.* Odiorne, 1 N. H. 232; Mott *v.* Buxton, 7 Ves. 201; Wright *v.* Pearson, 1 Edw. 125; Wheeler *v.* New-

imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents,[1] or to convey the estate,[2] or if any control is to be exercised, or duty performed by the trustee in *applying* the rents to a person's maintenance,[3] or in making repairs,[4] or to preserve contingent remainders,[5] or to raise a sum of money,[6] or to dispose of the estate by sale,[7] in all these, and in other and like cases, the operation of the statute is excluded, and the trusts or uses remain mere equitable estates. So if the trustee is to exercise any discretion in the management of the estate, in the investment of the proceeds, or the principal, or in the application of the income;[8] or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division.[9] So if an estate is given upon a trust to sell or mortgage for the payment of debts, legacies, or annuities, or to purchase other lands to be settled to certain uses;[10] and this construction will not

hall, 7 Mass. 189; Norton *v.* Leonard, 12 Pick. 152; Striker *v.* Mott, 2 Paige, 387; Wood *v.* Wood, 5 Paige, 596.

[1] Robinson *v.* Grey, 9 East, 1; Jones *v.* Saye & Sele, 1 Eq. Ca. Ab. 383; Barker *v.* Greenwood, 4 M. & W. 429; Sympson *v.* Turner, 1 Eq. Ca. Ab. 383; Chapman *v.* Blissett, Ca. t. Talb. 145; Garth *v.* Baldwin, 2 Ves. 646; Sherwin *v.* Kenny, 16 Ir. Ch. 138; Anthony *v.* Rees, 2 Cr. & Jer. 75; Doe *v.* Hampray, 6 Ad. & El. 206; White *v.* Barker, 1 Bing. N. C. 573; Kenrick *v.* Beauclerk, 3 Bos. & P. 178; Nevil *v.* Saunders, 1 Vern. 415. See the elaborate case, Leggett *v.* Perkins, 2 Comst. 297; Brewster *v.* Striker, ib. 19; Morton *v.* Barrett, 22 Me. 261; McCosker *v.* Brady, 1 Barb. Ch. 329; Doe *v.* Biggs, 2 Taunt. 109.

[2] Ibid. Doe *v.* Edlin, 4 Ad. & El. 582; Doe *v.* Scott, 4 Bing. 505; Mott *v.* Buxton, 7 Ves. 201.

[3] Sylvester *v.* Wilson, 2 T. R. 444; Doe *v.* Edlin, 4 Ad. & El. 582; Vail *v.* Vail, 4 Paige, 317; Porter *v.* Doby, 2 Rich. Eq. 52; Doe *v.* Ironmonger, 3 East, 533.

[4] Shapland *v.* Smith, 1 Bro. Ch. 75; Brown *v.* Ramsden, 3 Moore, 612; Tierney *v.* Moody, 3 Bing. 3.

[5] Biscoe *v.* Perkins, 1 Ves. & B. 485; Barker *v.* Greenwood, 4 M. & W. 431; Vanderheyden *v.* Crandall, 2 Denio, 9.

[6] Wright *v.* Pearson, 1 Eden, 119; Stanley *v.* Lennard, ib. 87.

[7] Bagshaw *v.* Spencer, 1 Ves. 142; Wood *v.* Mather, 38 Barb. 473.

[8] Exeter *v.* Odiorne, 1 N. H. 232; Ashhurst *v.* Given, 5 W. & S. 323; Vaux *v.* Parke, 7 W. & S. 19; Nickell *v.* Handly, 10 Grat. 336.

[9] Posey *v.* Cook, 1 Hill (S. C.), 413; Morton *v.* Barrett, 22 Me. 261; Wood *v.* Mather, 38 Barb. 473; McCaw *v.* Galbraith, 7 Rich. L. 74; McNish *v.* Guerard, 4 Strob. Eq. 66, was to the contrary upon the facts of that particular case.

[10] Curtis *v.* Price, 12 Ves. 89; Doe *v.* Ewart, 7 Ad. & El. 636, 668; Ashhurst *v.* Given, 5 W. & S. 323; Vaux *v.* Parke, 7 W. & S. 19; Keene *v.* Deardon, 8

be affected by a power given to one of the *cestuis que trust* to control the sale of part of the estate,[1] nor by the fact that the direction for the payment of debts and legacies, out of the proceeds of the sale of the land, is only in aid of the personal property.[2]

§ 306. If, however, the trust simply is to *permit and suffer* A. to occupy the estate, or to receive the rents, the legal estate is executed in A. by the statute.[3] And a trust to hold for the use and benefit of, and to apply the rents to, the children of A., is executed in the children, notwithstanding the word *apply* is used.[4] But where the trust is "*to pay* unto" or to permit and suffer a person to receive the rents, using both expressions, the construction will be governed by the intention of the donor; and in this view the position of the words in the sentence, and the priority of the words, and the consideration whether the instrument is a deed or will, will have a material bearing upon the decision.[5] Mr. Jarman and Mr. Lewin suggest that the repugnancy would be obviated in such a case by construing the instrument to give an election or discretion to the trustees.[6]

§ 307. Although the direction may be for the trustees to *permit and suffer* another person to receive the rents, yet if any duty is imposed upon the trustees expressly or by implication, the legal estate will remain in them unaffected by the statute. As if the direction is to *permit A.* to receive the *net*[7] rents, or the *clear*[8] rents, the trustees take the legal estate, the words *net* and *clear* implying that the trustees are to pay all charges, and pay over the

East, 248; Bagshaw *v.* Spencer, 1 Ves. 142; Chamberlain *v.* Thompson, 10 Conn. 244; Sanford *v* Irby, 3 B. & Al. 654; Creaton *v.* Creaton, 3 Sm. & Gif. 386; Spence *v.* Spence, 12 C. B. (N. S.) 199; Smith *v.* Smith, 11 C. B. (N. S.) 121.

[1] Chapman *v.* Blissett, Forr. 145; Naylor *v.* Arnitt, 1 R. & M. 501; Wykham *v.* Wykham, 18 Ves. 395.

[2] Ibid. Murthwaite *v.* Jenkinson, 2 B. & Cr. 257.

[3] Right *v.* Smith, 12 East, 455; Wagstaff *v.* Smith, 9 Ves. 524; Gregory *v.* Henderson, 4 Taunt. 773; Warter *v.* Hutchinson, 5 Moore, 143; 1 B. & C. 721; Barker *v.* Greenwood, 4 M. & W. 429; Boughton *v.* Langley, 1 Eq. Ca. Ab. 383; 2 Salk. 679; overruling Burchett *v.* Durdant, 2 Vent. 311; Doe *v.* Biggs, 2 Taunt. 109; Ramsey *v.* Marsh, 2 McCord, 252; Parks *v.* Parks, 9 Paige, 107.

[4] Laurens *v.* Jenney, 1 Spears, 356.

[5] Doe *v.* Biggs, 2 Taunt. 109; Pybus *v.* Smith, 3 Bro. Ch. 340.

[6] 1 Jarm. Pow. Dev. 222 n.; Lewin on Trusts, 174 (5th Lond. ed.).

[7] Barker *v.* Greenwood, 4 M. & W. 421; Keene *v.* Deardon, 8 East, 248.

[8] White *v.* Parker, 1 Bing. (N. C.) 573.

balance. So if, in addition to a devise in trust to preserve contingent remainders, there is a direction to *permit* A. to receive the rents and profits;[1] and so if trustees are to pay certain life annuities out of the rents, and subject to those annuities to *permit and suffer* certain persons to receive the rents and profits.[2] So if the trustees are to exercise any control,[3] as if there is a trust to *permit and suffer* a woman to receive the rents, and that her receipts with the approbation of one of the trustees should be good.[4]

§ 308. A mere *charge* of debts and legacies on real estate will not vest the estate in the trustees, unless there is some direction to them to raise the money and pay them, or unless there is some other implication that they are to exercise an *active trust* for the purpose.[5] Nor does the legal estate vest in the trustees where the *charge* of the debts and legacies upon the real estate is contingent upon the insufficiency of any other fund, for in that case the trustees do not take an *immediate* vested interest;[6] but if the *charge* is made in aid of any other fund without contingency, the trustees will take immediately a legal estate.[7] So if the trustees are to demise the estate for a term, at rack rent or otherwise, the term must come out of their interest, and the legal estate must be in them.[8] If, however, the instrument confers by construction upon the trustees a mere *power* of leasing, a good legal term may be created by the exercise of the power and without the legal estate in them.[9] So if a testator give his trustees a simple power of dis-

[1] Biscoe *v.* Perkins, 1 Ves. & B. 485, 489; Webster *v.* Cooper, 14 How. 499; Vanderheyden *v.* Crandall, 2 Denio, 9.

[2] Naylor *v.* Arnit, 1 R. & M. 501.

[3] Exeter *v.* Odiorne, 1 N. H. 232.

[4] Gregory *v.* Henderson, 4 Taunt. 772; Barker *v.* Greenwood, 4 M. & W. 430.

[5] Doe *v.* Claridge, 6 Man. & Scott, 657; 1 Jarm. Pow. Dev. 224 n.; Kenrick *v.* Beauclerk, 3 B. & P. 178; Cadogan *v.* Ewart, 7 Ad. & El. 636, 668; Jones *v.* Saye & Sele, 8 Vin. 262; Creaton *v.* Creaton, 3 Sm. & Gif. 386; Collier *v.* McBean, 34 Beav. 426.

[6] Goodtitle *v.* Knott, Coop. 43; Hawker *v.* Hawker, 3 B. & Al. 537; Gibson *v.* Montfort, 1 Ves. 485.

[7] Murthwaite *v.* Jenkinson, 2 B. & Cr. 357; Wykham *v.* Wykham, 18 Ves. 395; and see Popham *v.* Bamfield, 1 Vern. 79.

[8] Doe *v.* Willan, 2 B. & Al. 84; Doe *v.* Walbank, 2 B. & Al. 554; Osgood *v.* Franklin, 2 John. Ch. 20; Burr *v.* Sim, 1 Whart. 266; Riley *v.* Garnett, 3 De G. & Sm. 629; Brewster *v.* Striker, 2 Comst. 19; Doe *v.* Cafe, 7 Exch. 675.

[9] Doe *v.* Willan, 2 B. & Al. 84; Doe *v.* Simpson, 5 East, 162.

posing of his estates, as that his executors or trustees, or other persons shall sell or let or mortgage, or otherwise dispose of his estate to pay his debts or legacies or annuities, or other charges, or where he directs his executors to raise money, no estate vests in the trustees, executors, or other persons, but it descends to the heir or the person to whom it is directed to go in the will, until it is wanted for the purposes named, and then it is divested only to the extent necessary for the purposes named. Such directions are simple *powers* of disposition which may be executed without any legal title.[1]

§ 309. Where a testator gave his wife an annuity, and a certain sum to his children to be paid when they arrive at twenty-one years, and appointed three persons by name, "as trustees of inheritance for the execution thereof," it was held that the trustees took the legal estate.[2] And if several trusts are created in the same instrument, some of which would be executed by the statute, and others would require the legal estate to remain in the trustees, they will take the legal estate; and this will be the case, though the trusts are limited to arise successively.[3] In all cases where an estate is given to trustees to preserve contingent remainders, the statute does not execute the estate in the *cestui que trust;*[4] and in every case where the words "to the use of the trustees" are used, the statute does not execute the estate, although it is to the use of the trustees in trust for another; for the statute only executes the first use.[5]

[1] Reeve *v.* Att'y-Gen., 2 Atk. 223; Hilton *v.* Kenworthey, 3 East, 553; Bateman *v.* Bateman, 1 Atk. 421; Fowler *v.* Jones, 1 Ch. Ca. 262; Lancaster *v.* Thornton, 2 Burr. 1027; Yates *v.* Compton, 2 P. Wms. 308; Fay *v.* Fay, 1 Cush. 94; Shelton *v.* Homer, 5 Met. 462; Bank of U. S. *v.* Beverly, 10 Peters, 532; 1 How. 134; Deering *v.* Adams, 37 Me. 264; Jackson *v.* Schauber, 7 Cow. 187; 2 Wend. 12; Burr *v.* Sim, 1 Whart. 266; Guyer *v.* Maynard, 6 Gill & John. 420; Dabney *v.* Manning, 3 Ohio, 321; Jameson *v.* Smith, 4 Bibb. 307; Hope *v.* Johnson, 2 Yerg. 123; Bradshaw *v.* Ellis, 2 Dev. & Bat. Eq. 20. In Pennsylvania, such powers conferred upon executors pass the estate by force of a statute. Miller *v.* Meetch, 8 Penn. St. 417; Chew *v.* Chew, 28 Penn. St. 17.

[2] Trent *v.* Harding, 10 Ves. 495; 1 B. & P. (N. C.) 116; 7 East, 95; *Re* Hough, 4 De G. & Sm. 371; *Re* Turner, 2 De G., F. & J. 527.

[3] Hawkins *v.* Luscombe, 2 Swans. 375, 391; Horton *v.* Horton, 7 T. R. 652; Blagrave *v.* Blagrave, 4 Exch. 570; Brown *v.* Whiteway, 8 Hare, 156. But see Tucker *v.* Johnson, 16 Sim. 341.

[4] Laurens *v.* Jenney, 1 Spears, 365; Co. Lit. 265 a, n. 2, 337 a, n. 2.

[5] Keene *v.* Deardon, 8 East, 248; Whetstone *v.* St. Bury, 2 P. Wms. 146;

§ 310. If an estate be given to trustees upon a trust for a married woman "for her sole and separate use," and "her receipts alone to be sufficient discharges;" or if the trust be to "permit and suffer a *feme covert* to receive the rents to her separate use," the legal estate will vest in the trustees, and the statute will not execute it in the *cestui que trust*.[1] In all these cases the court will give this construction to the gift if possible;[2] for if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor.[3] These are not the only words necessary to prevent the estate from vesting. Any words that show an intent to create an estate or a trust, for the sole and separate use of a married woman, will have the same effect.[4] But it is said that if an estate is "released by deed" to A. and his heirs "upon a trust" for "the sole and separate use of the releasor," and no *active* duty is imposed upon the trustee in respect to the sole and separate estate, a common-law court will reject the sole and separate use as an estate unknown to the law, and it has been held in such case that the statute vested the estate in the *cestui que trust*.[5]

§ 311. As stated, chattel interests in land and personal property were never within the statute of uses, and the legal title to them will remain in the trustee, until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use, or the last use.[6] But where the trust is at an end, the title is in the person entitled

Pr. Ch. 591; Symson *v.* Turner, 1 Eq. Ca. Ab. 383; Hopkins *v.* Hopkins, 1 Atk. 586; Hawkins *v.* Luscombe, 3 Swans. 376, 388. *Ante*, § 304.

[1] Horton *v.* Horton, 7 T. R. 652; Neville *v.* Saunders, 1 Vern. 415; Jones *v.* Saye & Sele, 1 Eq. Ca. Ab. 383; Doe *v.* Claridge, 6 C. B. 641; Hawkins *v.* Luscombe, 2 Swans. 391; South *v.* Alleyne, 5 Mod. 63, 101; Bush *v.* Allen, 5 Mod. 63; Robinson *v.* Grey, 9 East, 1; Ayer *v.* Ayer, 16 Pick. 330; Williman *v.* Holmes, 4 Rich. Eq. 475; McNish *v.* Guerard, 4 Strob. Eq. 475; Franciscus *v.* Reigart, 4 Watt. 109; Escheator *v.* Smith, 4 McCord, 452; Bass *v.* Scott, 2 Leigh, 356; Rogers *v.* Ludlow, 3 Sand. Ch. 104.

[2] Ware *v.* Richardson, 3 Md. 505; Moore *v.* Shultz, 13 Penn. St. 98.

[3] Ibid.; Rice *v.* Burnett, 1 Spear, Eq. 580.

[4] Ayer *v.* Ayer, 16 Pick. 331; Kirk *v.* Paulin, 7 Vin. Ab. 95; Tyrrel *v.* Hope, 2 Atk. 558; Darley *v.* Darley, 3 Atk. 399; Hartley *v.* Hurle, 5 Ves. 540.

[5] Nash *v.* Allen, 1 Hurl. & Colt. 167; Williams *v.* Waters, 14 M. & W. 166; see remarks on this case in Ware *v.* Richardson, 3 Md. 505.

[6] *Ante*, § 303; Harley *v.* Platts, 6 Rich. L. 315; Rice *v.* Burnett, 1 Spear, Eq. 590; Schley *v.* Lyon, 6 Ga. 530; Doe *v.* Nichols, 1 B. & Cr. 336.

to the last use; and a mere delivery, without other formality, gives such person full and absolute control of the property.[1] Until such delivery the law cannot recognize any equitable interests in the property.[2] If the *cestui que trust* is an infant, it is said that the trust will not be executed by delivering the property to him, because he is incapable of assenting to such transfer.[3]

§ 312. In all cases where an estate is given to one for the use of another, in such manner that the statute of uses steps in and executes the estate in the *cestui que trust*, the statute executes in the *cestui que trust* only the estate that the first donee or trustee takes; that is, the statute executes or transfers the exact estate given to the trustee. Therefore, if A. give an estate to B. and his heirs for the use of C. and his heirs, the statute will execute the fee-simple in C. But if A. gives an estate to B. for the use of C. and his heirs, the statute will execute only an estate for the life of A. in C.; for that is the extent of the estate conveyed to B. by a deed in that form; that is, by a deed that has no words of inheritance in B.[4] While this is the rule in respect to estates which the statute executes, a very different rule applies to estates upon a trust or use not executed by the statute. In these cases, the extent or quantity of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore, the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given.[5] On this principle, two

[1] Ibid.; Bringhurst *v.* Cuthburt, 6 Binn. 398; Lawrie *v.* Bankes, 4 K. & J. 142.

[2] Ibid.; Iorr *v.* Hodges, 1 Spear, Eq. 593.

[3] Harley *v.* Platts, 6 Rich. L. 315. But see Lawrie *v.* Bankes, 4 K. & J. 142.

[4] Newhall *v.* Wheeler, 7 Mass. 189; Baptist Soc. *v.* Hazen, 100 Mass. 322; Idle *v.* Cooke, 1 P. Wms. 77; Doe *v.* Smeddle, 2 B. & Al. 126; Chambers *v.* Taylor, 2 M. & Cr. 376; Vanhorn *v.* Harrison, 1 Dall. 137; Jackson *v.* Fish, 10 John. 456.

[5] Cleveland *v.* Hallett, 6 Cush. 407; Gibson *v.* Montfort, 1 Ves. 485; Newhall *v.* Wheeler, 7 Mass. 189, 198; Oates *v.* Cooke, 3 Burr. 1684; Stearns *v.* Palmer, 10 Met. 32; Sears *v.* Russell, 8 Gray, 86; Gould *v.* Lamb, 11 Met. 84; Brooks *v.* Jones, 11 Met. 191; Fisher *v.* Fields, 10 John. 495; Doe *v.* Field, 2 B. & Ad. 564; Trent *v.* Hanning, 7 East, 99; Doe *v.* Willan, 2 B. & Al. 84;

rules of construction have been adopted by courts: first, 'Wherever a trust is created, a legal estate sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not."[1] And second, "although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires."[2]

§ 313. Thus courts have by construction implied an estate in the trustees, although no estate was given them in words; but, in all such cases, the trustees were required to do something that required a legal estate of some kind in them; as, where a testator gave to a married woman the rents and profits of certain lands to be paid her by his executors, it was held to be a devise of the land itself to the executors, although nothing was given them in terms, to enable them to carry out the purposes of the trust.[3]

§ 314. In the same manner, and for the same reasons, courts have enlarged or extended estates given to trustees. Thus if A.

8 Vin. Ab. 262, pl. 18; Shaw *v.* Wright, 1 Eq. Ca. Ab. 176, pl. 8; Brewster *v.* Striker, 1 E. D. Smith, 321.

[1] Neilson *v.* Lagow, 12 How. 98; Sears *v.* Russell, 8 Gray, 86; Chamberlin *v.* Thompson, 10 Conn. 244; Cleveland *v.* Hallett, 6 Cush. 407; Payne *v.* Sale, 2 Dev. & Bat. Eq. 460; Nichol *v.* Walworth, 4 Denio, 385; Upham *v.* Varney, 15 N. H. 462; King *v.* Parker, 9 Cush. 71; Williams *v.* First Soc. in Cin. 1 Ohio St. 478; Hawley *v.* James, 5 Paige, 318; Deering *v.* Adams, 37 Me. 265; Webster *v.* Cooper, 14 How. 499; Combry *v.* McMichael, 19 Ala. 751; Gill *v.* Logan, 11 B. Mon. 233; Powell *v.* Glen, 21 Ala. 468; King *v.* Akerman, 2 Black, 408; Ward *v.* Amory, 1 Curtis, C. C. 427.

[2] Norton *v.* Norton, 2 Sand. 296; Williman *v.* Holmes, 4 Rich. Eq. 475; Watson *v.* Pearson, 2 Exch. 593; Blagrave *v.* Blagrave, 4 Exch. 569; Brown *v.* Whiteway, 8 Hare, 156; Saye & Selè *v.* Jones, 1 Eq. Ca. Ab. 383; 3 Bro. P. C. 113; Shapland *v.* Smith, 1 Bro. Ch. 75; Heardson *v.* Williamson, 1 Keen, 33; Player *v.* Nicholls, 1 B. & Cr. 142; Warter *v.* Hutchinson, 5 Moore, 153; 1 B. & Cr. 721; Chapman *v.* Blissett, Forr. 145; Doe *v.* Hicks, 7 T. R. 433; Nash *v.* Coates, 3 B. & Ald. 839; *Ex parte* Gadsden, 3 Rich. 468; Adams *v.* Adams, 6 Q. B. 866; Barker *v.* Greenwood, 4 M. & W. 429; Doe *v.* Claridge, 6 C. B. 641; Ware *v.* Richardson, 3 Md. 505; Pearce *v.* McClenaghan, 5 Rich. 178; Ellis *v.* Fisher, 3 Sneed, 231; Gardenhire *v.* Hinds, 1 Head, 402; Smith *v.* Metcalf, 1 Head, 64; Slevin *v.* Brown, 32 Mo. 176; Greenwood *v.* Coleman, 34 Ala. 150; Bryan *v.* Weems, 29 Ala. 423.

[3] Oates *v.* Cooke, 3 Burr. 1684; W. Black. 543; Bush *v.* Allen, 5 Mod. 63; Doe *v.* Woodhouse, 4 T. R. 89; Doe *v.* Homfray, 6 Ad. & El. 206; Doe *v.* Sampson, 5 East, 162.

gives an estate to B. without words of limitation, it is an estate for the life of A.; but if A. gives an estate to B. to pay certain annuities to persons named for their lives, the trustee takes an estate for the lives of the several annuitants.[1]

§ 315. So, if land is devised to trustees without the word *heirs*, and a trust is declared which cannot be fully executed but by the trustees taking an inheritance, the court will enlarge or extend their estate into a fee-simple to enable them to carry out the intention of the donor.[2] Thus, if land is conveyed to trustees, without the word *heirs*, in trust to *sell*, they must have the fee, otherwise they could not sell.[3] The construction would be the same if the trust was to sell the whole or a part; for no purchasers would be safe unless they could have the fee;[4] and a trust to convey or to lease at discretion would be subject to the same rule.[5] *A fortiori*, if an estate is limited to trustees and their heirs in trust to sell or mortgage or to lease at their discretion, or if they are to convey the property in fee, or divide it equally among certain persons, for to do any or all these acts requires a legal fee.[6]

§ 316. Where an estate is given to trustees in fee upon trusts that do not exhaust the whole estate, and a power is superadded which can only be exercised by the trustees conveying in fee-simple,

[1] Ibid. Jenkins *v.* Jenkins, Willes, 656; Shaw *v.* Weigh, 2 Str. 798.

[2] Villiers *v.* Villiers, 2 Atk. 72; Cleveland *v.* Hallett, 6 Cush. 407; Fisher *v.* Fields, 10 John. 505; Ellis *v.* Fisher, 3 Sneed, 231; Rackham *v.* Siddall, 1 Mac. & G. 607; 2 Hall & T. 44; Deering *v.* Adams, 37 Me. 265; Brown *v.* Brown, 12 Md. 87; Webster *v.* Cooper, 14 How. 499; Blagrave *v.* Blagrave, 4 Exch. 569.

[3] Gibson *v.* Montfort, 1 Ves. 491; Amb. 95; Shaw *v.* Weigh, 1 Eq. Ca. Ab. 184; Bagshaw *v.* Spencer, 1 Ves. 144; Glover *v.* Monckton, 3 Bing. 113; 10 Moore, 453; Hawker *v.* Hawker, 3 B. & Al. 537; Warter *v.* Hutchinson, 5 Moore, 143; 1 B. & C. 121; Watson *v.* Pearson, 2 Exch. 594; Chamberlin *v.* Thompson, 10 Conn. 244; Doe *v.* Howland, 7 Cow. 277; Jackson *v.* Robins, 16 John. 537.

[4] Bagshaw *v.* Spencer, 1 Ves. 144.

[5] Booth *v.* Field, 2 B. & Ad. 556; Keen *v.* Walbank, 2 B. &. Ad. 554; Brewster *v.* Striker, 2 Comst. 19; Deering *v.* Adams, 37 Me. 265. But see Doe *v.* Cafe, 7 Exch. 675.

[6] Bagshaw *v.* Spencer, 1 Ves. 142; Keane *v.* Deardon, 8 East, 242; Cadogan *v.* Ewart, 7 Ad. & El. 636; Tompkins *v.* Willan, 2 B. & Ald. 84; Keen *v.* Walbank, 2 B. & Ald. 354; Garth *v.* Baldwin, 2 Ves. 646; Booth *v.* Field, 2 B. & Ad. 564; Rees *v.* Williams, 2 M. & W. 749; Shelly *v.* Eldin, 4 Ad. & El. 582; Creaton *v.* Creaton, 2 Sm. & Gif. 386.

the trustees will take the fee, and the estate conveyed by them will be sustained by the fee in them, and not by the mere power.[1] Where it is possible that the trustees may be under the necessity of exercising a power over the fee, as by mortgage, a gift to them of the fee will not be cut down;[2] and the rule is that all the trusts which trustees must execute are to be executed out of the estate given them.[3] Lord Talbot said that it was wholly a matter of intention whether the trustees should take a fee or not;[4] hence, in other cases, it has been said that, if no intention appeared upon the face of the will that the trustees were to take any thing beyond what was necessary for the execution of the trust, the estate, though limited to them and their heirs, would be cut down to the limit of the trust.[5] So trustees may take only a *chattel* interest in real estate, although limited to them and their heirs, as where they are to hold it in trust only for a short time to pay debts and legacies, and convey it to the *cestui que trust* when he comes of age or at a certain time;[6] and this construction will be much stronger if the fee is not limited to them.[7] The same construction as to the estate of trustees will prevail where the limitation is to them and their heirs, to their use and behoof for ever, whether it is contained in a deed or will.[8]

[1] Fenwick *v.* Potts, 8 De G., M. & G. 506; Poad *v.* Watson, 37 Eng. L. & Eq. 112; Watkins *v.* Frederick, 11 H. L. Cas. 354; Haddelsey *v.* Adams, 22 Beav. 266.

[2] Fenwick *v.* Potts, 8 De G., M. & G. 506; Horton *v.* Horton, 7 T. R. 652; Brown *v.* Whiteway, 8 Hare, 156.

[3] Watson *v.* Pearson, 2 Exch. 593.

[4] Chapman *v.* Blissett, Forr. 145; t. Talb. 145; Hawkins *v.* Luscombe, 2 Swans. 375; Curtis *v.* Price, 12 Ves. 89.

[5] Doe *v.* Hicks, 7 T. R. 433; Nash *v.* Coates, 3 B. & Ald. 839; Boteler *v.* Allington, 1 Bro. Ch. 72, is criticised in 7 T. R. 433, by Lord Kenyon. Webster *v.* Cooper, 14 How. 499; Beaumont *v.* Salisbury, 19 Beav. 198.

[6] Goodtitle *v.* Whitby, 1 Burr. 228; Warter *v.* Hutchinson, 1 B. & Cr. 721; Stanley *v.* Stanley, 16 Ves. 491; Badder *v.* Harris, 2 Dowl. & Ry. 76; Wheedon *v.* Lea, 3 T. R. 41; Pratt *v.* Timins, 1 B. & Ald. 530; Brune *v.* Martin, 8 B. & Cr. 497; Tucker *v.* Johnson, 16 Sim. 341; Glover *v.* Monkton, 3 Bing. 13; Doe *v.* Davies, 1 Q. B. 430; Player *v.* Nicholls, 1 B. & Cr. 336; Cadogan *v.* Ewart, 7 Ad. & E. 136, 667.

[7] Pearce *v.* Savage, 45 Me. 90; Boraston's Case, 3 Co. 19; Player *v.* Nicholls, 1 B. & Cr. 336.

[8] Hawkins *v.* Luscombe, 2 Swans. 375; Curtis *v.* Price, 12 Ves. 89; Venables *v.* Morris, 7 T. R. 342.

§ 317. Where a testator gave all his real and personal estate to trustees, "their executors, administrators, and assigns," in trust to pay several annuities, sums, and legacies, on the deficiency of the personal estates out of the rents, issues, and profits arising from the real estate, and gave the residue over, Lord Hardwicke held that if the annual reception of the rents and profits would satisfy the purposes of the trust, the trustees would take only a chattel interest in the real estate, but, as the land must be sold for the payment of the legacies, the trustees took the fee.[1] The court, however, is always reluctant to enlarge an estate in trustees beyond the terms of the gift; and it will not be done unless it is necessary for the execution of the trust.[2] Where it is plain that the trustees are to pay all charges, debts, legacies, annuities, or other moneys out of the rents and profits of the estate, and no anticipation of the income is necessary or contemplated for that purpose, they will take a chattel interest, or a term for years necessary for the purpose, and not the legal inheritance;[3] and if the testator use an inartificial word, as that the trustees are to lend the estate, they will not take a fee.[4] A trust to preserve contingent remainders, without limitation to heirs, will not be enlarged; for the trust does not require an estate of inheritance.[5]

§ 318. If, however, the subject-matter of the gift to trustees is personal estate, the whole legal interest will vest in them without words of limitation. They may generally dispose of personal estate absolutely, being compelled to account for it.[6]

[1] Gibson *v.* Montfort, 1 Ves. 485; Amb. 93.

[2] Heardson *v.* Williamson, 1 Keen, 33; White *v.* Simpson, 5 East, 162; Wykham *v.* Wykham, 3 Taunt. 316; 11 East, 458; 18 Ves. 395, 416; Ackland *v.* Lutley, 9 Ad. & El. 879; Doe *v.* Claridge, 6 C. B. 641.

[3] Cordall's Case, Cro. Eliz. 315; Carter *v.* Bernadiston, 1 P. Wms. 589; Hitchens *v.* Hitchens, 2 Vern. 404; Wykham *v.* Wykham, 18 Ves. 416; Heardson *v.* Williamson, 1 Keen, 33 Co. Lit. 42 a.

[4] Payne *v.* Sale, 2 Dev. & Bat. Eq. 455.

[5] Thong *v.* Bedford, 1 Bro. Ch. 14; Webster *v.* Cooper, 14 How. 499; Beaumont *v.* Salisbury, 19 Beav. 198; Co. Lit. 290 b.; Butl. n. viii.

[6] Dinsmore *v.* Biggert, 9 Barr, 135; Nicoll *v.* Walworth, 4 Denio, 385; Chamberlain *v.* Thompson, 10 Conn. 244; Combry *v.* McMichael, 19 Ala. 751; Elton *v.* Shepherd, 1 Bro. Ch. 531; 2 Jarm. Pow. Dev. 631; Doe *v.* Willan, 2 B. &. Ald. 84; Smith *v.* Thompson, 2 Swan, 386; and Aiken *v.* Smith, 1 Sneed, 304, held that when personalty was limited to trustees, their heirs, and executors in trust for a married woman for life, and after her death to be equally

§ 319. In England, a distinction is kept up between limitations to trustees in wills and deeds. Thus it is said that in wills there is more room for construction to ascertain and carry into effect the intention of testators, and that in deeds the rules of property are carried into effect with more strictness. So it is said, that if in a deed an estate is given to a trustee *and his heirs*, there is no power to abridge the estate on the ground that the purposes of the trust do not require a fee in the trustees; and that, on the other hand, when an estate is given by deed to a trustee in trust without words of inheritance, there is no authority to enlarge the estate in the trustee because the purposes of the trust seem to require a larger estate. There is a very respectable amount of authority, even in England, that an estate given to trustees and their heirs in trust, by a deed may be restricted to an estate for the life of another, where the purposes of the trust can all be answered by such an estate in the trustee.[1] In the cases sustaining the power to abridge the legal operation of the words of inheritance in a deed, there were some further limitations of the estate, either to the trustees or to third persons, inconsistent with the idea of a fee in the trustees.[2] The authorities, however, greatly preponderate, that courts cannot look to the equitable interests given or created by a *deed*, in order to determine whether the trustee under it takes a fee or not, if there are plain words of inheritance in it. Lord Eldon said, that it appeared to him very difficult to apply the doctrine to a *deed*, and he refused thus to cut down an estate.[3] While there is this conflict of authority upon the point, whether an estate given in fee by deed to trustees can be abridged to the extent of the trust, there is said to be no authority in England that an estate given by a deed to trustees without words of inheritance can be enlarged to suit

divided among her children, or to be conveyed to her children, the trustee took an estate for her life only, and that at her death the trust ceased. These cases, however, are not consistent with principle or authority, and probably would not be followed.

[1] Curtis *v.* Price, 12 Ves. 89; Venables *v.* Morris, 7 T. R. 342, 438; Doe *v.* Hicks, 7 T. R. 437; Brune *v.* Martyn, 8 B. & Cr. 497; Beaumont *v.* Salisbury, 19 Beav. 198, where the authorities were commented on.

[2] Ibid.

[3] Wykham *v.* Wykham, 18 Ves. 395; Colomore *v.* Tyndall, 2 Y. & J. 605; Co. Lit. 20 b; Butl. n. viii.; Dinsmore *v.* Biggert, 9 Barr, 123; Lewis *v.* Rees, 3 . & J. 132; where the authorities are reviewed by Wood, V. C.

the purposes of the trust;[1] although there is one expression by Lord Hardwicke that such enlargement is within the power of the court when the circumstances require it.[2]

§ 320. In the United States, the distinction between deeds and wills, in respect to the trustees' estate, has not been kept up; and the general rule is, that, whether words of inheritance in the trustee are or are not in the *deed*, the trustee will take an estate adequate to the execution of the trust, and no more nor less.[3] Courts will abridge the estate where words of inheritance are used, if the execution of the trust does not require a fee; and so they will enlarge the estate if no words of inheritance are used in a deed.[4] In examining the cases, however, where a trust ceases upon the death of a tenant for life, or upon the death of a person for whom the property was held in trust, care must be taken that this principle is not confounded with another. Thus, where an estate is given to trustees and their heirs in trust to pay the income to A. during her life, and at her decease to hold the same for the use of her children or her heirs, or for the use of other persons named, the trust ceases upon the death of A. for the reason that it remains no longer an *active* trust; the statute of uses immediately executes the use in those who are limited to take it after the death of A., and the trustees cease to have any thing in the estate, not because the court has abridged their estate to the extent of the trust, but because, having the fee or legal estate, the statute of uses has executed it in the *cestui que trust*.[5] But where the operation of the statute of uses does not put an end to the trust, and where it is necessary to enlarge an estate although there are no words of inheritance, courts have been obliged to resort to different expedients

[1] Pottow *v.* Fricker, 6 Exch. 570; Hill on Trustees, 251.

[2] Villiers *v.* Villiers, 2 Atk. 72.

[3] King *v.* Parker, 9 Cush. 71; Stearns *v.* Parker, 10 Met. 32; Gould *v.* Lamb, 11 Met. 84; Cleveland *v.* Hallett, 6 Cush. 403; Att'y-Gen. *v.* Federal Street Meeting House, 3 Gray, 1; Wright *v.* Delafield, 23 Barb. 498; Fisher *v.* Fields, 10 John. 105; Welch *v.* Allen, 21 Wend. 147; Rutledge *v.* Smith, 1 Busb. Eq. 283; Liptrot *v.* Holmes, 1 Kelley, 390.

[4] Neilson *v.* Lagow, 12 How. 110; North *v.* Philbrook, 34 Me. 537; Rutledge *v.* Smith, 1 Busb. Eq. 283; Cleveland *v.* Hallett, 6 Cush. 406. See to the contrary, Miles *v.* Fisher, 10 Ohio, 1.

[5] Parker *v.* Converse, 5 Gray, 336; Greenwood *v.* Coleman, 34 Ala. 150; Churchill *v.* Corker, 25 Ga. 479.

to avoid the technical rules of law upon the subject of inheritances.[1] In those States where no technical or other words are necessary to convey a fee no difficulties arise.

[1] Williams *v.* First Presby. Soc., 1 Ohio St. 498; Rutledge *v.* Smith, 1 Busb. Eq. 283; Co. Lit. 385, 386; 1 Prest. Touchstone, 182; Rawle on Covenants, 344; Shaw *v.* Galbraith, 7 Penn. St. 112.

CHAPTER XI.

PROPERTIES AND INCIDENTS OF THE LEGAL ESTATE IN THE HANDS OF TRUSTEES.

§ 321. As a general rule, the legal estate in the hands of a trustee has at common law precisely the same properties, characteristics, and incidents, as if the trustee were the absolute beneficial owner. The trustee may sell and devise it, or mortgage it, or it may be taken on execution. It may be forfeited, and it will escheat on failure of heirs, and so it will descend to heirs on the death of the trustee. All these properties and incidents attach to the legal estate at common law, whether in the hands of a trustee or of an absolute owner; but these incidents do not generally interfere with the proper execution of the trust.

§ 322. The legal estate in the hands of a trustee was subject at

common law to dower and curtesy;[1] but, as those who take in dower or curtesy take by operation of law, they are subject to the same equities as the original trustee; therefore, if the widow of a trustee should take dower in a trust estate, she would take her dower subject to the same trusts that the estate was under in the hands of her husband. It would thus be of no benefit to her; and it is now understood, from the equitable rule, that a widow has no dower in the lands held by her husband as trustee, and the same observations apply to the right of curtesy in trust estates.[2] If, however, the equitable estate meets the legal estate in the same holder, the equitable merges in the legal estate, and dower and curtesy will attach;[3] and so they will attach so far as there is a beneficial interest in the trustee.[4]

§ 323. While speaking upon this subject, it may be said that, until lately, in England the widow of a *cestui que trust* had no dower in his equitable estate, or his equitable fee in lands.[5] A widow was not dowable of a use, and lands were frequently conveyed to uses to defeat the right of dower.[6] Thus, if a man before marriage conveyed his lands to trustees upon trust for himself and his heirs in fee, or if after marriage he purchased lands, and took the conveyance to a trustee upon a trust for himself and his heirs, his wife had no right of dower.[7] But if lands were settled on trustees upon a trust for a woman and her heirs in fee, her husband was entitled to his curtesy.[8] This anomaly grew up from an attempt

[1] Bennett *v.* Davis, 2 P. Wms. 319; Noel *v.* Jevon, Freem. 43; Nash *v.* Preston, Cro. Car. 190; Casborne *v.* English, 2 Eq. Ca. Ab. 728; Hinton *v.* Hinton, 2 Ves. 631; 1 Sugd. V. & P. 358.

[2] Derush *v.* Brown, 8 Ham. 412; Green *v.* Green, 1 Ham. 249; Cooper *v.* Whitney, 3 Hill, 97; Powell *v.* Monson, &c., 3 Mason, 364; Bartlett *v.* Gouge, 5 B. Mon. 152; Cowman *v.* Hall, 3 Gill & J. 398; Robison *v.* Codman, 1 Sumn. 129; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Ray *v.* Pung, 5 B. & Ald. 561; Gomez *v.* Tradesmen's Bank, 4 Sandf. 102.

[3] Hopkinson *v.* Dumas, 42 N. H. 303.

[4] 4 Kent, 43, 46; Prescott *v.* Walker, 16 N. H. 343.

[5] Dixon *v.* Saville, 1 Bro. Ch. 326; Maybury *v.* Brien, 15 Pet. 38; D'Arcy *v.* Blake, 2 Sch. & Lef. 387; 2 Eq. Ca. Ab. 384; 4 Kent, 43; 1 Rop. Hus. & Wife, 354; Banks *v.* Sutton, 2 P. Wms. 716, was overruled; Park. on Dow. 138. In Pennsylvania, however, a wife can have dower in both legal and equitable estates. Dubs *v.* Dubs, 31 Penn. St. 154.

[6] Wms. Real Prop. 134–136; Perkins, § 349.

[7] Co. Lit. 208 a, (n. 105).

[8] D'Arcy *v.* Blake, 2 Sch. & Lef. 387; Chaplin *v.* Chaplin, 3 P. Wms. 234;

to give to equitable estates the same incidents that belong to legal estates; but when it was proposed to assign dower to a widow out of her husband's equitable estate, it was found that it would disarrange so many titles and estates that the attempt was abandoned. The same inconvenience did not arise in allowing curtesy to a husband, for the reason that a wife could not convey her equitable interests without her husband joining in the act, and thus, to allow him curtesy would not affect titles to any considerable extent.[1] But by a late statute a wife is now dowable in equity of all the lands of which her husband dies possessed of a beneficiary interest.[2]

§ 324. The general rule in the United States is, that a wife is dowable in equity in all lands of which the husband had a complete equitable title at the time of his death.[3] This rule, it is presumed, would apply in all the States where the common-law principles of dower prevail, except in Maine and Massachusetts, where a wife is not entitled to dower in her husband's equitable estates.[4] The husband also in most States has curtesy in the equitable estates of his wife.[5] But the wife must be actually in possession of her

Attorney-General *v.* Scott, t. Talb. 139; Watt *v.* Ball, 1 P. Wms. 108; Sweetapple *v.* Bindon, 2 Vern. 536; Cunningham *v.* Moody, 1 Ves. 174; Dodson *v.* Hay, 3 Bro. Ch. 405.

[1] Chaplin *v.* Chaplin, 3 P. Wms. 234; Attorney-General *v.* Scott, t. Talb. 139; Burgess *v.* Wheat, 1 Ed. 196; Dixon *v.* Saville, 1 Bro. Ch. 327; Banks *v.* Sutton, 2 P. Wms. 713; Casburne *v.* Casburne, 2 J. & W. 204; Watt *v.* Ball, 1 P. Wms. 109; D'Arcy *v.* Blake, 2 Sch. & L. 388.

[2] 3 & 4 Wm. IV. c. 105; 1 Spence, Eq. Jur. 505.

[3] Shoemaker *v.* Walker, 2 S. & R. 554; Dubs *v.* Dubs, 31 Penn. St. 154; Reid *v.* Morrison, 12 S. & R. 18; Miller *v.* Beverly, 1 Hen. & Munf. 368; Clairborne *v.* Henderson, 3 Hen. & Munf. 322; Lawson *v.* Morton, 6 Dana, 471; Bowie *v.* Berry, 1 Md. Ch. 452; Miller *v.* Stump, 3 Gill, 304; Hawley *v.* James, 5 Paige, 318; Thompson *v.* Thompson, 1 Jones (N. C.), 430; Gully *v.* Ray, 18 Ky. 113; Barnes *v.* Gay, 7 Io. 26; Lewis *v.* James, 8 Humph. 537; Rowton *v.* Rowton, 1 Hen. & Munf. 92; Gillespie *v.* Somerville, 3 St. & P. 447; Robinson *v.* Miller, 1 B. Mon. 93; Smiley *v.* Wright, 2 Ohio, 512; Davenport *v.* Farrar, 1 Scam. 314; Bowers *v.* Keesecker, 14 Io. 301; Peay *v.* Peay, 2 Rich. Eq. 409.

[4] Hamlin *v.* Hamlin, 19 Me. 141; Reed *v.* Whitney, 7 Gray, 533; Lobdell *v.* Hayes, 4 Allen, 187.

[5] Tillinghast *v.* Coggeshall, 7 R. I. 383; Nightingale *v.* Hidden, 7 R. I. 115; Dubs *v.* Dubs, 31 Penn. St. 154; Alexander *v.* Warrance, 17 Mo. 228; Robinson *v.* Codman, 1 Sumn. 128; Houghton *v.* Hapgood, 13 Pick. 154; Rawlings *v.*

equitable interest: a mere right not in possession is not enough to entitle the husband to curtesy.[1] But the husband's curtesy will not be defeated by the negligence of the trustee, as where money is directed to be laid in land in such manner that the husband would have been entitled to his curtesy, and the trustee neglected to invest the money during the life of the wife, the husband was held to be entitled to his curtesy.[2] Nor will a trust for the separate use of the wife exclude the husband's curtesy, if at her decease the estate is to go to her heirs.[3]

§ 325. At common law if a person holding land committed treason or felony, he forfeited his land to the crown; and if he died without heirs, the land escheated to the crown or to his superior lord. Exactly the same incidents applied to land held in trust for another, if the trustee committed a treason or felony, or died without heirs.[4] This rule of law has been changed in England by statute.[5] At the present day the land either will not be forfeited or escheat, or the crown or superior lord will take it subject to the same equities under which the trustee held it. In the United States, either the land would not be forfeited or escheat, by reason of the failure or incapacity of the trustee or his heirs, or the State would hold it, subject to all the equities it was under in the hands of the trustee. It might not go to the State, for the reason that, if trustees are wanting, courts will appoint new trustees; and if, for any reason, the trust estate should vest in the State, care would be taken that all the rights of the *cestui que trust* should be protected. There are statutes in most of the States determining the rights of the *cestui que trust* in such cases.

Adams, 7 Md. 54; and see Fletcher *v.* Ashburner, 1 Bro. Ch. 503, and Amer. notes; 1 Green. Cruise, 147, n.

[1] Parker *v.* Carter, 4 Hare, 413; Sartill *v.* Robeson, 2 Jones, Eq. 510.

[2] Sweetapple *v.* Bindon, 2 Vern. 536; Dodson *v.* Hay, 3 Bro. Ch. 405; Parker *v.* Carter, 4 Hare, 413; Casborne *v.* Scarfe, 1 Atk. 609.

[3] Roberts *v.* Dixwill, 1 Atk. 609; Hearle *v.* Greenbank, 3 Atk. 715; Morgan *v.* Morgan, 5 Mad. 408; Follett *v.* Tyrer, 14 Sim. 125; Bennett *v.* Davis, 2 P. Wms. 316; Tillinghast *v.* Coggeshall, 7 R. I. 383.

[4] Burgess *v.* Wheat, 1 Ed. 177; 1 Bro. Ch. 123; Hovenden *v.* Annesley, 2 Sch. & L. 617; Eales *v.* England, Pr. Ch. 200; Pawlett *v.* Attorney-General, Hard. 467; Attorney-General *v.* Leeds, 2 M. & K. 243; Penn *v.* Baltimore, 1 Ves. 453; Williams *v.* Lonsdale, 3 Ves. Jr. 752; Reeves *v.* Attorney-General, 2 Atk. 223; Geary *v.* Bearcroft, Cart. 67; King *v.* Mildmay, 5 B. & Ad. 254; Wilks's Case, Lane, 54; Scounden *v.* Hawley, Comst. 172.

[5] 4 & 5 Wm. IV. c. 23; 39 & 40 Geo. III. c. 88; Hughes *v.* Wells, 9 Hare, 479; 14 Vic. c. 60.

§ 326. The trustee is so far clothed with the legal title and all its incidents, that he must perform all the duties of the holder of the legal estate.[1]

§ 327. Before the statute of uses, the estate of the *cestui que use* was not forfeited for crime, and did not escheat upon failure of heirs; but the feoffee to uses held the estate absolutely as his own.[2] And the same rule was afterwards followed in regard to trusts.[3] Although it was enacted by statute that the *cestui que use* or *cestui que trust* should forfeit his equitable interest upon conviction for *treason*,[4] yet the law never went further; and if the *cestui que trust* committed a *felony*, so that he could no longer claim his equitable rights, the trustee continued to hold the lands for his own use discharged of the trusts.[5] And so it was held, after great debate in Burgess *v.* Wheat, that if the *cestui que trust* left no heirs, the trust estate of inheritance did not escheat, but that the trustee thenceforth held the estate discharged of the trust.[6] This case has been doubted,[7] but it has been followed as the law.[8] This is upon the principle, that there is no want of a tenant to the land, the trustee being clothed with all the rights of ownership against all the world except the *cestui que trust*, and those claiming under him. But this principle does not apply to chattels, where there can be no tenant, nor to leaseholds,[9] nor to an equity of redemption.[10] In the United States, trustees would hold personal property subject to the right of the State as *ultima hæres*, in case the *cestui que trust*

[1] Wilson *v.* Hoare, 2 B. & Ad. 350; Trinity Coll. *v.* Brown, 1 Vern. 441; 2 Ld. Raym. 994; Bath *v.* Abney, 1 Dick. 260; Carr *v.* Ellison, 3 Atk. 73; 1 Cru. Dig. 305.

[2] Burgess *v.* Wheat, 1 Ed. 199, per Sir Thos. Clarke, M. R.

[3] Attorney-General *v.* Sands, 1 Hale, P. C. 249.

[4] 33 Hen. VIII. c. 20; 1 Hale, P. C. 248.

[5] Attorney-General *v.* Sands, 1 Hale, P. C. 249.

[6] Burgess *v.* Wheat, 1 Ed. 177; 1 Black. 123; 1 Bro. Ch. 123.

[7] Middleton *v.* Spicer, 1 Bro. Ch. 204; Fawcet *v.* Lowther, 2 Ves. 300; Sweeting *v.* Sweeting, 33 L. J. Ch. 211.

[8] Taylor *v.* Haygarth, 14 Sim. 8; 8 Jur. 185; Henchman *v.* Attorney-General, 3 M. & K. 485; Onslow *v.* Wallis, 1 Mac. & G. 506; 1 Hall & T. 513; Rittson *v.* Stordy, 3 Sm. & Gif. 230; Barrow *v.* Wadkin, 24 Beav. 1.

[9] Middleton *v.* Spicer, 1 Bro. Ch. 201; Walker *v.* Dean, 2 Ves. Jr. 170; Barclay *v.* Russell, 3 Ves. 424; Henchman *v.* Attorney-General, 3 M. & K. 485; Taylor *v.* Haygarth, 14 Sim. 8; Cradock *v.* Owen, 2 Sm. & Gif. 241; Bishop *v.* Curtis, 17 Jur. 23; Powell *v.* Merritt, 22 L. J. 208; 1 Sm. & Gif. 381.

[10] Down *v.* Morris, 3 Hare, 394.

died without heirs or next of kin; and it is conceived that they would hold real estate under the same rule.[1]

§ 328. It is the duty of the trustee to defend and protect the title to the trust estate; and, as the legal title is in him, he alone can sue and be sued in a court of law; the *cestui que trust*, the absolute owner of the estate in equity, is regarded in law as a stranger.[2] The rule is carried to the extent that the grantee of the trustee can alone maintain an action upon the legal title, although the conveyance to him was a breach of the trust.[3] A trustee may also maintain an action for any trespass upon the land;[4] but if the *cestui que trust* is in the actual possession of it, he may maintain an action for any injury done to his possession.[5] If, however, the trust is terminated by operation of law or otherwise, and the property has vested in the *cestui que trust*, he may after that time maintain an action upon the title;[6] and so if there has been a conveyance or surrender by the trustees to the *cestui que trust*,[7] or a presumption of a surrender from the fact that the purposes of the trust are all accomplished.[8] If the trustee is in possession, he must sue for all injuries to the possession, and he is the proper person to maintain the claim for damages for flowing the land under the mill acts, or for taking it for railroad purposes, turnpikes, or public highways.[9] In Pennsylvania, however, the action of ejectment is an equitable action, and the *cestui que trust* may maintain the suit if he is entitled to possession, or it may be maintained by

[1] McCaw *v.* Galbraith, 7 Rich. L. 75; Darrah *v.* McNair, 1 Ash. 236; Mathews *v.* Ward, 10 G. & J. 443; 4 Kent, 425.

[2] May *v.* Taylor, 6 M. & Gr. 261; Gibson *v.* Winter, 5 B. & Ad. 96; Allen *v.* Imlett, Holt, 641; Goodtitle *v.* Jones, 7 T. R. 47; Baptist Soc. *v.* Hazen, 100 Mass. 322; Cox *v.* Walker, 26 Me. 504; Beach *v.* Beach. 14 Vt. 28; Moore *v.* Burnett, 11 Ohio, 334; Wright *v.* Douglass, 3 Barb. 59; Mathews *v.* Ward, 10 G. & J. 443; Mordecai *v.* Parker, 3 Dev. 425; Finn *v.* Hohn, 21 How. 481; Hooper *v.* Scheimer, 23 How. 235; Fitzpatrick *v.* Fitzgerald, 13 Gray, 400; Chapin *v.* Universalist Society, 8 Gray, 581; Crane *v.* Crane, 4 Gray, 323; Davis *v.* Charles River Railroad, 11 Cush. 506; Raymond *v.* Holden, 2 Cush. 268; Moody *v.* Farr, 33 Miss. 192.

[3] Reese *v.* Allen, 5 Gilm. 241; Taylor *v.* King, 6 Munf. 358; Canoy *v.* Troutman, 7 Ired. 155.

[4] Walker *v.* Fawcett, 7 Ired. 44.

[5] Cox *v.* Walker, 26 Me. 504.

[6] Nicoll *v.* Walworth, 4 Denio, 385.

[7] Obert *v.* Bordine, 1 Spencer; Hopkins *v.* Ward, 6 Munf. 38; Doggett *v.* Hart, 5 Flor. 215.

[8] Ibid.

[9] Davis *v.* Charles River R.R. Co. 11 Cush. 506.

the trustee.[1] In a few States there are statutes or codes which enact that parties beneficially interested in the subject-matter of the suit shall be made the parties plaintiffs; but the right or duty of trustees, or persons holding the legal title in a fiduciary capacity, to sue is generally provided for.[2] Merely nominal trustees, as officers of a town or parish, cannot sue in their own name.[3]

§ 329. Whether the trustees are entitled to the possession, control, and management of real estate, as against the *cestui que trust*, depends upon the whole scope of the settlement, and the nature of the duties which the trustees are required to perform. If the entire interest is vested in the trustees, and they are to manage the property, keep it insured, and pay taxes, premiums, annuities, and other charges out of the income, the court will imply that the trustees are to have the possession, and will not take it from them, unless there is some very clear intention expressed to control such directions.[4] If the *cestui que trust*, or tenant for life is a *female*, the court will continue the possession in the trustees for her protection in case of marriage.[5] So if the trustees themselves have a beneficial interest, or a reversion or remainder after the death of the tenant for life, the court will continue the possession in them.[6] If, however, the plain intention of the settlement is, that the *cestui que trust* is to have the possession, then all other considerations must give way; as, if it is plain that the settlor intended the estate to be a place of residence for the *cestui que trust*, the intention must be carried out.[7] If the tenant for life takes a *legal* estate, subject to a charge, he will of course be entitled to the possession, so long as he discharges all incumbrances thus put upon the estate.[8] But if the tenant for life allows the annuities or

[1] School Dir. *v.* Dunkleberger, 6 Barr, 29; Presbyterian Cong. *v.* Johnston, 1 W. & S. 56; Kennedy *v.* Fury, 1 Dall. 72; Hunt *v.* Crawford, 3 Penn. 426.

[2] See Codes of New York and Ohio, McGill *v.* Doe, 9 Ind. 306.

[3] Regina *v.* Shee, 4 Q. B. 2; Manchester *v.* Manchester, 17 Q. B. 859; Queen *v.* Commissioners, 15 Q. B. 1012; Connor *v.* New Albany, 1 Blackf. 88.

[4] Tidd *v.* Lister, 3 Mad. 429; Naylor *v.* Arnitt, 1 R. & M. 501; Young *v.* Miles, 10 B. Mon. 290; Blake *v.* Bunbury, 1 Ves. Jr. 194, 514; 4 Bro. Ch. 21; Jenkins *v.* Milford, 1 J. & W. 629; Moseley *v.* Marshall, 22 N. Y. 200; Marshall *v.* Sladen, 4 De G. & Sm. 468.

[5] Ibid.

[6] Ibid.

[7] Tidd *v.* Lister, 3 Mad. 432.

[8] Denton *v.* Denton, 7 Beav. 388; Blake *v.* Bunbury, 1 Ves. Jr. 194; Tidd *v.* Lister, 5 Mad. 432.

other charges to fall in arrears, the trustees must take possession for the security of the annuitants, and must continue the possession until ample security is made for the future.[1] Security may be required in any case where the tenant for life is let into possession.[2]

§ 330. The trustee is entitled to the possession of all personal securities, such as bonds, notes, mortgages, and certificates of stocks, belonging to the trust estate; and he may maintain an action for their delivery, even against the *cestui que trust*.[3] All personal actions for injury to the personal property, or for its detention or conversion, such as trespass,[4] trover,[5] detinue,[6] or replevin,[7] must be brought in the name of the trustee, although the possession is in the *cestui que trust*,[8] and although there may be a defect in the title of the trustee;[9] for the possession of the *cestui que trust* is the possession of the trustee, and in law he is not allowed to dispute the title or possession of his trustee.[10] The action of assumpsit is an equitable action, and, generally, if a promise is made to one for the benefit of another, the person for whose benefit the promise is made may bring the action; but if a promise is made to a trustee for the benefit of the *cestui que trust*, the trustee alone can sue.[11] So only those parties can sue on a contract with whom it is made, unless it is negotiable paper; therefore, substituted trustees cannot sue upon a contract made with their predecessors in the trust, but the suit must be in the names of the

[1] Ibid.

[2] Ibid.; Pugh *v.* Vaughn, 12 Beav. 517; Langston *v.* Ollivant, Coop. 33; Baylies *v.* Baylies, 1 Col. 137.

[3] Jones *v.* Jones, 3 Bro. Ch. 80; Poole *v.* Pass, 1 Beav. 600; Beach *v.* Beach, 14 Vt. 28; Gunn *v.* Barrow, 17 Ala. 743; White *v.* Albertson, 3 Dev. 241; Guphill *v.* Isbell, 8 Rich. L. 463; Presley *v.* Stribling, 24 Miss. 257.

[4] McRaeny *v.* Johnson, 2 Flor. 520.

[5] Hower *v.* Geesaman, 17 S. & R. 251; Poage *v.* Bell, 8 Leigh, 604; Coleson *v.* Blanton, 3 Hayw. 152; Guphill *v.* Isbell, 8 Rich. L. 463; Thompson *v.* Ford, 7 Ired. 418; Schley *v.* Lyons, 6 Ga. 530.

[6] Jones *v.* Strong, 6 Ired. 367; Murphy *v.* Moore, 4 Ired. Eq. 118; Chambers *v.* Mauldin, 4 Ala. 477; Parsons *v.* Boyd, 20 Ala. 112; Stoker *v.* Yelby, 11 Ala. 327; Baker *v.* Washington, 3 Stew. & P. 142; Newman *v.* Montgomery, 5 How. (Miss.) 742.

[7] Presley *v.* Stribling, 24 Miss. 527; Daniel *v.* Daniel, 6 B. Mon. 230.

[8] Jones *v.* Cole, 2 Bail. 330; Wynn *v.* Lee, 5 Ga. 236.

[9] Rogers *v.* White, 1 Sneed, 69.

[10] White *v.* Albertson, 3 Dev. 241.

[11] Treat *v.* Stanton, 14 Conn. 445.

parties with whom it was made, for the benefit of the estate.[1] Generally, all notices and tenders[2] must be made to the trustees; and they must use all due diligence in prosecuting suits in favor of the estate and of the *cestui que trust*, and they must take the proper care in defending such suits; and if appeals are taken from decrees or judgments in favor of the estate, or of the *cestui que trust*, they must duly support the rights of the *cestui que trust* in whatever court the case may be carried.[3] If the *cestui que trust* brings an action in the name of the trustee, the trustee may insist upon indemnity against the costs.[4] If the trustee collusively releases such suit without the consent of the party beneficially interested, the court will set aside the release.[5] So if a trustee discharges a debt or mortgage without payment, the court would set aside the discharge;[6] and if a trustee refuses to bring a suit, or to allow his name to be used, equity will compel him to take such steps as the interest of the estate and of the *cestui que trust* requires.[7] In all such suits in the name of the trustee, a debt due from the *cestui que trust* cannot be set off.[8]

§ 331. The trustee, being liable for a breach of the trust, if he permits any misapplication of the funds, should of course have the possession and control of all personal property. So all the duties and privileges which attach to such property pertain to him. If the property consists of stocks in corporations, he may attend corporate meetings, vote, and hold office by virtue of such stock.[9]

[1] Binney *v.* Plumly, 5 Vt. 500; Ingersoll *v.* Cooper, 5 Blackf. 420; Davant *v.* Guerard, 1 Spear, 242; Wake *v.* Tinkler, 16 East, 36.

[2] Chahoon *v.* Hollenback, 16 S. & R. 425; Henry *v.* Morgan, 2 Binn. 497.

[3] Wood *v.* Burnham, 6 Paige, 513.

[4] Ins. Co. *v.* Smith, 11 Penn. St. 120; Annesley *v.* Simeon, 4 Mad. 390; Roden *v.* Murphy, 10 Ala. 804.

[5] Anon., Salk. 260; Bauerman *v.* Radenius, 7 T. R. 670; Legh *v.* Legh, 1 B. & P. 447; Payne *v.* Rogers, Doug. 407; Manning *v.* Cox, 7 Moore, 617; Hickey *v.* Burt, 7 Taunt. 48; Barker *v.* Richardson, 1 Y. & J. 362; Roden *v.* Murphy, 10 Ala. 804; Greene *v.* Beatty, Coxe, 142; Kirkpatrick *v.* McDonald, 11 Penn. St. 387.

[6] Woolf *v.* Bate, 9 B. Mon. 210.

[7] Blin *v.* Pierce, 20 Vt. 25; Chisholm *v.* Newton, 1 Ala. 371; Robinson *v.* Mauldin, 11 Ala. 978; Welch *v.* Mandeville, 1 Wheat. 233; Parker *v.* Kelly, 10 Sm. & M. 184; McCullum *v.* Coxe, 1 Dall. 139.

[8] Wells *v.* Chapman, 4 Sand. Ch. 312; Campbell *v.* Hamilton, 4 Wash. C. C. 93; Woolf *v.* Bate, 9 B. Mon. 211; Beale *v.* Coon, 2 Watts, 183; Tucker *v.* Tucker, 4 B. & Ad. 745; Porter *v.* Morris, 2 Harr. 509.

[9] Matter of Barker, 6 Wend. 509; *Re* Phœnix Life Assur. Co., 2 J. & H. 279.

So the trustee is rated or assessed for taxes, and must see that the taxes upon the trust property are paid. The statutes of the various States determine the localities where such property shall be assessed: real estate is generally assessed in the parish, town, or county where it is situated; and personal property, either in the place of the domicile of the trustee or of the *cestui que trust*, as the statutes of a State may direct. In the absence of a statute, the law would look upon the trustee as the owner, and assess the property at his domicile.[1]

§ 332. The trustee must prove a debt against a bankrupt debtor of the estate, as he is the person to receive the dividend;[2] but in special cases the concurrence of the *cestui que trust* may be required, as where he may have a right to receive the payment.[3]

§ 333. In England, trustees had at common law the right to vote for local officers and for members of parliament, by virtue of the qualification conferred upon them by the trust property, if it was sufficient in amount. Statutes have, however, changed the common law, and given the right in most cases to the *cestui que trust*. In the United States, property qualifications of voters are generally abrogated.

§ 334. Trustees of real or personal estate may *at law*, sell, convey, assign, or incumber the same, as if they were the beneficial owners,[4] and each of several trustees may exercise all his rights of ownership. If the trustees are joint-tenants, each may receive the rents,[5] and each may sever the joint-tenancy by a conveyance of his share,[6] and each may collect the dividends on stocks. The general power of a trustee to sell and convey the estate is coextensive with his ownership of the legal title; and this general power over the legal title is entirely distinct from the execution of a special power given in respect to the sale of an estate. Though the trustee may thus sell, even in breach of the trust, a conveyance without consideration will not injure the *cestui que trust;* as the grantee, who

[1] Latrobe *v.* Baltimore, 19 Md. 13; Green *v.* Mumford, 4 R. I. 313; and see the statutes of the various States.

[2] *Ex parte* Green, 2 Dea. & Ch. 116.

[3] *Ex parte* Dubois, 1 Cox, 310; *Ex parte* Buther, Buck, 426; *Ex parte* Gray, 4 Dea. & Ch. 778; *Ex parte* Dickenson, 2 Dea. & Ch. 520.

[4] Shortz *v.* Unangst, 3 W. & S. 55; Canoy *v.* Troutman, 7 Ired. 155.

[5] Townley *v.* Sherborne, Bridg. 35.

[6] Boursot *v.* Savage, L. R. 2 Eq. 134.

is a volunteer, will hold upon the same trusts as the trustee held, and if the purchaser for a valuable consideration have notice of the trust he will still hold the estate upon trust.[1] In New York, however, a statute has converted the trustee's ownership of the legal title into a power; and where a trust is expressly created by a written instrument, every sale in breach or contravention of the trust is declared to be absolutely void, even if the sale is under the sanction of a court.[2] Whether a trustee intends to convey an estate is frequently a question made upon conveyances, and it has been determined that a general assignment of all the trustee's estates, for the benefit of his creditors, does not pass estates held by him in trust.[3]

§ 335. As among the incidents of the trustee's legal title in the trust estate is his power to sell it, so he may devise it by his last will and testament. The principal question that here arises is, whether the words of the will of a trustee embrace estates held by him in trust, for a trust estate will not in all cases pass by the same words as would pass the beneficial ownership; for wherever an estate passes, not by operation of law, but by the intention of any one, it is necessary to find the intention from the instrument under the circumstances in which it is made; and an intention to devise a trust estate is not so readily inferred as an intention to devise a beneficial estate.

§ 336. An assignment in general words by a trustee of all his estate for his creditors will not pass a trust estate, for the reason that the court will not presume that the trustee intended to commit a breach of trust; for a similar reason it has at times been said that a devise of all a trustee's estates in general words would not operate upon estates that he held in trust, unless there appeared a positive intention that they should so pass.[4] The question was finally considered by Lord Eldon; and, after a careful examination, the rule was declared to be, that "where the will contained words large enough, and there was no expression authorizing

[1] See *ante*.

[2] Cruger *v.* Jones, 18 Barb. 468.

[3] Ludwig *v.* Highley, 5 Barr, 132.

[4] Casborne *v.* Scarfe, 1 Atk. 605; Strode *v.* Russell, 2 Vern. 625; Leeds *v.* Munday, 3 Ves. 348; *Ex parte* Sergison, 4 Ves. 147; *Ex parte* Bowes, cited note 1 Atk. 605; Pickering *v.* Vowles, 1 Bro. Ch. 198; Att'y-Gen. *v.* Buller, 5 Ves. 340.

a narrower construction, nor any such disposition of the estate as it was unlikely a testator would make of property not his own, in such case the trust property would pass." [1] Mr. Hill states the rule, "that a general devise of real estate will pass estates vested in the testator as trustee or mortgagee, unless a contrary intention can be collected from the expressions of the will, or from the purposes or limitations to which the devised lands are subjected." [2] This general rule is acted upon in the United States.[3]

§ 337. Notwithstanding the rule, that a trust estate will pass by general words in a devise, unless there is something in the will to show a contrary intention, there has continued to be a conflict of opinion upon the propriety of the rule, and more conflict upon its application. But a charge of debts, legacies, and annuities upon the estate devised, or a power given to sell it, is an indication that the testator did not intend that the trust estate should pass under the words of his devise, for the reason that he could not have intended that his devisee should do that with the estate which would be a breach of trust.[4] So if there is a limitation of the estate in strict settlement, with a great number of complicated conditions, contingencies, remainders and limitations, it will not be presumed that a trustee intended to devise a dry trust in a legal title upon such terms, and the estate will not pass under general words;[5] so if the devise is to A. in tail with remainder over in strict settlement;[6] so a devise to a testator's nephews and nieces in equal shares as ten-

[1] Braybrooke *v.* Inskip, 8 Ves. 436; Roe *v.* Read, 8 T. R. 118; *Ex parte* Morgan, 10 Ves. 101; Langford *v.* Auger, 4 Hare, 313; Linsell *v.* Thacher, 12 Sim. 178; *Ex parte* Shaw, 8 Sim. 159; Hawkins *v.* Obeen, 2 Ves. 559.

[2] Hill on Trustees, 283.

[3] Taylor *v.* Benham, 5 How. 270; Heath *v.* Knapp, 4 Barr, 228; Jackson *v.* Delancy, 13 John. 537; Hughes *v.* Caldwell, 11 Leigh, 342; Merritt *v.* Farmers' Ins. Co., 2 Edw. 547; Ballard *v.* Carter, 5 Pick. 112; Asay *v.* Hoover, 5 Barr, 35; Richardson *v.* Woodbury, 43 Me. 206; Drane *v.* Gunter, 19 Ala. 731.

[4] Rackham *v.* Siddall, 16 Sim. 297; 1 Mac. & G. 607; Hope *v.* Liddell, 21 Beav. 183; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J., 58; Wall *v.* Bright, 1 J. & W. 494; Leeds *v.* Munday, 3 Ves. 348; *Ex parte* Marshall, 9 Sim. 555; *Re* Morley's Trusts, 10 Hare, 293; Sylvester *v.* Jarman, 10 Price, 78; Roe *v.* Reade, 8 T. R. 118; Att'y-Gen. *v.* Buller, 5 Ves. 339; *Ex parte* Morgan, 10 Ves. 101; *Ex parte* Brettell, 6 Ves. 577; Merritt *v.* Farmers' Ins. Co., 2 Edw. Ch. 547.

[5] Braybrooke *v.* Inskip, 8 Ves. 434.

[6] Thompson *v.* Grant, 4 Mad. 438; *Ex parte* Bowes, cited 1 Atk. 603; Galliers *v.* Moss, 9 B. & Cr. 267; *Re* Horsfall, 1 M'Clel. & Y. 292.

ants in common, is to a class not ascertained at the date of the will, and will not by general words pass a trust estate.[1] So a devise to a woman for her separate use imports a beneficial use, and not a dry legal estate, and the trust estate would not pass to her under general words.[2] But a devise to a woman, her heirs and assigns, to her and their own sole and absolute use, passes the estate for the reason that there is nothing inconsistent with their holding the absolute use in trust;[3] and a devise to A. and B. to be equally divided between them, as tenants in common, and their respective heirs, will pass the estate.[4] A devise of all my estates will pass trust property.[5] So a devise to A., his heirs, and assigns to and for his and their own use and benefit;[6] and a devise to A. and her heirs, to be disposed of, by her will or otherwise, as she shall think fit,[7] will pass trust property under general words, for there is no necessary breach of the trust.

§ 338. The interest of a *mortgagee in fee* in the mortgaged land stands upon a somewhat different ground. The mortgagee has a debt due him which is the principal thing, and the mortgage is a beneficial interest in the land as security for the debt. This interest generally goes with the debt. Therefore a general devise of all securities for moneys would carry the mortgagee's right and interest in the mortgage, and, as a consequence, in the land covered by the mortgage.[8] In such case neither a general trust to sell and convert, nor a charge of debts would prevent it from passing.[9] But if there are special trusts for sale, or other special charges annexed to the devise, inconsistent with the idea of holding the

[1] *Re* Finney's Est., 3 Gif. 465.

[2] Lindsell *v.* Thacher, 12 Sim. 178; the case itself, not the marginal note.

[3] Lewis *v.* Mathews, L. R. 2 Eq. 177.

[4] *Ex parte* Whiteacre, cited Lewin on Trusts, 186; 1 Saund. Uses & Tr. 359; *Re* Morley's Trusts, 10 Hare, 293.

[5] Braybrooke *v.* Inskip, 8 Ves. 425.

[6] *Ex parte* Shaw, 8 Sim. 159; Bainbridge *v.* Ashburton, 2 Y. & C. 347; Sharpe *v.* Sharpe, 12 Jur. 598; *Ex parte* Brettell, 6 Ves. 577; Heath *v.* Knapp, 4 Barr, 228.

[7] Ibid.

[8] *Ex parte* Barber, 5 Sim. 451; Doe *v.* Benett, 6 Exch. 892; *Re* Cantley, 17 Jur. 124; King's Mort., 5 De G. & Sm. 644; Knight *v.* Robinson, 2 K. & J. 503; Rippen *v.* Priest, 13 C. B. (N. S.) 508; Ballard *v.* Carter, 5 Pick. 112; Asay *v.* Hoover, 5 Barr, 35; Richardson *v.* Woodbury, 43 Me. 206.

[9] *Ex parte* Barber, 5 Sim. 451; Mather *v.* Thomas, 6 Sim. 119; Field's Mort., 9 Hare, 414, overruling Benvoize *v.* Cooper, 10 Price, 78, and in opposition to Doe *v.* Lightfoot, 8 M. & W. 553.

estate as security for money, it would not pass under a general devise.[1]

§ 339. In allowing a trust estate to pass under general words of a devise, it is assumed that the testator does not intend by his devise to commit a breach of the trust. It is simply a question, whether the testator has devised, or can or should devise a trust estate, or whether he should allow it to descend to his heir or legal representatives. It was said in Cook *v.* Crawford, that it was not lawful for the trustee to dispose of the estate, but that he ought to permit it to descend; that a devise did not differ from a deed *inter vivos;* and that it was only a *post mortem* conveyance.[2] On the other hand, it is said that there is a wide distinction between a conveyance and a devise. That during the trustee's lifetime there was a personal trust and confidence in his discretion, which he could not delegate; that the settlor could have reposed no confidence in the heir, for he could not know beforehand who the heir would be; that if the estate was allowed to descend, it might become vested in married women, infants, bankrupts, or persons out of the jurisdiction of the court; and that therefore it could not be a breach of trust for a trustee to devise the estate by will to persons capable of executing it, or of transferring it to other trustees.[3] Mr. Lewin concludes from these observations, that whether the devise of the trust estate is proper or not depends upon the circumstances of each case. If the heir is a fit person to execute the trust, the testator ought not to intercept the descent and pass the legal estate to another, and especially not to an unfit person. In such case the estate of the testator might be liable for the costs of restoring the trust estate to its proper channel or to proper trustees. If, however, the heir is an unfit person, as an infant, bankrupt, insolvent, lunatic, married woman, or out of the jurisdiction, it may be proper to devise the estate.[4] And this seems to be the result of the authorities.[5]

§ 340. It does not follow that the devisee can execute the trust from the fact that the legal title is devised to him, nor does it follow that the heir can execute the trust from the fact that the legal title descends to him. How far either can execute the trust de-

[1] *Re* Cantley, 17 Jur. 123.

[2] Cook *v.* Crawford, 13 Sim. 98; and see Beasley *v.* Wilkinson, 13 Jur. 649.

[3] Titley *v.* Wolstenholme, 7 Beav. 435; Macdonald *v.* Walker, 14 Beav. 556; Wilson *v.* Bennett, 5 De G. & Sm. 479.

[4] Lewin, 187, 188.

[5] Beasley *v.* Wilkinson, 13 Jur. 649.

pends upon the intention of the settlor, to be gathered from the terms of the instrument. Thus, if an estate is so vested in A. that A. alone shall *personally* execute the trust, neither the heir nor the devisee of A. could execute it, although holding the legal title.[1] As if an estate is vested in A. and his heirs upon a trust to sell, and A. devises the estate, neither the heir nor the devisee can sell: for the heir has nothing in the estate to sell, it having gone to the devisee; and the devisee has no power, he not being mentioned in the original settlement.[2] So, where property was vested in two trustees, their executors and administrators in trust, and the surviving trustee devised the property to A. and B., and appointed A., B., and C. executors, the court refused to hand over the property to A. and B., for the reason that devisees were not named as parties who could execute the trust; and the court refused to hand it over to the executors for the reason that the legal title was given away from them; new trustees were therefore appointed to receive the property and execute the trust.[3] But where the word *assigns* is part of the limitation of the estate to trustees, as where an estate is vested in A., his heirs, executors, administrators, and *assigns* in trust, and A. devises the estate, the devisee may execute the trust, for the reason that he comes within the limitation of the persons who may take the trust property and execute the trust.[4] This principle has been doubted and criticised,[5] but it seems to be acted upon in the English courts.[6]

§ 341. In New York, Michigan, and Wisconsin, trust property, upon the death of the surviving trustee, does not descend to the heir, nor can it be devised, but it vests in the court, and will be administered by the court by the appointment of new trustees to execute the trust. In the other States the trust estate descends to the heir, or vests in the devisee, as the legal title must go somewhere in the absence of a statute, upon the death of the surviving

[1] Mortimer *v.* Ireland, 6 Hare, 196; 11 Jur. 721; Ockleston *v.* Heap, 1 De G. & Sm. 640.

[2] Ibid.; Cook *v.* Crawford, 13 Sim. 91; Stevens *v.* Austen, 7 Jur. (N. S.) 873; Wilson *v.* Bennett, 5 De G. & Sm. 475.

[3] *Re* Burtt's Est., 1 Dr. 319; McDonald *v.* Walker, 14 Beav. 556.

[4] Titley *v.* Wolstenholme, 7 Beav. 425; Saloway *v.* Strawbridge, 1 K. & J. 371; 7 De G., M. & G. 594.

[5] Ockleston *v.* Heap, 1 De G. & Sm. 642.

[6] Mortimer *v.* Ireland, 6 Hare, 196; 11 Jur. 721; Ashton *v.* Wood, 3 Sm. & Gif. 436; Hall *v.* May, 3 K. & J. 585; Lane *v.* Debenham, 11 Hare, 188.

trustee. Courts in the United States do not have occasion often to consider the question, whether the heir or devisee can execute the trust, as new trustees can be appointed in any case at the desire of the parties, and, in many States, the trust property may be vested in the new trustees by an order of the court. In most cases, it would simply be a question whether the words of the will were comprehensive enough to pass the trust estate, or whether it had descended to the heir; and this question would be important only in determining who should make a conveyance of the trust property to the new trustees, if it became necessary that a conveyance should be made.

§ 342. If an owner of real estate contracts to sell it, he becomes a trustee of the legal title for the vendee; and if he dies before conveying the legal title, it will descend to his heir or heirs, as the legal title must vest somewhere; and so he may devise it; and the heir, in case it descends, and the devisee, in case it is devised, may be called upon to convey it to the vendee.[1] In Massachusetts, there is a statute, authorizing the vendor's executor or administrator to convey such estate, under the direction of the Court of Probate.[2]

§ 343. Trust property is generally limited to trustees, as joint-tenants; and if by the terms of the gift it is doubtful, whether the trustees take as joint-tenants, or tenants in common, courts will construe a joint-tenancy if possible, on account of the inconvenience of trustees holding as tenants in common; and, where statutes have abolished joint-tenancy, an exception is generally made in the case of trustees. Therefore, upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on to the last survivor; and upon the death of the last survivor, if he has made no disposition of the estate by will or otherwise, it devolves upon his heirs, if real estate, and upon his executors or administrators if it is personal estate.[3] The title in the surviving trustee is complete, and

[1] Wall *v.* Bright, 1 J. & W. 494; Read *v.* Read, 8 T. R. 118.

[2] Gen. Stat. c. 117, §§ 5 and 6; Reed *v.* Whitney, 7 Gray, 533.

[3] Whiting *v.* Whiting, 4 Gray, 236; Moses *v.* Murgatroyd, 1 John. Ch. 119; De Peyster *v.* Ferrars, 11 Paige, 13; Shook *v.* Shook, 19 Barb. 653; Shortz *v.* Unangst, 3 W. & S. 45; Gray *v.* Lynch, 8 Gill, 404; Mauldin *v.* Armstead, 14 Ala. 702; Powell *v.* Knox, 16 Ala. 364; Richeson *v.* Ryan, 15 Ill. 13; Stewart *v.* Pettus, 10 Mo. 755; Jenks *v.* Backhouse, 1 Binn. 91; King *v.* Leach, 2 Hare, 59.

no breaches of trust after the death of his cotrustees can be charged upon their estate;[1] nor can the representatives of his cotrustees interfere with his management of the trust estate, even if he is insolvent or unfit for the trust.[2] The *cestui que trust* alone can interfere or apply to the court for redress or relief. So all rights of action are in the surviving trustee, and he may sue in his own name or as survivor, according as the cause of an action accrued before or after the death of his cotrustees;[3] and, in case of his death, his executor or administrator may continue the action.[4]

§ 344. So absolute is the rule that the heir or administrator takes the trust property upon the death of the last surviving trustee, that a husband, as administrator of his wife, takes the personal property that she held in trust, but he must hold it upon the original trust.[5] In England, the heir, in case of real estate in trust, or the executor, in case of personal, is competent to administer and execute the trusts, but they cannot execute discretionary trusts confided *personally* to the original trustee, unless the power and confidence are also confided in them by the instrument.[6] In the United States, the heirs or executors will take the trust property, and they must settle the accounts of the testator in relation to the trust. They must also see that the property is protected and preserved, but they are not under any obligation to execute the trust. They may decline the office, and generally the court will appoint new trustees to succeed to the original trustees. If the heirs or executors continue to act as trustees, they will be liable for no past breaches of trust, but only for breaches that occur under their own management.[7]

§ 345. It has been before stated that a general assignment for creditors does not pass a trust estate. In such case, it requires

[1] See *post*.

[2] Shook *v.* Shook, 19 Barb. 653.

[3] Richeson *v.* Ryan, 15 Ill. 13; Wheatley *v.* Boyd, 7 Exch. 20.

[4] Nichols *v.* Campbell, 10 Grat. 561; Powell *v.* Knox, 16 Ala. 364; Mauldin *v.* Armstead, 14 Ala. 702.

[5] Kuster *v.* Howe, 3 Ind. 268.

[6] Mansell *v.* Mansell, Wilm. 36; Cook *v.* Crawford, 13 Sim. 91; Hall *v.* Dewes, Jac. 189; Peyton *v.* Bury, 2 P. Wms. 626; Bradford *v.* Belfield, 2 Sim. 264; Cole *v.* Wade, 16 Ves. 27; Sharp *v.* Sharp, 2 B. & Ald. 405. See Townsend *v.* Wilson, 1 B. & Ald. 608.

[7] Baird's App., 3 W. & S. 459.

special words to vest the estate in an assignee. So an assignment in bankruptcy of all the trustee's property does not pass estates which the bankrupt holds in trust.[1] If the bankrupt by a breach of trust has converted the trust estate into other property, the *cestui que trust* may follow it into the hands of the assignee, so far as he can identify the particular property obtained by breach of the trust.[2] But if the trust property has become so amalgamated with the general mass of the bankrupt's estate that it cannot be traced or identified, the *cestui que trust* must prove his claim.[3] If an assignee should get possession of the trust estate, and refuse to restore it, the trustee, though a bankrupt, may maintain a suit for its restoration, or the *cestui que trust* may have a bill for the appointment of new trustees, and the conveyance of the property to them.[4] But if a bankrupt trustee has a beneficial interest in the trust property, it will pass to his assignee; and the assignee will hold the bankrupt's beneficial interest in trust for his creditors, and the remainder of the property in trust for the other parties beneficially interested.[5]

§ 346. It is now a universal rule that all those who take under the trustee, except purchasers for a valuable consideration without notice, take subject to the trust, and they must either execute the trust themselves, or convey the property to new trustees appointed by the court. Thus the heir, executor, administrator, devisee, and the assignee by deed or in bankruptcy, are bound by the trust; so are those who take dower or curtesy in the trust estate, or a creditor who levies an execution upon it. If the trust estate is forfeited to the crown or the State, it is still subject to the trust; so if it escheats upon the failure of heirs. But a disseisor is not an *assignee* of the trustee; he holds a wrongful title of his own, adversely to the trust. The *cestui que trust* has no remedy in such case, except to procure the trustee to bring an action upon his legal title to recover the possession. The *cestui que trust* could not maintain a suit in equity to compel the disseisor to hold upon the same trusts

[1] Scott *v.* Surman, Willes, 402.

[2] Taylor *v.* Plumer, 3 M. & S. 562; *Ex parte* Sayers, 5 Ves. 169.

[3] *Ex parte* Dumas, 1 Atk. 232; Ryall *v.* Rolle, 1 Atk. 172; Scott *v.* Surman, Willes, 403.

[4] Winch *v.* Keely, 1 T. R. 619; Carpenter *v.* Marnell, 3 B. & P. 40.

[5] Carpenter *v.* Marnell, 3 B. & P. 40; Parnham *v.* Hurst, 8 M. & W. 743; D'Arnay *v.* Chesneau, 13 M. & W. 809; Leslie *v.* Guthrie, 1 Bing. N. C. 697; Boddington *v.* Castelli, 1 El. & Bl. 879.

as the trustee; for there is no privity between the disseisor and disseisee.[1] The only remedy of the *cestui que trust* is against the trustee; and if he refuses to bring an action to recover the estate, he may be removed and a new trustee appointed.

§ 347. Where the legal and equitable estate in the same land becomes vested in the same person, the equitable will merge in the legal estate; for a man cannot be a trustee for himself, nor hold the fee, which embraces the whole estate, and at the same time hold the several parts separated from the whole.[2] But in order that this may be true, the two estates must be commensurate with each other; or the legal estate must be more extensive or comprehensive than the equitable. The equitable fee cannot merge in a partial or particular legal estate.[3] And there will be no merger, if it is contrary to the intention of the parties.[4] If A. should convey lands to B. in trust for C. and her heirs, and C. should be the heir of B., upon the death of B. the legal title would descend to C., and thus both the legal and equitable title would meet in C.; but if C. was a married woman, and it was plainly the intention of the grantor or settlor, to be gathered from the whole instrument, that the trust should not cease, but continue an active trust, the court would not allow the equitable estate to merge in the legal, but a new trustee would be appointed to take the legal title.[4] Of

[1] Finch's Case, 4 Inst. 85; Gilbert on Uses by Sugd. 249; Reynolds *v.* Jones, 2 Sim. & S. 206; Turner *v.* Buck, 22 Vin. Ab. 21; Doe *v.* Price, 16 M. & W. 603.

[2] Wade *v.* Paget, 1 Bro. Ch. 363; Selby *v.* Alston, 3 Ves. 339; Phillips *v.* Bridges, 3 Ves. 126; Goodright *v.* Wells, Doug. 747; Finch's Case, 4 Inst. 85; Harwood *v.* Oglander, 8 Ves. 127; Creagh *v.* Blood, 3 Jones & L. 133; James *v.* Morey, 2 Cow. 246; Mason *v.* Mason, 2 Sandf. Ch. 433; James *v.* Johnson, 6 John. Ch. 417; Cooper *v.* Cooper, 1 Halst. Ch. 9; Healy *v.* Alston, 25 Miss. 190; Brown *v.* Bontee, 10 Sm. & M. 268; Lewis *v.* Starke, 10 Sm. & M. 128; Nicholson *v.* Halsey, 1 John. Ch. 422; Butler *v.* Godley, 1 Dev. 94; Hopkinson *v.* Dumas, 42 N. H. 306; Gardner *v.* Gardner, 3 John. Ch. 53; Downes *v.* Grazebrook, 3 Mer. 208; Ayliff *v.* Murray, 2 Atk. 59; Wills *v.* Cooper, 1 Dutch. N. J. 137; Habergham *v.* Vincent, 2 Ves. Jr. 204.

[3] Selby *v.* Alston, 3 Ves. 339; Hunt *v.* Hunt, 14 Pick. 374; Donalds *v.* Plumb, 8 Conn. 453; James *v.* Morey, 2 Cow. 284; Goodright *v.* Wells, Doug. 771; Phillips *v.* Bridges, 3 Ves. 125; Robinson *v.* Cuming, t. Talbot, 164; 1 Atk. 475; Boteler *v.* Allington, 1 Bro. Ch. 72; Buchanan *v.* Harrison, 1 John. & Hen. 662; Merest *v.* James, 6 Mad. 118; Habergham *v.* Vincent, 2 Ves. Jr. 204.

[4] Gardner *v.* Astor, 3 John. Ch. 53; James *v.* Morey, 2 Cow. 246; Mechanics' Bank *v.* Edwards, 1 Barb. S. C. 272; Starr *v.* Ellis, 6 John. Ch. 393; Donald *v.*

course, in law the estates will merge wherever the interests meet; but courts of equity will preserve the estates separate, where the rights or interests of the parties require it. If the trustee acquires the equitable interest by any breach of his duty, or by fraud, the courts would not allow it to merge.[1] So if there are intervening heirs who would be squeezed out, the estates will not merge.[2] So if the legal estate comes to the *cestui que trust* by a conveyance which turns out to be void, there will be no merger.[3] Whether charges upon an estate, as mortgages, will merge in the legal title, upon being paid off, depends upon the intention of the parties, and frequently upon the interests and equities between them.[4]

§ 348. Thus if a tenant for life pays off a charge or incumbrance upon an estate, it will be considered that, as his interest ceases with his life, he could never have intended that the charge should be extinguished, and not survive for the benefit of his representatives.[5] And the same rule applies, though the tenant for life may be ultimately entitled to the reversion in fee, subject to remainders which fail.[6] Even in this case, evidence may be given that the tenant for life intended the charge to be merged and extinguished.[7] A tenant in tail in possession has the power to convert the estate into an absolute fee; therefore if he pays off an incumbrance, the presumption is that he intended it to merge.[8]

Plumb, 8 Conn. 453; Den *v.* Vanness, 5 Halst. 102; Hunt *v.* Hunt, 14 Pick. 374; Nurse *v.* Yerwarth, 3 Swans. 608; Saunders *v.* Bournford, Finch, 424; Thom *v.* Newman, 3 Swans. 603; Mole *v.* Smith, Jac. 490.

[1] 1 Spence, Eq. Jur. 572.

[2] Lewis *v.* Stark, 10 Sm. & M. 128.

[3] Elliott *v.* Armstrong, 2 Blackf. 208; Buchanan *v.* Harrison, 1 John. & H. 662; Brandon *v.* Brandon, 31 L. J. Ch. 47.

[4] Hunt *v.* Hunt, 14 Pick. 374; Johnson *v.* Webster, 4 De G., M. & G. 474; Tyrwhitt *v.* Tyrwhitt, 32 Beav. 244; Morley *v.* Morley, 25 L. J. Ch. 1; Compton *v.* Oxden, 2 Ves. Jr. 264; Forbes *v.* Moffatt, 18 Ves. 390; Horton *v.* Smith, 4 K. & J. 630; Tomlinson *v.* Steers, 3 Mer. 210; Smith *v.* Phillips, 1 Keen, 694; Medly *v.* Horton, 14 Sim. 226; Brown *v.* Stead, 5 Sim. 535; Parry *v.* Wright, 1 S. & S. 369; 5 Russ. 542; Mocatta *v.* Murgatroyd, 1 P. W. 193; Greswold *v.* Marsham, 2 Ch. Ca. 170; Garnett *v.* Armstrong, 2 Conn. & Laws. 458; Watts *v.* Symes, 16 Sim. 646; Cooper *v.* Cartwright, 1 John. 679.

[5] Pitt *v.* Pitt, 22 Beav. 294; Burrell *v.* Egremont, 7 Beav. 205; Redington *v.* Redington, 1 B. & B. 139; Faulkner *v.* Daniel, 3 Hare, 217.

[6] Wyndham *v.* Egremont, Amb. 753; Trevor *v.* Trevor, 2 M. & K. 675.

[7] Astley *v.* Milles, 1 Sim. 298.

[8] St. Paul *v.* Dudley, 15 Ves. 173; Buckinghamshire *v.* Hobart, 3 Swans. 199; Jones *v.* Morgan, 1 Bro. Ch. 206.

But if the estate of the tenant in fee-simple or in tail is subject to any executory limitations that may defeat their estate, or if they pay off the charges under any mistake as to their title, the court would not allow the charges to merge or become extinguished.[1] But if a person pays or takes up the charges or incumbrances, and afterwards the legal title should come to him, the charges would merge.[2] So if a person, having the legal title and holding charges and incumbrances upon the estate, conveys in fee or in mortgage, and makes no mention of the charges or incumbrances, they would merge as between the grantor and grantee.[3] Generally, where the owner in fee-simple pays off a charge or incumbrance on an estate, the presumption of law is that such charge or incumbrance will merge;[4] but if he owns only a partial interest, the presumption is that the charge was to be kept on foot.[5]

§ 349. Sometimes where an estate has been vested by deed or will in trustees for a *cestui que trust*, whether it is a fee or some lesser estate, the law will presume that the trustees have surrendered, conveyed, or assigned the estate, whatever it was, to the *cestui que trust*.[6] This presumption of law is necessary for the quieting of titles. If such presumptions could not be made, some titles would remain for ever imperfect. There might be an outstanding legal estate, which would at any time defeat the tenant, if

[1] Drinkwater *v.* Combe, 2 S. & S. 340; Shrewsbury *v.* Shrewsbury, 3 Bro. Ch. 120; 1 Ves. Jr. 227; Wigsell *v.* Wigsell, 2 S. & S. 364; Horton *v.* Smith, 4 K. & J. 624; Buckinghamshire *v.* Hobart, 3 Swans. 199; Kirkham *v.* Smith, 1 Ves. 528.

[2] Horton *v.* Smith, 4 K. &. J. 624; Trevor *v.* Trevor, 2 M. & K. 675; Wigsell *v.* Wigsell, 2 S. & S. 364.

[3] Tyler *v.* Lake, 4 Sim. 351; Johnson *v.* Webster, 4 De G., M. & G. 474.

[4] Hood *v.* Phillips, 3 Beav. 513; Pitt *v.* Pitt, 22 Beav. 294; Gunter *v.* Gunter, 23 Beav. 571; Swinfen *v.* Swinfen, 29 Beav. 199; Tyrwhitt *v.* Tyrwhitt, 32 Beav. 244.

[5] Price *v.* Gibson, 2 Ed. 115; Swinfen *v.* Swinfen, 29 Beav. 199; Compton *v.* Oxenden, 2 Ves. Jr. 263; Donisthorpe *v.* Porter, 2 Ed. 162.

[6] England *v.* Slade, 4 T. R. 682; Wilson *v.* Allen, 1 J. & W. 611; Noel *v.* Bewley, 3 Sim. 103; Cooke *v.* Salton, 2 S. & S. 154; Hillary *v.* Waller, 12 Ves. 239; Lade *v.* Holford, Bul. (N. S.) 110; Doe *v.* Hilder, 2 B. & Ald. 782; Emery *v.* Grocock, 6 Mad. 54; Townshend *v.* Champernown, 1 Y. & J. 583; Goodtitle *v.* Jones, 7 T. R. 47; Doe *v.* Sybourn, 7 T. R. 2; Moore *v.* Jackson, 4 Wend. 59; Dutch Church *v.* Mott, 7 Paige, 77; Jackson *v.* Moore, 13 John. 513; 1 Green. Cruise, Dig. 412; Matthews *v.* Ward, 10 Gill & J. 443; Jackson *v.* Pierce, 2 John. 226; Sinclair *v.* Jackson, 8 Cow. 543.

there could not be a presumption of a conveyance or surrender by the trustee to the *cestui que trust.* This presumption is somewhat different from that prescription by which one tenant by an open, peaceable, and adverse occupation under a claim of right, obtains the legal title as against another person. In such case, after a definite period of time, a grant or conveyance is presumed in favor of the tenant in occupation, though it may be well enough understood that no such grant or conveyance was ever made. So there may be a presumption that a trustee has conveyed to the *cestui que trust*, though such presumption may not always be founded on a belief that such conveyance was actually made.[1] There is another difficulty between trustees and *cestuis que trust* which does not exist between adverse claimants of the same legal title. 'The titles of the trustee and *cestui que trust* are not adverse to each other, and generally the possession of the *cestui que trust* is the possession of the trustee; at any rate it is generally consistent with the legal title of the trustee. Therefore, mere length of time as between trustee and *cestui que trust* will afford no ground for a presumption of a conveyance or surrender from the trustee to the *cestui que trust*,[2] as *cestuis que trust* may occupy the estate indefinitely under a merely equitable title.

§ 350. This presumption has been discussed at length in several cases, and some difference of opinion has been expressed;[3] but it seems now to be well settled that three circumstances must concur in order to raise the presumption of a conveyance or surrender by the trustee to the *cestui que trust:* (1.) It must have been the duty of the trustee to make the conveyance; (2.) There must be some sufficient reason to support the presumption; (3.) The presumption must be in support of a just title and not to defeat it.

§ 351. Thus where the *cestui que trust* becomes absolutely entitled to the whole beneficial interest in the trust estate, and the active duties of the trustee have ceased, the statute of uses generally executes the legal title of the trustee to the *cestui que trust*, and he

[1] Hillary *v.* Waller, 12 Ves. 252.

[2] Keene *v.* Deardon, 8 East, 263; Goodson *v.* Ellison, 3 Russ. 588; Hillary *v.* Waller, 12 Ves. 251; 1 Sugd. V. & P. 350, 470; Flournoy *v.* Johnson, 7 B. Mon. 694; Doe *v.* Langdon, 12 Q. B. 719.

[3] Lade *v.* Holford, Bull. N. P. 110; Doe *v.* Sybourn, 7 T. R. 2; Goodtitle *v.* Jones, 7 T. R. 49; Doe *v.* Read, 8 T. R. 118; see note, 1 Green. Cruise, 410; 2 Pow. on Mort. 491.

obtains the legal as well as the beneficial estate. But there are cases where the active duties of the trustee having ceased, the legal title does not pass without a conveyance. In such cases it is clearly the duty of the trustee to convey the legal title to the *cestui que trust*, or to such person as he shall appoint.[1] Therefore, if the beneficial owner has been a long time in possession, dealing with the estate in every respect as his own, it will be presumed that the trustee performed his duty and conveyed the legal estate to the proper person. As where a mortgage in fee was made to a trustee for the real mortgagee, and the *cestui que trust* or real mortgagee took a conveyance of the equity of redemption, and ever after dealt with the estate as if the legal fee was in him, a conveyance of the mortgage was presumed to have been made to him by the trustee.[2] There was a use of the estate in this case for one hundred years. Where lands were conveyed to trustees for a religious society, which was afterwards incorporated, it was held, after the use of the land for one hundred and forty years by the incorporated society, that a conveyance by the trustees might be presumed.[3] So where several persons conveyed to a trustee a tract of land for the purposes of a partition by the trustee conveying back to each person his share in severalty, as set forth in the deed, it was held, after an occupation of many years by each person in severalty according to the intended partition, that the trustee might be presumed to have conveyed.[4] Where the trustees are to convey upon a certain event, or at a certain time, as when a minor becomes twenty-one, the presumption will arise after a much shorter lapse of time.[5] Thus, where trustees were to convey to the testator's son immediately on his coming of age, the son became of age in 1788, and granted a long lease in 1789, the court presumed a conveyance in 1792, or only four years after the event, there being no proof of an actual conveyance. Lord Kenyon said "there was no reason why the jury should not presume a conveyance from the trustees. They were bound to make one, and a court would have com-

[1] Langley *v.* Sneyd, 1 S. & S. 45; Carteret *v.* Carteret, 2 P. Wms. 134; Angier *v.* Stannard, 3 M. & K. 571; England *v.* Slade, 4 T. R. 682; Goodson *v.* Ellison, 3 Russ. 583.

[2] Noel *v.* Bewley, 3 Sim. 103.

[3] Dutch Church *v.* Mott, 7 Paige, 77.

[4] Jackson *v.* Moore, 13 John. 513.

[5] Wilson *v.* Allen, 1 J. & W. 611; Hillary *v.* Waller, 12 Ves. 239; Doe *v.* Sybourn, 7 T. R. 2.

pelled them to have done it if they had refused. It is rather to be presumed that they did their duty. And as to time, the jury may be directed to presume a conveyance and surrender in much less time than twenty years."[1] So where the direction to the trustee to convey applies to only a part of the estate, the court may presume a conveyance of the whole, if the circumstances require or warrant such presumption.[2]

§ 352. If the estate was originally conveyed to trustees for some particular purpose, as by way of security or indemnity, or to raise an annuity or portion, or for any other purpose, as soon as the purpose is accomplished, the trustees become mere dry trustees, and it is their duty to convey the estate to the beneficial owner.[3] Where, from lapse of time joined with other circumstances, there is a moral certainty that the purposes of the trust have all been accomplished, the court will act upon the certainty, and presume a reconveyance, although there is no direct proof of the fact.[4]

§ 353. Where an estate is vested in trustees upon an express trust, they must retain the legal title until the trusts are fully executed. Therefore, no conveyance will be presumed, so long as the trustees have any duties to perform; for that would be to presume a breach of trust, which will never be presumed: the fact must be proved by competent evidence.[5] In Aiken *v.* Smith, the court presumed that the conveyance was made at the death of the tenant for life, that being the time fixed for the conveyance, and the time when the active duties of the trustees ceased.[6]

§ 354. But there must always be sufficient reason for presuming a reconveyance or surrender by the trustee; that is, there must be some evidence of such a conveyance, or some evidence upon which the presumption of the conveyance may be founded. The mere fact that the trustee was to convey upon the execution of the

[1] England *v.* Slade, 4 T. R. 682.

[2] Hillary *v.* Waller, 12 Ves. 239.

[3] Hillary *v.* Waller, 12 Ves. 239; Doe *v.* Sybourn, 7 T. R. 2; Cooke *v.* Soltau, 2 S. & S. 154; *Ex parte* Holman, 1 Sugd. V. & P. 509; Emery *v.* Grocock, 6 Mad. 54; Doe *v.* Wright, 2 B. & Ald. 710; Bartlett *v.* Downes, 3 B. & Cr. 616.

[4] Emery *v.* Grocock, 6 Mad. 54; Hillary *v.* Waller, 12 Ves. 252.

[5] Beach *v.* Beach, 14 Vt. 28; Doe *v.* Steaple, 2 T. R. 684; Keene *v.* Deardon, 8 East, 248; Flournoy *v.* Johnson, 7 B. Mon. 694.

[6] Aiken *v.* Smith, 1 Sneed, 304. This case is opposed to Rees *v.* Williams, 2 M. & W. 749.

trust, or upon the happening of a certain event, is not enough. There must be some circumstance from which it may be reasonably concluded that he did in *fact* convey. Mere length of time is not enough. Courts have refused after the lapse of one hundred and twenty years to presume a reconveyance, when there were no intermediate transactions to give force to the length of time; [1] for the possession during all that time may not be inconsistent with the trustee's title.[2] However, great lapse of time is an important circumstance; and the fact that it was the duty of the trustees to convey is another important circumstance. Very slight circumstances added to these will be sufficient to justify a court or jury in presuming a conveyance; and a conveyance may be presumed where the estate has been dealt with by the beneficial owner in a manner in which reasonable men do not deal with their estates, unless they are the legal as well as beneficial owners.[3]

§ 355. It is further said that the purpose of the presumption must be to prevent a just title from being defeated by mere matter of form.[4] The presumption is a shield for defence and not a sword for attack, as was said of another principle of law. As the presumption was introduced for the security of estates and the protection of innocent purchasers, it cannot be set up to eject them from their estates; and therefore the presumption will be made only in favor of the person in whom the beneficial title is clearly vested for the time being, whatever may be the extent of his equitable interest.[5] So it was not allowed to be set up in favor of a defendant who showed no title but a mere naked possession, which might have been obtained by a disseisin of the beneficial owner.[6] And where two litigants both claimed to be the beneficial owners, a surrender of an outstanding legal estate or term was not presumed, lest either obtaining it should defeat the other without regard to the merits of his beneficial title.[7]

[1] Goodright *v.* Swymmer, 1 Kenyon, 385; Goodson *v.* Ellison, 3 Russ. 583; Langley *v.* Sneyd, 1 S. & S. 45; Doe *v.* Lloyd, Mathews on Presumptions, 215.

[2] Ibid. Keene *v.* Deardon, 8 East, 363; Hillary *v.* Waller, 12 Ves. 250.

[3] Garrard *v.* Tuck, 8 C. B. 248; Cottrell *v.* Hughes, 15 C. B. 532; Hillary *v.* Waller, 12 Ves. 239; Wilson *v.* Allen, 1 J. & W. 611.

[4] Lade *v.* Holford, Bull. N. P. 110; Doe *v.* Sybourn, 7 T. R. 2; Goodtitle *v.* Jones, 7 T. R. 47.

[5] Doe *v.* Cook, 6 Bing. 179; Tenny *v.* Jones, 10 Bing. 75; Bartlett *v.* Downes, 8 B. & Cr. 616; Noel *v.* Bewley, 3 Sim. 103; Wilson *v.* Allen, 1 J. & W. 611.

[6] Doe *v.* Cook, 6 Bing. 179; England *v.* Slade, 4 T. R. 682; Doe *v.* Sybourn, 7 T. R. 2.

[7] Doe *v.* Wright, 2 B. & Ald. 710.

§ 356. In England there was a system of conveyancing by which outstanding terms were made to attend the legal title and protect it. Much litigation and discussion has been had over these terms, their merging in the legal title, and their presumed surrender. They have very little importance in this country, and the statement of the law concerning them is not deemed necessary.[1]

[1] See Hill on Trustees, pp. 253-263.

CHAPTER XII.

EXECUTORY TRUSTS.

§ 357. It is a fundamental proposition that equitable estates are governed by the same rules as legal estates, otherwise inextricable confusion would ensue. If there was one rule on the equity side, and another on the law side of courts, there would be no certainty or uniformity of interpretation or construction. Thus at common law a grant to A. for life, remainder to the heirs of his body, vested an estate in fee-tail in A., which he could bar, and cut off the remainder. The same rule was applied to *executed* trusts. Thus if land is given to A. and his heirs in trust for B. for life, remainder to the heirs of his body, B. takes an equitable fee-tail;[1] for the same rules apply to the two species of estate. Therefore where technical words are used in the creation of an executed trust estate, they will be taken in their legal technical sense,[2] though Lord Hardwicke once

[1] This illustration states the law only in States where the rule in Shelley's case, as it is called, is in force. In States where the rule is abrogated by statute, those who take in remainder under the limitation, take as purchasers; and the same rule applies to equitable estates.

[2] Wright *v.* Pearson, 1 Ed. 125; Bale *v.* Coleman, 8 Vin. 268; Jervoise *v.* Northumberland, 1 J. & W. 571.

added this qualification, "unless the intention of the testator or author of the trust plainly appeared to the contrary."[1] But this qualification has been time and again overruled, and it is now an established canon that a limitation in trust, perfected and declared by the settlor, shall have the same construction as in the case of an executed legal estate.[2] But while technical words receive their technical meaning in equitable as well as legal estates, technical words are not always necessary to create and limit equitable estates in fee. Thus an equitable fee may be created in a deed without the word "heirs," and an equitable entail without the words "heirs of the body," if the words used in their popular sense are equivalent to the technical words, or if the intention is sufficiently expressed and clear.[3] Thus if an estate is *devised* to A. and his heirs in trust for B. without other limitations, B. will take an equitable fee; for it is plain that B. is to take an equitable estate as large as the legal estate that passed to A. and his heirs, which is a legal fee.[4] But if an estate is conveyed by *deed* to A. and his heirs in trust for the grantor for life, remainder for his children, without the word "heirs," the children take an estate for life only, in analogy to the rules of law.[5]

§ 358. The rule in Shelley's case was never a rule of intention, or of construction to reach and carry out the settlor's intention; but it was established as an absolute rule of property to obviate certain difficulties that would arise in relation to tenures, if certain persons to whom property was limited were allowed to take as purchasers, and not by descent. It is notorious that the rule disappointed the intention of settlors in most cases, and gave an absolute disposal of the inheritance to the first taker, where the settlor intended that such first taker should have only an estate for life.[6] As trusts are

[1] Garth *v.* Baldwin, 2 Ves. 655.

[2] Brydges *v.* Brydges, 3 Ves. Jr. 125; Austen *v.* Taylor, 1 Ed. 367; Glenorchy *v.* Bosville, Ca. t. Talb. 19; Synge *v.* Hales, 2 B. & B. 507; Wright *v.* Pearson, 1 Ed. 125.

[3] Shep. Touch. by Preston, 106.

[4] Moore *v.* Cleghorn, 10 Beav. 423; 12 Jur. 591; Knight *v.* Selby, 3 Man. & Gr. 92; Doe *v.* Cafe, 7 Exch. 675; Watkins *v.* Weston, 32 Beav. 238; McClintock *v.* Irvine, 10 Ir. Ch. 481; Brenan *v.* Boyne, 16 Ir. Ch. 87; Betty *v.* Elliott, 16 Ir. Ch. 110 n.; *Re* Bayley, 16 Ir. Ch. 215.

[5] Halliday *v.* Overton, 14 Beav. 467; 15 Beav. 480; 16 Jur. 71; Lucas *v.* Brandreth, 28 Beav. 274; Tatham *v.* Vernon, 29 Beav. 604.

[6] For these reasons, the rule is now abolished in many of the States by statute.

wholly independent of tenure, they ought not to be affected by the rule, and a few cases have seemed to indicate that they were withdrawn from the operation of it;[1] but it is now established that the same rule shall apply to the same limitation whether it is of an equitable or a legal estate.[2] Thus the rule in Shelley's case will be applied to a gift to A. and his heirs in trust for B. for life, and remainder to his heirs, or heirs of his body. The reason of the rule as applied to legal estates was some real or fancied difficulty concerning tenures, or to bring estates one generation sooner into commerce, or some other reason; for neither judges nor text-writers are agreed upon the original reasons of the rule. The reason of the application of the rule to limitations of trust estates is to preserve a uniformity of the law in relation to the two kinds of estates in land. This leads Mr. Lewin to say, that although the rule is not *equally applicable* to trust estates, yet it is *equally applied*.[3] But the rule will not be applied to vest a fee or fee-tail in the first taker, unless the word "heir" is used as a term of succession, and not as a mere *designatio personæ*. Thus if an estate be *devised* to A. and his heirs in trust for B. for life, and after his decease in trust for the person who shall then be his heir, B. takes an estate for life only, and the person thus designated takes the estate by purchase.[4] So if the legal estate is given to A. *in trust* for B. for life, and the legal remainder to the heirs of B., at his decease the rule cannot apply; for the legal and equitable estate cannot so coalesce that B. can take a fee either legal or equitable.[5]

§ 359. But in order that technical words may receive their legal signification, and in order that the rule in Shelley's case may be applied to limitations of equitable estates, the trusts must be *executed* and *not executory*.[6] All trusts are *executory* in one

[1] Withers *v.* Allgood, cited, and Bagshaw *v.* Spencer, 1 Ves. 150.

[2] Garth *v.* Baldwin, 2 Ves. 646; Wright *v.* Parsons, 1 Ed. 128; Brydges *v.* Brydges, 3 Ves. 120; Jones *v.* Morgan, 1 Bro. Ch. 206; Webb *v.* Shaftesbury, 3 M. & K. 599; Roberts *v.* Dixwell, 1 Atk. 610; West, 536; Britton *v.* Twining, 3 Mer. 175; Spence *v.* Spence, 12 C. B. (N. S.) 199; Coape *v.* Arnold, 2 Sm. & Gif. 311.

[3] Lewin on Trusts, 88 (5th ed.).

[4] Greaves *v.* Simpson, 10 Jur. (N. S.) 609.

[5] Collier *v.* McBean, 34 Beav. 426.

[6] Egerton *v.* Brownlow, 4 H. L. Ca. 210; Rochfort *v.* Fitzmaurice, 2 Dr. & W. 20; Tatham *v.* Vernon, 29 Beav. 604. This distinction was very early established. Bale *v.* Coleman, 8 Vin. 267; Stamford *v.* Hobart, 3 Bro. P. C. 33; Papillon

sense of the word; that is, the trustee must have some duty, either active or passive, to perform, so that the statute of uses shall not execute the estate in the *cestui que trust*, and leave nothing in the trustee.[1] But such is not the meaning of judges when they speak of *executed* trusts, and *executory* trusts. These words refer rather to the manner and perfection of their creation, than to the action of the trustee in administering the property. Thus a trust created by a deed or will, so clear and certain in all its terms and limitations that a trustee has nothing to do but to carry out all the provisions of the instrument according to its letter, is called an

v. Voice, 2 P. Wms. 471; Glenorchy *v.* Bosville, t. Talb. 3; Gower *v.* Grosvenor, Barn. 62; Roberts *v.* Dixwell, 1 Atk. 607; Baskerville *v.* Baskerville, 2 Atk. 279; Woodhouse *v.* Haskins, 3 Atk. 24; Read *v.* Snell, 2 Atk. 648; Marryat *v.* Townley, 1 Ves. 102. Several of these cases were decided by Lord Hardwicke; but in Bagshaw *v.* Spencer, 1 Ves. 152, he nearly confounded and denied the distinction. In Exel *v.* Wallace, 2 Ves. 233, however, Lord Hardwicke explained his meaning, and desired to have it remembered that he did not mean to say that his predecessors were wrong. The distinction, as stated in the text, is now firmly established both in England and the United States. Barnard *v.* Proby, 2 Cox, 8; Wright *v.* Pearson, 1 Ed. 125; Austen *v.* Taylor, 1 Ed. 366; Stanley *v.* Lennard, 1 Ed. 95; Lincoln *v.* Newcastle, 12 Ves. 227; Jervoise *v.* Northumberland, 1 J. & W. 570; Deerhurst *v.* St. Albans, 5 Mad. 233; 2 Cl. & Fin. 611; Blackburn *v.* Stables, 2 V. & B. 369; Douglass *v.* Congreve, 1 Beav. 59; 4 Bing. N. C. 1; 5 Bing. N. C. 318; Boswell *v.* Dillon, 1 Dru. 297; Neves *v.* Scott, 9 How. 211; 13 How. 268; 4 Kent, Com. 218, *et seq.*; Garner *v.* Garner, 1 Des. 444; Porter *v.* Doby, 2 Rich. Eq. 49; Dennison *v.* Goehring, 7 Barr, 177; Findlay *v.* Riddle, 3 Binn. 152; Edmondson *v.* Dyson, 2 Kelly, 307; Wiley *v.* Smith, 3 Kelly, 559; Wood *v.* Burnham, 6 Paige, 518; 26 Wend. 19; Imlay *v.* Huntington, 20 Conn. 162; Berry *v.* Williamson, 11 B. Mon. 251; Horne *v.* Lyethe, 4 H. & J. 434; Loring *v.* Hunter, 8 Yerg. 31; Bold *v.* Hutchinson, 5 De G., M. & G. 558. Lord Northington said that the words "executory" trusts seemed to him to have no fixed signification. Lord King said a trust was executory where the party must come into court to have the benefit of the will. Mr. Lewin says the true criterion is where the assistance of the court is necessary to complete the limitations, p. 89. Lord Eldon said the trust was executory where the testator had not completed the devise, but had left something to be done, so that the court must look to the intention. Jervoise *v.* Northumberland, 1 J. & W. 570. Lord St. Leonards distinguishes the two as follows: "Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out, from general expressions, what his intention is, or has he so defined that intention that you have nothing to do but to take that which is given you, and to convert them into legal estates?" Egerton *v.* Brownlow, 4 H. L. Ca. 210.

[1] Bagshaw *v.* Spencer, 1 Ves. 142; Egerton *v.* Brownlow, 4 H. L. Ca. 210; Coape *v.* Arnold, 4 De G., M. & G. 585.

executed trust. In these trusts, technical words receive their legal meaning, and the rules applicable to legal estates govern the equitable estates thus created.[1] On the other hand, an executory trust is where an estate is conveyed to a trustee upon trust, to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the directions thus given.[2] They are called *executory*, not because the trust is to be performed in the future, but because the trust instrument itself is to be moulded into form and perfected according to the outlines or instructions made or left by the settlor or testator.[2] Thus land conveyed to A. upon trust, to settle the same upon B. and C. and their issue, in the event of their marriage, is an *executory trust.*[2] There is a conveyance or settlement to be executed by A., and the form or terms of this conveyance or settlement is to be determined by the intention of the original grantor.[2] When this conveyance or settlement is finally determined and made, the trust becomes *executed* in the sense of the word as applicable to this distinction, and it is afterwards governed by all the rules of an executed trust. The difference between the two kinds of trusts is this. In *executed* trusts the rules of property govern, and not the intention of the settlor, if it is contrary to the law or rule of property.[3] Thus if, in an executed trust, an estate is given to A. in trust for B. for life, with remainder to his heirs, B. takes an equitable fee, and may convey the equitable inheritance and exclude his heirs, although it is perfectly certain that the settlor intended that B. should take an estate for his life only.[3] But an executory trust is settled and carried into effect according to the *intention* of the settlor.[4] Thus if an estate is conveyed to

[1] Wright *v.* Pearson, 1 Ed. 125; Austen *v.* Taylor, 1 Ed. 367; 4 Kent, Com. 220; Jones *v.* Morgan, 1 Bro. Ch. 206; Jervoise *v.* Northumberland, 1 J. & W. 559; Boswell *v.* Dillon, 1 Dru. 291.

[2] Austen *v.* Taylor, 1 Ed. 366; Wright *v.* Pearson, 1 Ed. 125; Jervoise *v.* Northumberland, 1 J. & W. 570; Coape *v.* Arnold, 4 De G., M. & G. 585; Neves *v.* Scott, 9 How. 211; Wiley *v.* Smith, 3 Kelly, 559; Edmondson *v.* Dyson, 2 Kelly, 307; Wood *v.* Burnham, 6 Paige, 518; 26 Wend. 19.

[3] Choice *v.* Marshall, 1 Kelly, 97; Schoonmaker *v.* Sheely, 3 Hill, 165; Kingsland *v.* Rapelye, 3 Edw. 2; Brant *v.* Gelston, 2 John. Ca. 384.

[4] Wood *v.* Burnham, 6 Paige, 513; 26 Wend. 9; 4 Kent, Com. 219; 1 West.

A. in trust, with instructions to convey it to B. for life, with remainder to his heirs, or to convey it in trust for B. for life, with remainder to his heirs, B. takes an estate for life only, and his heirs take by purchase at his decease, if such appeared to be the intention of the original gift or grant.[1]

§ 360. In the history of executory trusts, still another distinction has been drawn, or a distinction between executory trusts created by marriage articles, and executory trusts created by wills. This is not so much a difference between two classes of executory trusts, as it is a difference between the rules that will be applied to the interpretation of *marriage articles and of wills*, in order to determine the intention of the settlor or the testator. Lord Eldon once said, that "there was no difference in the execution of an executory trust created by will, and a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity."[2] But the great chancellor afterwards modified his expression.[3] And certainly there is no difference in the execution of the two trusts when it is settled what they are; but there is a difference in the construction of marriage articles and of wills in order to reach the intention of the creator of the trusts. Thus, in marriage articles, the intention of the parties to the articles is presumed to be a provision for the issue of the marriage, and such construction is given to the articles as to carry into effect this presumed intention if possible; while in construing wills, in order to settle the limitations of a trust, there is no such presumed leading intention; or as Sir W. Grant put it, "I know of no difference between an executory trust in marriage articles and

Ch. t. Hardwicke, 542. A mere direction to convey will not render the trust executory, if the directions are so clear, and the limitations are so certainly defined, that there is nothing to do but to convey in accordance with them. In order that the trust may be executory, there must be some room for construction, in order to determine the intention of the settlor; that is, to determine what limitation shall be, and what shall not be, introduced into the conveyance to be made. Egerton *v.* Brownlow, 4 H. L. Ca. 210; Austen *v.* Taylor, 1 Ed. 361; Wight *v.* Leigh, 15 Ves. 564; Graham *v.* Stewart, 2 Macq. H. L. Ca. 205; Herbert *v.* Blunden, 1 Dr. & Walsh, 78; East *v.* Twyford, 9 Hare, 713; Doncaster *v.* Doncaster, 3 K. & J. 26; Stanley *v.* Stanley, 16 Ves. 491; Glenorchy *v.* Bosville, 1 Lead. Ca. Eq. 20, and notes.

[1] Ibid.

[2] Lincoln *v.* Newcastle, 12 Ves. 230; and see Turner *v.* Sargent, 17 Beav. 519.

[3] Jervoise *v.* Northumberland, 1 J. & W. 574.

in a will, except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter. Where the object is to make a provision by the settlement for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement be to limit an estate for life with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention. But if a will directs a limitation for life with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement."[1]

§ 361. Thus if, in marriage articles, the real estate of the husband or of the wife is limited to the *heirs of the body* or to the *issue*[2] of the contracting parties, or either of them, or to the issue of the body, or to the issue and their heirs,[3] so that the words and limitations, taken in their legal sense, would enable the parents, or one of them, to defeat this provision for the children, equity will construe the articles to mean that the estate is limited to the parents for life, and the children will take at the decease of their parent or parents as purchasers; and equity will decree a formal settlement to be drawn in such way as to carry out this purpose.[4] If a settlement is already drawn *after* the marriage, but not in accordance with this rule, equity will correct and reform it so as to carry out this intention.[5] But if the settlement was formally drawn out before marriage contrary to this rule, the court will presume that the parties abandoned the articles, and entered into a

[1] Blackburn *v.* Stables, 2 Ves. & B. 369; Bale *v.* Coleman, 8 Vin. 267; Strafford *v.* Powell, 1 B. & B. 25; Synge *v.* Hales, 2 B. & B. 508; Maguire *v.* Scully, 2 Hog. 113; Rochfort *v.* Fitzmaurice, 1 Con. & Laws. 173; 2 Dru. & W. 18; 4 Ir. Eq. 375; Jervoise *v.* Northumberland, 1 J. & W. 574; Deerhurst *v.* St. Albans, 5 Mad. 260.

[2] Dod *v.* Dod, Amb. 274.

[3] Phillips *v.* James, 2 Dr. & Sm. 404.

[4] Handick *v.* Wilkes, 1 Eq. Ca. Ab. 393; Gilb. Eq. 114; Trevor *v.* Trevor, 1 P. Wms. 622; Rochfort *v.* Fitzmaurice, 1 Con. & Laws. 173; 2 Dr. & War. 18; 4 Ir. Eq. 375; Cusack *v.* Cusack, 5 Bro. P. C. 116; Davies *v.* Davies, 4 Beav. 54; Griffith *v.* Buckle, 2 Vern. 13; Jones *v.* Langton, 1 Eq. Ca. Ab. 392; Stonor *v.* Curwen, 5 Sim. 269; Barnaby *v.* Griffin, 3 Ves. 206; Horne *v.* Barton, 19 Ves. 398; Coop. 257; 22 L. J. (N. S.) Ch. 225.

[5] Warrick *v.* Warrick, 3 Atk. 293; Sheatfield *v.* Sheatfield, Ca. t. Talb. 176; Legg *v.* Goldwire, ib. 20; Burton *v.* Hastings, Gilb. Eq. 113; overruling same case, 1 Eq. Ca. Ab. 393.

new agreement, as expressed in the settlement.[1] If, however, a settlement before marriage is expressed on its face to be made to carry out the articles, and it does not carry them out in this respect, equity will reform it.[2] So if it can be shown in any other way that the formal settlement was intended to carry out the articles, and it does not do so, equity will reform it on the ground of mistake,[3] or if the settlement is made in the very words of the articles, and the legal effect of the words of the articles and settlement is different from the intention of the parties, the settlement will be corrected and reformed in order to carry out the exact intention of the parties.[4] If, however, there are any intervening rights as those of an innocent purchaser, without notice, his rights of course will be protected.[5] So it is established that daughters are included under the general term of *heirs* or *issue*, and that they take as purchasers.[6] This has been held in England.[7] Of course in the United States where primogeniture is abolished, estates will be settled upon sons and daughters equally, or upon daughters alone in default of sons. But if the children or issue of the marriage are provided for in some other way, as by portions to be raised for them in such manner that it appears that they are not intended to take as purchasers of the particular estate under the settlement, then the rule in Shelley's case will prevail, and the parents or parent may sell the whole estate.[8] And so where there

[1] Legg *v.* Goldwire, Ca. t. Talbot, 20; Warrick *v.* Warrick, 3 Atk. 291.

[2] Honor *v.* Honor, 1 P. Wms. 123; West *v.* Errissey, 2 P. Wms. 349; Roberts *v.* Kingsley, 1 Ves. 238.

[3] Bold *v.* Hutchinson, 5 De G., M. & G. 568; Rogers *v.* Earl, 1 Dick. 294; 1 Sugd. V. & P. 143.

[4] West *v.* Errissey, 2 P. Wms. 349; Roberts *v.* Kingsley, 1 Ves. 238; Honor *v.* Honor, 1 P. Wms. 128; 2 Vern. 658; Powell *v.* Price, 2 P. Wms. 535; Gaillard *v.* Pardon, 1 McMul. Eq. 358; Neves *v.* Scott, 9 How. 197; Gause *v.* Hale, 2 Ired. Eq. 241; Smith *v.* Maxwell, 1 Hill, Eq. 101; Allen *v.* Rumph, 2 Hill, Eq. 1.

[5] Warrick *v.* Warrick, 3 Atk. 291; Trevor *v.* Trevor, 1 P. Wms. 622; West *v.* Errissey, 2 P. Wms. 349. But if the purchaser have notice of the articles, they may be enforced against him. Davies *v.* Davies, 4 Beav. 54; Thompson *v.* Simpson, 1 Dr. & W. 491; Abbott *v.* Geraghty, 4 Ir. Eq. 15.

[6] West *v.* Errissey, 2 P. Wms. 349; Comyn, R. 412; 1 Bro. P. C. 225.

[7] Burton *v.* Hastings, 2 P. Wms. 535; Gilb. Eq. 113; 1 Eq. Ca. Ab. 393; Hart *v.* Middlehurst, 3 Atk. 371; Maguire *v.* Scully, 2 Hog. 113; 1 Beat. 370; Marryat *v.* Townley, 1 Ves. 105; Phillips *v.* Jones, 4 Dr. & Sm. 406.

[8] Powell *v.* Price, 2 P. Wms. 535; Fearns, Con. Rem. 103.

is an actual present conveyance of personal property by a marriage contract executed before marriage in trust for the wife, and at her death to the heirs of her body, it was held to be an executed trust, there being no further conveyances to be executed, and that the rule in Shelley's case applied.[1]

§ 362. In England, when a married woman could not convey her interest in real estate, a strict settlement was not ordered under marriage articles that limited the *husband's* estate to the heirs of the body of the wife, for the reason that this created an entail that could not be barred without considerable difficulty; but since the Fines and Recoveries Act, the difficulty is removed.[2] Nor will the court order a strict settlement, if there is any thing in the nature of the limitations or otherwise on the face of the articles, which indicates that such was not the intention of the parties, for the reason that the rule now under discussion was established in order to carry out the intention of the parties. If, therefore, the intention of the parties appears to be in accordance with, or not contrary to, the ordinary rule, the ordinary rule will be allowed to prevail.[3]

§ 363. If personal property is agreed to be settled on the parents for life, and then to their heirs, or the heirs of their bodies, the chattels will not vest in the parents absolutely, but in the heirs when they are born;[4] and it is not necessary that they should survive their parents, or become actual heirs,[5] unless the gift is to the parents, and their heirs living at the death of the surviving parent, or there are other equivalent words.[6]

§ 364. If there is a covenant in marriage articles to settle personal property upon the same trusts, and for the same purposes, as the real estate is settled, the court will not apply the same limitations to the personal as to the real estate, for that would be to vest an absolute interest in the heirs at their birth; but the court will

[1] Carroll *v.* Renick, 7 Sm. & M. 799.

[2] Rochfort *v.* Fitzmaurice, 2 Dru. & W. 19; Highway *v.* Banner, 1 Bro. Ch. 587; Howel *v.* Howel, 2 Ves. 358; Green *v.* Ekins, 2 Atk. 477; Honor *v.* Honor, 1 P. Wms. 123.

[3] Ibid. Power *v.* Price, 2 P. Wms. 535; Chambers *v.* Chambers, 2 Eq. Ca. Ab. 35; Fitzg. 127.

[4] Hodgeson *v.* Bussey, 2 Atk. 89; Barn. 195; Bartlett *v.* Green, 13 Sim. 218.

[5] Theebridge *v.* Kilburne, 2 Ves. 233.

[6] Read *v.* Snell, 2 Atk. 642.

insert a provision making the personal property follow the course of the real estate.[1] Courts will also insert a provision that the children or issue shall take, as tenants in common, and not as joint-tenants, on account of the inconveniencies of joint-tenancies, and from the presumed intention of the parties;[2] and so the court will insert other words and conditions, and vary the literal construction of the articles in order to carry out the presumed intention, and promote a convenient settlement for the protection and security of all the parties.[3] The court will not always order a formal settlement to be drawn out, but will declare the meaning and intention of the articles, and leave the parties to act upon the declaration, as if it was a formal settlement drawn out and executed by them.[4] So the court will sometimes rectify the settlement drawn under articles by a decree, without ordering a new deed to be drawn out and executed.[5]

§ 365. Marriage settlements, whether made in pursuance of articles, or under directions contained in wills, or under decrees of the court, are matters in which courts exercise the most liberal principles of equity. If a settlement is drawn up under a decree, and it is not in all respects in accordance with the decree, the court will set it aside, and order a new settlement.[6] In Grout *v.*

[1] Stanley *v.* Leigh, 2 P. Wms. 690; Gower *v.* Grosvenor, Barn. 63; 5 Mad. 348; Newcastle *v.* Lincoln, 3 Ves. 387, 394, 397; Scarsdale *v.* Curzon, 1 John. & Hem. 51. The matter referred to in the text seldom or never arises in the marriage settlements made in the United States, as primogeniture is abolished, and entails on the eldest son are seldom resorted to. But where personal chattels are made to vest under a marriage settlement in the eldest son as heir, and such son dies under age, very awkward effects follow; and, under covenants to settle personal property upon the same limitations as are applied to a settlement of real estate wherein the eldest son takes as heir, it was a matter of great discussion in the Court of Chancery and in the House of Lords, what kind of provisions ought to be inserted to protect the parents and other children in case the eldest son died under age and without issue. Newcastle *v.* Lincoln, 3 Ves. 387; 12 Ves. 218.

[2] Taggart *v.* Taggart, 1 Sch. & L. 88; Rigden *v.* Vallier, 3 Atk. 734; Marryat *v.* Townley, 1 Ves. 103. Joint-tenancy is abolished by statute in most of the United States, with the exception, in some States, of gifts and grants to husband and wife.

[3] Kentish *v.* Newman, 1 P. Wms. 234; Martin *v.* Martin, 2 R. & M. 507; Master *v.* De Croismar, 11 Beav. 184; Targus *v.* Puget, 2 Ves. 194.

[4] Byam *v.* Byam, 19 Beav. 58.

[5] Tebbitt *v.* Tebbitt, 1 De G. & Sm. 506.

[6] Temple *v.* Hawley, 1 Sand. Ch. 154.

Van Schoonhoven, the court ordered a new settlement, in substance that the trust should be for the wife during her life without power of anticipating the income; and upon her death for the use of her husband for life, in case he survived her; and after the death of both to be divided equally among all their children then living, and the descendants of such as had died leaving issue, *per stirpes*; with a power to make advances with the approbation of the trustees to the children, on their attaining full age or being married, out of the capital fund, in anticipation of the ultimate distribution, in order to set them up in the world.[1] In Imlay *v.* Huntington, a husband covenanted that he would pay over to certain trustees $10,000, and one-half of certain other expected moneys of his intended wife, to be held by said trustees in trust for the wife for the term of twenty years, after which time they were to convey to such persons as the wife should appoint. The marriage was consummated, and the husband received $60,000, which he continued to hold and manage as his own during the lifetime of his wife, making no payment to the trustees, and neither the trustees nor the wife requesting him to pay the sum over, or to make any settlement in pursuance of the articles. On the death of the wife, at the end of twenty years, her brothers and sisters, there being no issue of the marriage, applied to the court by bill in equity for the execution of the marriage settlement, in accordance with the articles and covenants entered into by the husband before marriage: but it was held that it was competent for the wife to discharge the husband from the fulfilment of the covenants, and to abandon the trust; that, under the circumstances of the case, the articles were abandoned by the wife and all the parties; that the wife's personal property vested absolutely in the husband; and that the wife's heirs had no right to maintain the bill for any part of her personal estate.[2]

§ 366. In executory trusts created by *wills*, no presumption arises *a priori* that a provision was intended for the children of the first taker, as in marriage settlements, and that such children were intended to take as purchasers. If the trust be "for A. and the heirs of his body,"[3] or "for A. and the heirs of his body and

[1] Grout *v.* Van Schoonhoven, 1 Sand. Ch. 342.

[2] Imlay *v.* Huntington, 20 Conn. 146.

[3] Harrison *v.* Naylor, 2 Cox, 247; Bagshaw *v.* Spencer, 1 Ves. 151; Marshall *v.* Bousley, 2 Mad. 166.

their heirs,"[1] or "for A. for life and after his decease to the heirs of his body,"[2] A. will be tenant in tail; and he may disappoint his heirs by barring the entail. So, where a testator directed an estate to be settled on his "daughter and her children, and if she died without issue," remainder over, the court held that the daughter was tenant in tail; and that in a voluntary devise the court must take it as they find it, though upon like words in a marriage settlement it might be different.[3] So where a testator directed lands to be settled on his "nephew for life, remainder to the heirs male of his body, and the heirs male of every such heir male severally and successively, one after another, as they should be in seniority and priority of birth, every elder and the heirs male of his body to be preferred before the younger," it was held that, although the nephew took by a voluntary executory devise, the court must execute it in the words of the will and according to the rules of law, and that equity could not carry the words further than the same words would operate at law, and that the nephew took an estate tail. The words in this case all went upon the idea of an entail.[4] So if there is a direction that the trustees shall not give up their trust until "a proper entail was made to the heir male by them."[5] But in another similar executory trust, Lord Eldon declined to compel a purchaser to accept the title, on the ground that the entail was too doubtful to be acted upon in so grave a matter.[6]

§ 367. In executory trusts under marriage articles, many distinctions arise upon the question, Who may enforce their specific performance, and compel the execution of the formal deed and the disposal of the property in accordance with the settlement that should have been made under the articles? Thus the general rule is, that parties, seeking a specific execution of such articles, must be those who come strictly within the reach and influence of the consideration of the marriage, or who claim through them, as the wife, or the husband, and the issue of the husband or wife, or both.

[1] Marryat v. Townley, 1 Ves. 104.

[2] Blackburn v. Stables, 2 V. & B. 370; Seale v. Seale, 1 P. Wms. 290; Meure v. Meure, 2 Atk. 266.

[3] Sweetapple v. Bindon, 2 Vern. 536.

[4] Legatt v. Sewell, 2 Vern. 551.

[5] Blackburn v. Stables, 2 V. & B. 367; Marshall v. Bousley, 2 Mad. 166; Dodson v. Dodson, 3 Bro. Ch. 405.

[6] Jervoise v. Northumberland, 1 J. & W. 559; Woolmore v. Burrows, 1 Sim. 512.

As a general rule mere volunteers, or collateral relatives of husband or wife, cannot interfere and ask for a specific performance of the articles.[1] But there are so many exceptions and qualifications to this rule, that a case is rarely decided upon it. The principle is, that, to bring collateral relations within the reach and influence of the consideration, there must be something over and above that flowing from the immediate parties to the marriage articles, from which it can be inferred that relatives beyond the issue were intended to be provided for, and that, if the provision in their behalf had not been agreed to, the superadded consideration would not have been given.[2] While this is the general rule, the court seize hold of the slightest valuable consideration to give effect to the settlement in favor of collateral relatives; and it need not appear that these slight considerations were inserted in favor of distant relatives: the court will presume such to be the case.[3] The result of all the cases is, that, if from the circumstances under which marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives in a given event should take the estate, and a proper limitation to that effect is contained in the articles, a court of equity will enforce the trust for their benefit. Such parties are not volunteers outside the deed, but come fairly within the influence of the consideration upon which it is founded. Such consideration extends through all the limitations of the articles for the benefit of the remotest persons provided for, consistent with the rules of law.[4] But of course there is a more

[1] Vernon *v.* Vernon, 2 P. Wms. 594; Edwards *v.* Warwick, 2 P. Wms. 171; Osgood *v.* Strode, 2 P. Wms. 245; Ithell *v.* Beane, 1 Ves. 215; 1 Dick. 132; Stephens *v.* Trueman, 1 Ves. 73; Pulvertoft *v.* Pulvertoft, 18 Ves. 90; 2 Kent, Com. 172, 173; Atherly on Mar. Sett. 145; Bradish *v.* Gibbs, 3 John. Ch. 550; West *v.* Errissey, 2 P. Wms. 349; Kettleby *v.* Atwood, 1 Vern. 298, 471; Williamson *v.* Codrington, 1 Ves. 512; Colman *v.* Sarel, 1 Ves. Jr. 50; 3 Bro. Ch. 13; Ellison *v.* Ellison, 6 Ves. 662; Graham *v.* Graham, 1 Ves. Jr. 275; Wycherly *v.* Wycherly, 2 Ed. 177, note; Bunn *v.* Winthrop, 1 John. Ch. 336.

[2] Osgood *v.* Strode, 2 P. Wms. 245; Goring *v.* Nash, 3 Atk. 186; Hamerton *v.* Whitton, 2 Wils. 356; Williamson *v.* Codrington, 1 Ves. 512; Bleeker *v.* Bingham, 3 Paige, 246.

eves *v.* Scott, 9 How. 209; Stephens *v.* Trueman, 1 Ves. 73; Edwards *v.* Warwick, 2 P. Wms. 171.

[4] Neves *v.* Scott, 9 How. 210; Canby *v.* Lawson, 5 Jones, Eq. 32; Dennison *v.* Goehring, 7 Barr, 175; King *v.* Whitely, 10 Paige, 465. See this matter very learnedly discussed in Neves *v.* Scott, 9 Monthly Law Reporter, 67,

direct equity in favor of a wife and children.[1] So in respect to chattel interests, it has been held that a bond under seal, though voluntary, will uphold a decree for the execution of the trust in favor of those whom the obligor is under obligations to support, as wife or children; for a seal in law imports a consideration.[2] But this doctrine seems to be rejected; and it is now held that neither wife nor child can enforce a purely voluntary contract or settlement.[3]

§ 368. And where a third person — parent, agent, or friend of the parties — holds out any considerations of a pecuniary nature to induce a marriage, and articles are drawn up, and a marriage takes place, equity will compel the party holding out the inducements to make them good, or specifically perform the articles.[4]

§ 369. If, however, in an executory trust created in a will there are indications of an intention that the words "heirs of the body" shall be words of purchase and not of inheritance, they will receive that construction; that is, the intention of the testator will be carried out, if it is sufficiently clear, although the same words in an ordinary grant would create an estate tail. Thus if there are other words in the will that indicate that the words "heirs of the body" are words of designation, and not of inheritance, such heirs will take by purchase, and the first taker of course will have only an estate for life. Thus if the testator direct a settlement on A. for life "without impeachment of waste,"[5] or with a limitation "to preserve contingent remainders,"[6] or if he direct that "care be

Boston, June, 1846. This decision, however, was overruled in Neves v. Scott, 9 How. 98. The case was again discussed before the State court of Georgia, and the opinion of the Circuit Court of the district of Georgia was followed. That case was in turn overruled in 13 How. 268. The judgment of the Supreme Court of the United States was, that on the face of that instrument the consideration extended to brothers and sisters; and, further, that it was an executed trust, and that they had an interest.

[1] Pulvertoft v. Pulvertoft, 18 Ves. 99.

[2] Bunn v. Winthrop, 1 John. Ch. 336; Minturn v. Seymour, 4 John. Ch. 500; Lechmere v. Carlisle, 3 P. Wms. 222; Walwyn v. Coutts, 3 Mer. 708; Antrobus v. Smith, 12 Ves. 44; Colman v. Sarel, 1 Ves. Jr. 54; Beard v. Nutthall, 1 Vern. 427.

[3] Jefferys v. Jefferys, 1 Cr. & Phil. 138; Holloway v. Headington, 8 Sim. 325.

[4] Hammersley v. De Biel, 2 Cl. & Fin. 45.

[5] Glenorchy v. Bosville, Ca. t. Talb. 3; 1 Lead. Ca. Eq. 1, and notes.

[6] Pappillon v. Voice, 2 P. Wms. 471; Rochfort v. Fitzmaurice, 1 Conn. & Laws. 158.

taken in the settlement that the tenant for life shall not bar the entail,"[1] the superadded words show the intention to be, that the first taker shall have only an estate for life with no power over the inheritance. So where a gift was in trust for the separate use of a married woman for life, she alone to receive the rent, and her husband not to intermeddle, and, after her decease, to the heirs of her body, the wife took only for life, and the words "heirs of her body" were words of purchase; for if the wife takes the inheritance in tail, the husband will have curtesy, which would be contrary to the clause against his intermeddling.[2] So where a testator directed an estate to be settled on a married woman for life for her separate use, and at her death on her *issue*, she was not tenant in tail; for there would be only an equitable estate in her, while a legal estate would vest in her issue, and the two estates could not coalesce in such manner as to make her tenant in tail.[3] So a direction to settle land on A. and the heirs of his body "as counsel shall advise,"[4] or as "the executors shall think fit,"[5] implies that a simple estate tail is not intended, for if it was there would be no need of the additional words. And where the trust was to settle on A. for life without impeachment of waste, remainder to his issue in *strict settlement*, the court directed the estates to be settled on A. for life, without impeachment for waste, remainder to his sons successively in tail male, remainder to his daughters as tenants in common in tail male, with cross-remainders in tail male, and with limitations to trustees to preserve contingent remainders.[6]

§ 370. Where a testator devised his estate to trustees for the term of six years, and to be then divided among his children or their issue, and conveyances to be given therefor, and directed that "in each deed or writing to any of my children shall be inserted and expressed a clause limiting such grant or interest conveyed to

[1] Leonard *v.* Sussex, 2 Vern. 526.

[2] Roberts *v.* Dixwell, 1 Atk. 607; West, Ca. t. Hardw. 536; Turner *v.* Sargent, 17 Beav. 515; Stanley *v.* Jackman, 5 W. R. 302; Stonor *v.* Curwen, 5 Sim. 264; Shelton *v.* Watson, 16 Sim. 542.

[3] Stonor *v.* Curwen, 5 Sim, 268; Verulam *v.* Bathurst, 13 Sim. 386; Coape *v.* Arnold, 2 Sim. & Gif. 311; 4 De G., M. & G. 574. And see Collins *v.* McBean, 34 Beav. 426.

[4] White *v.* Carter, 2 Ed. 366; Amb. 670.

[5] Read *v.* Snell, 2 Atk. 642.

[6] Trevor *v.* Trevor, 13 Sim. 108; 1 H. L. Ca. 239; Coape *v.* Arnold, 2 Sim. & Gif. 311; 4 De G., M. & G. 574.

the grantee for life *with remainder over to the right heirs of such grantee, their heirs and assigns for ever*," it was held that the deeds must be so drawn as to give the children a life-estate only, and not a fee in their shares.[1] The same rule of construction has been established and enforced in Georgia,[2] and in Tennessee,[3] and has been recognized in South Carolina,[4] Maryland,[5] and Pennsylvania.[6]

§ 371. It will be observed that "heirs of the body" and "issue" are not synonymous terms. "Heirs" are technical words of limitation, while the word "issue" is *prima facie* a word of purchase; and courts have ordered a strict settlement when the word "issue" was used, when it would probably have been otherwise if the word "heir" had been used.[7] The words "heirs of the body,"[8] and "issue,"[9] embrace daughters; for they equally answer the description, and are equally the objects of bounty; and where the words are words of purchase, the settlement, in default of sons, will be made upon daughters, as tenants in common in tail, with cross-remainders.[10] In the United States, the settlement would be made upon sons and daughters in common, with cross-remainders in default of issue, unless the direction was to settle upon some particular one of the heirs of the body or issue.

[1] Wood *v.* Burham, 6 Paige, 515, affirmed on appeal, 27 Wend. 9. The rule in Shelley's case was in force in New York at the time, and would have applied to this case if it had not been an executory trust. The rule in Shelley's case was soon after abrogated in that State, and the decision has ceased to be important; nor is the subject-matter now under discussion of importance in any State where the rule in Shelley's case is abolished by statute.

[2] Edmondson *v.* Dyson, 2 Kelly, 307; Wiley *v.* Smith, 3 Kelly, 551, 559; Neves *v.* Scott, 9 How. 197; 13 How. 268.

[3] Loring *v.* Hunter, 8 Yerg. 4.

[4] Garner *v.* Garner, 1 Des. 437; Porter *v.* Doby, 2 Rich. Eq. 49.

[5] Horner *v.* Lyeth, 4 H. & J. 431.

[6] Findlay *v.* Riddle, 3 Binney, 139.

[7] Meure *v.* Meure, 2 Atk. 265; Haddelsey *v.* Adams, 22 Beav. 276; Rochfort *v.* Fitzmaurice, 2 Conn. & Laws. 158; Bastard *v.* Proby, 2 Cox, 6; Dodson *v.* Hay, 3 Bro. Ch. 405; Stonor *v.* Curwen, 5 Sim. 264; Horne *v.* Barton, G. Coop. 257; Crozier *v.* Crozier, 2 Conn. & Laws. 311; Ashton *v.* Ashton, cited in Bagshaw *v.* Spencer, 1 Coll. Jur. 402.

[8] Bastard *v.* Proby, 2 Cox, 6.

[9] Meure *v.* Meure, 2 Atk. 265; Trevor *v.* Trevor, 13 Sim. 108; Ashton *v.* Ashton, *ut supra.*

[10] Marryat *v.* Townley, 1 Ves. 105; Meure *v.* Meure, 2 Atk. 265; Trevor *v.* Trevor, 13 Sim. 108; 1 H. L. Ca. 239; Bastard *v.* Proby, 2 Cox, 6; Ashton *v.* Ashton, in Spencer *v.* Bagshaw, *ut supra;* Shelton *v.* Watson, 16 Sim. 543.

§ 372. If the limitations of an executory trust are imperfectly or defectively declared in a will, the court will rectify the limitations, and order the settlements to be made in accordance with the intention of the testator, and to be drawn up in proper form to effectuate that intention.[1] But if a testator undertake to be his own conveyancer, and himself draw up in his will all the particulars of the limitations upon which he desires his property to be settled, intending them to be final and to be carried into effect in the trusts, the court is bound by the words, as in Austen *v.* Taylor, where Lord Northington said that "the testator had referred no settlement to the trustees to complete, but had declared his own uses and trusts," and that there was no authority in the court to vary them.[2]

§ 373. When a testator has devised lands in strict settlement, and then devises personal chattels as *heirlooms*, to be held by, or in trust for, the parties entitled to the use of the real estate under the limitations of the settlement; or when he expresses a desire that the heirlooms should be held upon the same trusts as the real estate, — "so far as the rules of law and equity will permit," the tenant for life will have the use of the heirlooms, and they will vest absolutely in the first tenant in tail, upon his birth, though he die immediately after.[3] In such cases, the court regards the trust, either as executed, or, if the trust is executory, that it has no authority to insert a limitation over in case of the tenant in tail dying under twenty-one. But such a limitation over is not illegal; and if the bequest of the heirlooms is clearly executory, and if the intention of the testator is plainly manifested that no person shall take the chattels absolutely who does not live to become possessed

[1] Franks *v.* Price, 3 Beav. 182; Doncaster *v.* Doncaster, 3 K. & J. 26; Rochfort *v.* Fitzmaurice, 1 Conn. & Laws. 173; 2 Dru. & W. 21.

[2] Austen *v.* Taylor, 1 Ed. 368. This case, however, has been criticised. See Green *v.* Stephens, 17 Ves. 76; Jervoise *v.* Northumberland, 1 J. & W. 572. And see East *v.* Twyford, 9 Hare, 713; Meure *v.* Meure, 2 Atk. 265; Harrison *v.* Naylor, 2 Cox, 247.

[3] Foley *v.* Burnell, 1 Bro. Ch. 274; Vaughan *v.* Burslem, 3 Bro. Ch. 101; Newcastle *v.* Lincoln, 3 Ves. 387; Carr *v.* Erroll, 14 Ves. 228; Trafford *v.* Trafford, 3 Atk. 347; Doncaster *v.* Doncaster, 3 K. & J. 26; Rowland *v.* Morgan, 6 Hare, 463; 2 Phil. 674; Gower *v.* Grovesnor, Barn. Ch. 54; 5 Mad. 337, overruled; Evans *v.* Evans, 17 Sim. 108; Tollemache *v.* Coventry, 2 Cl. & Fin. 611; 8 Bligh (N. S.), 547; Stapleton *v.* Stapleton, 2 Sim. (N. S.) 212; Deerhurst *v.* St. Albans, 5 Mad. 232, overruled; Scarsdale *v.* Curzon, 1 Johns. & Hem. 40, where all the cases are cited and commented on.

of the real estate, the court will execute the intention by directing the insertion of a limitation that the absolute interest of the first tenant in tail, if he should die under twenty-one, should go over to the next person in remainder.[1] And so where the absolute vesting of the chattels is coupled with the actual possession, and is therefore suspended until the death of the tenant for life, the chattels will vest in the child, who, after the death of the tenant for life, shall fulfil all the requisites of being tenant in tail in possession.[2]

§ 374. If the words of a will, taken in their ordinary sense, create a *joint-tenancy*, the court cannot order a settlement giving a *tenancy in common*, as it may do under marriage articles. But in some cases, where a testator is providing for his children, or where a grandparent *in loco parentis* is providing for his grandchildren, the court will order a settlement that will create a tenancy in common.[3] And, generally, executory trusts under wills will be construed in the same manner as marriage articles entered into after marriage.[4]

§ 375. When a settlement is directed in an executory trust, but there is no direction as to the powers to be given under it, the court cannot order the insertion of any powers,[5] except perhaps the power of leasing, which generally is an implied power to enable a party to enjoy the estate.[6] But if the executory articles or the will contain a direction to insert the "*usual powers*," powers to lease for twenty-one years,[7] of sale and exchange,[8] of varying the securities,[9] of appointing new trustees,[10] and (according to the nature of the property) of partition, of leasing mines, and of grant-

[1] Potts *v.* Potts, 3 J. & L. 353; 1 H. L. Ca. 671; Trafford *v.* Trafford, 3 Atk. 347; Lincoln *v.* Newcastle, 3 Ves. 387.

[2] Scarsdale *v.* Curzon, 1 Johns. & Hen. 40.

[3] Synge *v.* Hales, 2 B. & B. 499; Marryat *v.* Townley, 1 Ves. 102. But there were other circumstances in these cases that indicated a tenancy in common.

[4] Rochfort *v.* Fitzmaurice, 1 Conn. & Laws. 158.

[5] Wheate *v.* Hall, 17 Ves. 80; Brewster *v.* Angell, 1 J. & W. 628.

[6] Woolmore *v.* Burrows, 1 Sim. 518; Fearne's, P. W. 310; but see the late cases, Turner *v.* Sargent, 17 Beav. 515; Scott *v.* Steward, 27 Beav. 367; Charlton *v.* Rendall, 1 Hare, 296.

[7] Hill *v.* Hill, 6 Sim. 144; Bedford *v.* Abercorn, 1 M. & Cr. 312.

[8] Ibid.; Peake *v.* Penlington, 2 V. & B. 311.

[9] Sampayo *v.* Gould, 12 Sim. 426.

[10] Lindow *v.* Fleetwood, 6 Sim. 152; Sampayo *v.* Gould, 12 Sim. 426; Brewster *v.* Angell, 1 J. & W. 628.

ing building leases, will be inserted.[1] But there is a distinction between powers for the management and enjoyment of the estate, and powers which are personally beneficial to one or more particular persons, such as powers of jointure, to charge portions, or to raise money for a particular purpose.[2] The court cannot therefore order these latter powers to be inserted under the direction to insert the *usual powers*, for there is no rule by which the court could be governed in reducing the *corpus* of the estate.[3] So if certain particular powers are directed to be inserted, the *usual powers* will be qualified by the direction. Thus, where it was directed that the settlement should contain a power of leasing for twenty-one years, a power of sale and exchange, and of appointment of new trustees, it was held that a power of granting building leases could not be inserted.[4] So the powers must be inserted and executed as they are directed; as where a power was directed to be inserted of selling and exchanging estates in one county, *and all other usual powers*, it was held that the powers could not be extended to estates in other counties.[5] And where a testator directed the insertion of a power of making leases, *and otherwise according to circumstances*, and of appointing new trustees, the court refused to insert a power of sale and exchange, saying that, if where nothing is expressed nothing can be implied, it is impossible where something is expressed, to imply more than is expressed, especially where the will notices what powers are to be given.[6] But under particular directions as to certain powers, and general directions that other usual powers should be inserted, the two directions being separate and independent of each other, it was held that a power to appoint new trustees might be inserted.[7] Where *proper powers* of making leases or otherwise were directed to be reserved in the settlement to the tenants for life while qualified to exercise them, and when disqualified to the trustees, and a power of sale and exchange was inserted in the settlement, Lord Eldon held that it was improperly introduced;[8] and Sir T. Plummer gave a similar decision, on

[1] Hill *v.* Hill, 6 Sim. 145; Bedford *v.* Abercorn, 1 M. & Cr. 312.

[2] Hill *v.* Hill, 6 Sim. 144.

[3] Higginson *v.* Barneby, 2 S. & S. 516.

[4] Pearse *v.* Baron, Jac. 158.

[5] Brewster *v.* Angell, 1 J. & W. 625; Horne *v.* Barton, Jac. 439.

[6] Hill *v.* Hill, 6 Sim. 141.

[7] Lindow *v.* Fleetwood, 6 Sim. 152.

[8] Brewster *v.* Angell, 1 J. & W. 625.

the ground that the tenant for life ought not to have a power of sale unless it was expressly directed, nor ought the trustees to have such a power in the absence of an express direction.[1] But where there was a settlement of stock with a power of varying the securities, and also a covenant to settle real estate upon the same trusts and with like powers, it was held that a power to sell and exchange was properly introduced in analogy to the power of varying the securities.[2]

§ 376. In drawing up the final deed of settlement under executory articles or a will, the intention of the settlor is to be carried out if possible. If the intention conflicts with any of the rules of law, it shall be executed so far, and as near as it can be. The doctrine of *cy près* applies to this class of executory trusts. Thus, if a settlement is directed which would create a perpetuity, the court will order a settlement which shall carry the trust as far as it can extend without running counter to the rules against perpetuities. As where there was a devise to a corporation in trust to convey to A. for life, and after his death to his first son for life, and so on to the first son of such first son for life; and, in default of male issue, then to B. for life, and to his son for life after the death of B., and so as in the case of A., Lord Cowper said the attempt to create a perpetuity was vain, yet the directions should be complied with, so far as consistent with the law, and he directed that all the sons already born should take estates for life in succession, with limitations to unborn sons in tail.[3] But if the devise is such that it cannot be carried into effect, in any form approximating the intention of the testator, without contravening the law against perpetuities or remoteness, the whole trust will be void.[4]

[1] Horne *v.* Barton, Jac. 437.

[2] Williams *v.* Carter, Append. to Treatise on Powers, 945 (8th ed.); Elton *v.* Elton, 27 Beav. 634; Horne *v.* Barton, Jac. 437.

[3] See § 383; Humberston *v.* Humberston, 1 P. Wms. 332; 2 Vern. 737; Pr. Ch. 455; Parfitt *v.* Hember, L. R. 4 Eq. 443; Peard *v.* Kekewich, 15 Beav. 173; Lyddon *v.* Ellison, 19 Beav. 565; Williams *v.* Teal, 6 Hare, 239, and cases; Vanderplank *v.* King, 3 Hare, 1; Monypenny *v.* Dering, 16 M. & W. 418.

[4] Blagrave *v.* Hancock, 16 Sim. 371.

CHAPTER XIII.

PERPETUITIES AND ACCUMULATIONS.

§ 377. That the same rules apply to trusts as to legal estates is further apparent from the rule against perpetuities. A perpetuity has been declared to be "an estate unalienable, though all mankind should join in the conveyance;"[1] and an executory devise is said to be "a perpetuity as far as it goes." Again, it has been said, that "a perpetuity is when if all that have interest join, yet they cannot pass the estate." These are characteristics of a perpetuity. There are other descriptions given, as that "a perpetuity is a thing odious in the law, and destructive to the commonwealth: it would stop commerce and prevent the circulation of property."[3] Others have described the rule of law as respects the period of re-

[1] Scattergood *v.* Edge, Salk. 229.
[2] Washborne *v.* Downes, 1 Ch. Ca. 213.
[3] Duke of Norfolk's Case, 1 Vern. 164.

moteness, rather than the thing itself called a perpetuity;[1] thus, "a perpetuity is a limitation tending to take the subject out of commerce for a longer period than a life or lives in being and twenty-one years beyond, and in the case of a posthumous child a few months more, allowing for the term of gestation."[2] Mr. Saunders says: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from alienating the fee-simple of the property, discharged of such future use or estate, before the event is determined, or the period is arrived, when such future use or estate is to arise. If that period is within the bound prescribed by law, it is not a perpetuity."[3] This describes the thing itself, and not the rule of law, or the length of time, which may vary. Mr. Lewis gives a fuller definition: "A perpetuity is a future limitation, whether executory, or by way of remainder, and of either real or personal property, which is not to vest, until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation."[4] If such person is not yet in being, as he may not be after an extended period, of course the estate cannot be conveyed, even if all the world join in the deed.

§ 378. Executory devises are a species of testamentary dispositions, allowed by courts of law, and when properly exercised, they pass the *legal* estate or interest to all persons in favor of whom the dispositions are made. They are devises to take effect at a certain time in the future, or upon a certain event, and in favor of certain persons. Limitations by way of springing or shifting uses are similar in effect, except that they are created by deeds *inter vivos*, and are based upon the statute of uses. Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seisin and ownership in the person entitled by virtue of the use. These executory devises, and

[1] Stanley *v.* Leigh, 2 P. Wms. 688.

[2] Rand. Perp. 48.

[3] Uses and Trusts, 204.

[4] Lewis on Perpetuity, 164. Jarman's Treatise on Wills contains this marked sentence: "*Te teneam moriens* is the dying lord's apostrophy to his manor, for which he is forging these fetters that seem, by restricting the dominion of others to extend his own." 1 Jar. on Wills, 226, note (ed. 1861).

shifting and springing uses, must vest in the persons intended to be benefited within the time allowed by law, or they will be declared illegal and of no effect. The same rules apply in equity to trusts. In cases of trusts the legal estate is vested in certain trustees, and their heirs; but the beneficial interest, or equitable estate, is given by the grantor, testator, or settlor to such person or persons, and upon such terms and upon such events, as he shall declare. The settlor can change and shift the beneficial enjoyment of the equitable estate from one person to another, in the future, in a manner analogous to the limitations of springing or shifting uses under the statute of uses. Courts of equity always take spécial care that future estates or interests shall not be destroyed by the present user of the property; and that the limitations of future equitable interests shall not transcend the limits assigned for the limitation of similar legal interests or executory devises, and shifting and springing uses at law.

§ 379. The rule against perpetuities has been gradually established by judicial decisions, and affords a most notable instance of the nice adaptation of the principles of the common law to the decision of a question which requires at once a due regard for the rights of persons and property, and a careful consideration of these larger principles of public policy so essential to the welfare of communities and States. For public policy is opposed to the perpetual settlement of property in families in such manner that it is for ever inalienable, or inalienable so long as there may be a person to take, answering the designation of some testator who died generations before. The first stand of the judges was to allow only those limitations which would take effect at the end of one life from the death of the testator.[1] This was afterwards modified to include two or more lives in being, and running at the same time, "or where the candles are all burning at once;" for it is plain that such a space of time is only one life in being, — that of the longest liver.[2] The next step was much debated; but it was finally settled, that an executory devise might be made to vest at the end of lives in being and twenty-one years after, to allow for the infancy of the

[1] Pells *v.* Brown, Cro. Jac. 590; 1 Eq. Ca. Ab. 187, c. 4 (A. D. 1621); see Snow *v.* Cutler, 1 Lev. 135; t. Raym. 162; 1 Keb. 151, 752, 800; 2 Keb. 11, 145, 296; 1 Sid. 153.

[2] Goring *v.* Bickerstaff, Pollexf. 31; 1 Ch. Ca. 4; 2 Freem. 163 (1664); 2 Harg. Jurid. Arg. 46; Lloyd *v.* Carew, Shower, P. C. 137; Pr. Ch. 72.

next taker, who by reason of infancy could not alienate the estate.[1] The statute of 10 & 11 Wm. III. c. 16, having provided that children *en ventre sa mère*, born after their father's death, should for the purposes of the limitations of estates be deemed to have been born in his lifetime, a further extension of nine or ten months was allowed for the period of gestation.[2] The next step was to allow a period of nine months for gestation at the beginning of the term, as the life in being during which the term would run might be that of a child *en ventre sa mère*.[3] Much discussion arose upon each one of these steps.[4] For instance, the term of twenty-one years, it was said, could not be allowed as a term in gross, and without reference to the infancy of some person interested in the estate; this question was not settled until Cadell *v.* Palmer, in the House of Lords in 1833, when it was finally determined, that twenty-one years might be allowed as a term in gross, without reference to the infancy of any person, but that the period of nine months for gestation should be allowed in cases only where the gestation had commenced[5] of some person who, if born, would take an interest in the estate. By such steps, by imperceptible degrees, and after two centuries of doubt and litigation, and unaided by legislation, the judges framed and completed the *great rule against perpetuities*.[6]

§ 380. Thus all future legal estates which arise by way of executory devise, conditional limitation, or shifting and springing

[1] Taylor *v.* Biddal, 2 Mad. 289; Freem. 243; 1 Eq. Ca. Ab. 188, c. 11; F. C. R. 432; Laddington *v.* Kime, 1 Raym. 203; Gore *v.* Gore, 2 W. Kel. 204; 2 P. Wms. 28; 2 Stra. 948; Scattergood *v.* Edge, 12 Mod. 277; Duke of Norfolk's Case, 3 Ch. Ca. 12 Ch. R. 229; 2 Freem. 72; Pollexf. 223; Massenburgh *v.* Ash, 1 Vern. 234; Maddox *v.* Staine, t. Talb. 228; 2 Harg. Jurid. Arg. 50.

[2] Stephens *v.* Stephens, Ca. t. Talb. 228; Forrest, 228; Goodtitle *v.* Woods, Willes, 211; 7 T. R. 103 (n.); Sheffield *v.* Orrery, 3 Atk. 282; Gulliver *v.* Wicket, 1 Wils. 185; Bullock *v.* Stones, 2 Ves. 521; Goodman *v.* Goodright, 2 Burr. 873.

[3] Long *v.* Blackall, 7 T. R. 100; 2 Harg. Jurid. Arg. 105; 6 Cru. Dig. 488.

[4] Davies *v.* Speed, 12 Mod. 39; 2 Salk. 675; Holt, 731; Bostock's Case, Ley, 56; Roe *v.* Tranmer, 2 Wils. 75; Lloyd *v.* Carew, Show. P. C. 137; Pr. Ch. 72; 2 Harg. Jurid. Arg. 36; Carwardine *v.* Carwardine, 1 Ed. 34; Blandford *v.* Thackerell, 2 Ves. Jr. 241; 1 Sand. Uses & Tr. 198; Thellusson *v.* Woodford, 4 Ves. 337; Routledge *v.* Dorrill, 2 Ves. Jr. 357; Keily *v.* Fowler, Wilmot, 306; Beard *v.* Westcott, 5 Taunt. 393; 5 B. & Al. 801; T. & R. 25; Bengaugh *v.* Edridge, 1 Sim. 173, 271.

[5] Cadell *v.* Palmer, 7 Bligh (N. S.), 202; 10 Bing. 140; 1 Cl. & Fin. 372; 1 Jarm. Wills, 222.

[6] Lewis on Perpetuity, pp. 140–162; 1 Powell on Devisees by Jar. 389 n.

uses, must vest within a life or lives in being at the death of the testator, and twenty-one years; and, in case the person in whom the estate or interest should then vest is *en ventre sa mère*, nine months more will be allowed; and all estates created as aforesaid, and so limited that they may not vest within that time, are void.[1] If the estates are created and limited by deeds *inter vivos*, the lives in being must be those persons who are living at the execution of the deed, and not at the death of the grantor or settlor.[2] And if an absolute term is taken, and no anterior term for a life in being is referred to, such absolute term cannot be longer than twenty-one years;[3] but a term of any number of years may be taken, provided the term is so connected with some life or lives in being that the interest must vest in some person living at the death of the testator and at the time of the vesting.[4] So estates limited to take effect after an indefinite failure of issue of a living or deceased person are void, for the reason that the issue of such persons may not fail until after the term of a life or lives in being and twenty-one years has expired.[5]

§ 381. It will be observed, that, in determining whether a partic-

[1] Proprietors of Church in Brattle Square *v.* Grant, 3 Gray, 149; Sears *v.* Russell, 8 Gray, 86; 1 Shep. Touch. 126; 4 Kent, Com. 128 and notes; 2 Fearne, Cont. Rem. 50; Nightingale *v.* Burrell, 15 Pick. 111; 6 Cru. Dig., tit. 38, c. 17, § 23; Cadell *v.* Palmer, 1 Cl. & Fin. 372, 423; Bacon *v.* Proctor, T. & R. 31; Mackworth *v.* Hinxman, 2 Keen, 658; Ker *v.* Dungannon, 1 Dr. & W. 509; Com., &c., *v.* De Clifford, 1 Dr. & War. 245; Welsh *v.* Foster, 12 Mass. 97; Tilbury *v.* Barbut, 3 Atk. 617; Conklin *v.* Conklin, 3 Sand. Ch. 64; Tyte *v.* Willis, Ca. t. Talb. 1; Att'y-Gen. *v.* Gill, 2 P. Wms. 369; Nottingham *v.* Jennings, 1 P. Wms. 25; Kampf *v.* Jones, 2 Keen, 756; Miller *v.* Macomb, 26 Wend. 229; Tator *v.* Tator, 4 Barb. 431; Ring *v.* Hardwicke, 2 Beav. 352; Ferris *v.* Gibson, 4 Edw. 707; Egerton *v.* Brownlow, 4 H. L. Ca. 1, 160.

[2] Lewis on Perpetuity, 171, 172. Mr. Lewis observes an inconsistency in taking lives in being at the death of the testator, if the future interest is created by will, and lives in being at the date or execution of the deed, if such interests are created by deed. But it should be remembered that a will speaks as at the death of the testator, while a deed speaks as at the time of its execution, so that there is no inconsistency in principle. See Tregonwell *v.* Sydenham, 3 Dow, 194; 2 Jar. on Wills, 257; Ed. 1861.

[3] Crooke *v.* De Vandes, 9 Ves. 197; Palmer *v.* Holford, 4 Russ. 403; Speakman *v.* Speakman, 8 Hare, 180.

[4] Lachlan *v.* Reynolds, 9 Hare, 796.

[5] Randolph *v.* Wendel, 4 Sneed, 646; Van Vechten *v.* Pearson, 5 Paige, 512; Van Vechten *v.* Van Vechten, 8 Paige, 104; Hone *v.* Van Schaick, 20 Wend. 564; Watkins *v.* Quarles, 23 Ark. 179; Hawley *v.* James, 5 Paige, 318; 16

ular devise is contrary to the rule against perpetuities, the inquiry is not whether the contingency upon which the estate is to vest actually occurs within the time limited by the rule, but whether it is possible that the event may not happen within the time. If it is possible that the event upon which an executory devise or shifting or springing use is to vest in some person may not happen within the time, the executory estate is void, although in fact the event actually happens within the time.[1] And it must further be observed, that, if the estate is to vest in some person within the time limited, it will not be obnoxious to the rule against perpetuities, even if such person may not be entitled to the actual enjoyment of the property; that is, the rule as to perpetuities deals with the *vesting of the title*, and not with the *actual reception of the profits of an estate*.[2]

§ 382. The same rule applies with equal force in law and equity, and trusts and beneficial or equitable estates are subject to the same restrictions.[3] A perpetuity will no more be tolerated when it is covered by a trust, than when it displays itself undisguised in

Wend. 61; Miller *v.* Macomb, 2 Wend. 229; 9 Paige, 265; Lorillard *v.* Coster, 5 Paige, 172; Boehm *v.* Clark, 9 Ves. 580; Black *v.* McAulay, 5 Jones, L. 375; Jackson *v.* Billinger, 18 John. 368; Fisk *v.* Keen, 35 Me. 349; Bramlet *v.* Bates, 1 Sneed, 554; Jordan *v.* Roach, 32 Miss. 481; Gray *v.* Bridgforth, 33 Miss. 312; Tongue *v.* Nutwell, 13 Md. 415; Jones *v.* Miller, 13 Ind. 337; Chism *v.* Williams, 29 Mo. 288; Dodd *v.* Wake, 8 Sim. 615; Trafford *v.* Boehm, 3 Atk. 440; Ellicombe *v.* Gompertz, 3 M. & Cr. 127; Murray *v.* Addenbrook, 4 Russ. 407; Hayes *v.* Hayes, 4 Russ. 311; Bell *v.* Phyn, 7 Ves. 453; Thackeray *v.* Sampson, 2 S. & S. 214; Cross *v.* Cross, 7 Sim. 201; Bradshaw *v.* Skilbeck, 2 Bing. N. C. 182; Budd *v.* State, 22 Md. 48; Johnson *v.* Currin, 10 Penn. St. 498; Bedford's App., 40 Penn. St. 18; Deihl *v.* King, 6 S. & R. 29; Eichelberger *v.* Barnitz, 17 S. & R. 293; Rice *v.* Satterwhite, 1 Dev. & Bat. Eq. 69; Postell *v.* Postell, Bail. Ch. 390; Conklin *v.* Conklin, 3 Sand. Ch. 64; Brashear *v.* Marcy, 3 J. J. Marsh. 89; Allen *v.* Parkam, 5 Munf. 457; Mazyck *v.* Vanderhost, Bail. Ch. 48; Adams *v.* Chaplin, 1 Hill, Eq. 265; Lanesborough *v.* Fox, Ca. t. Talb. 262; Bennett *v.* Lowe, 5 Moor. & P. 485; Smith *v.* Dunwoody, 19 Ga. 237; McRee *v.* Means, 34 Ala. 378; Powell *v.* Brandon, 24 Miss. 343; Armstrong *v.* Armstrong, 14 B. Mon. 333. As to the legislation in the various States upon the failure of issue, see 2 Washburn Real Prop. 683 (3d ed.).

[1] Langdon *v.* Simson, 12 Ves. 295; O'Neill *v.* Lucas, 2 Keen, 313; Moore *v.* Moore, 6 Jones, Eq. 132; Welch *v.* Foster, 12 Mass. 97; Craig *v.* Hone, 2 Edw. Ch. 554; Robinson *v.* Bishop, 23 Ark. 378.

[2] Loring *v.* Blake, 98 Mass. 253; Murrray *v.* Addenbrook, 4 Russ. 407; Phipps *v.* Kelynge, 2 V. & B. 57 n. (c); Curtis *v.* Lukin, 5 Beav. 147.

[3] Duke of Norfolk's Case, 3 Ch. Ca. 20; 2 Ch. R. 229; 2 Freem. 72; Pol-

the settlement of a legal estate.[1] "If," as Lord Guilford said, "in equity you could come nearer to a perpetuity than the common law admits, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might make well for the jurisdiction of chancery, but would be destructive to the commonwealth.

§ 383. Therefore, the creation of a trust or equitable interest, which cannot vest in the object of the trust within the time limited by law for the vesting of legal estates, will be nugatory. Thus where a testator devised his real estate to trustees, in trust to apply the rents to the support of his wife, and his present and future grandchildren, during the life of the wife, and on her death to convey the estates to all his present and future grandchildren, as they respectively attained the age of twenty-five years, to hold to them and their heirs as tenants in common, it was held that the trust to convey was void, for the reason that some of the grandchildren might not become twenty-five years old until after the expiration of the life of the tenant for life, and twenty-one years in addition.[2] So a testator cannot authorize his trustees to limit an estate beyond the limits of the rule against perpetuities; but the persons appointed to take must be capable of taking directly under the will.[3] So where a testator devised land to a corporation in trust to convey the same to A. for life, with remainder to his oldest son for life, remainder to the son's oldest son for life, and so on in an endless series, and in default of issue of A., then to B. for life, and remainder to his oldest son for life, and so on in the same manner as to the sons of A., it was held to be void and vain as a perpetuity.[4] So if any directions are given which, if complied with, must enforce a perpetuity, they will be void; as when a

lexf. 293; Massenburgh *v.* Ash, 1 Vern. 254. *Æquitas sequitur legem,* but courts of equity have rather led the law courts in fashioning the rules against perpetuities.

[1] Norfolk's Case, 1 Vern. 164; Humberston *v.* Humberston, 1 P. Wms. 332; Parfitt *v.* Hember, L. R. 4 Eq. 443.

[2] Blagrave *v.* Hancock, 16 Sim, 374; Dodd *v.* Wake, 8 Sim. 615; Boughton *v.* James, 1 Coll. 26; 1 H. L. Ca. 406; Walker *v.* Mower, 16 Beav. 365; Leake *v.* Robinson, 2 Mer. 363; Sears *v.* Russell, 8 Gray, 86.

[3] Marlborough *v.* Godolphin, 1 Ed. 404; Robinson *v.* Hardcastle, 2 T. R. 241, 380, 781.

[4] Humberston *v.* Humberston, 1 P. Wms. 332; Parfitt *v.* Hember, L. R. 4 Eq. 443.

testator gave land to a college, and directed that the same should be leased for ever to his wife's relations at two-thirds its value, it was held to be a void direction, as tending to a perpetuity.[1]

§ 384. In private trusts the beneficial interest is vested absolutely in some individual or individuals who are, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under some disability, it is, or, within the allowed limit, will be competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity, as before stated. Nor can a settlor give his trustees a power to appoint the property subject to a trust, to new trusts to arise at or upon the termination of the trusts created by himself. But a trust created for charitable or public purposes is not subject to similar limitations, but it may continue for a permanent or indefinite time.[2]

§ 385. A trust to raise a sum of money out of an estate will be good if properly limited, although the trust itself upon which the money is limited after it is raised is void as being too remote. In such case, the heir will take the money as personal estate.[3] Contingent remainders of trust estates do not follow the strict rules of legal estates, but they are made to wait upon the contingency. In legal estates, the contingency must happen before the time, or the estate is gone. In the contingent remainders of equitable estates here spoken of, if the contingency may happen within the time, the estate is made to wait: if it happens, the estate vests; if it does not happen, the estate fails.[4]

[1] Att'y-Gen. v. Greenhill, 9 Jur. (N. S.) 1307.

[2] Christ's Hospital v. Granger, 1 Mar. & G. 460; Att'y-Gen. v. Foster, 10 Ves. 344; Att'y-Gen. v. Newcombe, 14 Ves. 1; Fearon v. Webb, 14 Ves. 19; Walker v. Richardson, 2 M. & W. 892; Att'y-Gen. v. Aspinal, 2 M. & Cr. 622; Att'y-Gen. v. Heelis, 2 S. & S. 76; Att'y-Gen. v. Shrewsbury, 6 Beav. 224; Gass v. Wilhite, 2 Dana, 183; Griffin v. Graham, 1 Hawks. 131; Miller v. Chittenden, 2 Io. 362; Philadelphia v. Girard, 45 Penn. St. 26; Odell v. Odell, 10 Allen, 1; Yard's App. 64 Penn. St. 95. The rule is held differently under the legislation of the State of New York. Levy v. Levy, 33 N. Y. 130; Bascomb v. Albertson, 34 N. Y. 598; Beekman v. Bonsor, 23 N. Y. 308.

[3] Burnly v. Evelyn, 16 Sim. 290; Tregonell v. Sydenham, 3 Dow, 194.

[4] Mogg v. Mogg, 1 Mer. 654; Monypenny v. Dering, 7 Hare, 568; Alexander v. Alexander, 16 C. B. 59; Hopkins v. Hopkins, 1 Atk. 581; Festing v. Allen, 12 M. & W. 279; Sayer's Trusts, L. R. 6 Eq. 319; Litt v. Randall, 3 Sm. & G. 83; Hodson v. Ball, 14 Sim. 558; Jee v. Audley, 1 Cox, 324; Church in Brattle Square v. Grant, 3 Gray, 142; Arnold v. Congreve, 1 R. & M. 209;

§ 386. A legal estate in fee cannot be conveyed to a person with a provision that it shall not be alienated, or that it shall not be subject to the claims of creditors; and so trusts cannot be created with a proviso, that the equitable estate, or interest of the *cestui que trust*, shall not be alienated or charged with his debts.[1] If it is ascertained that an interest is vested in the *cestui que trust*, the mode in which, or the time when, he is to reap the benefit is immaterial. The law does not allow property, whether legal or equitable, to be fettered by restraints upon alienation. Therefore when an equitable interest is once vested in the *cestui que trust*, he may dispose of it, or it may pass to his assignees by operation of law, if he becomes a bankrupt. Thus a trust for a person's support,[2] or to pay the interest to a person for life, as the trustees may think proper,[3] or when it shall become payable,[4] or in such sums or portions, and at such times and in such manner as the trustees think best,[5] may be exercised according to the discretion of the trustees; but the bankruptcy of the *cestui que trust* puts an end to the discretion of the trustees, and vests the whole interest in the assignees; and this is so, even where the trustees were directed to pay as they should think proper, and at their will and pleasure and not otherwise, so that the *cestui que trust* should have no right, claim, or demand, other than the trustees should think proper. The court thought in Snowden *v.* Dales, that, taking the whole instrument together, the *cestui que trust* had a vested interest, that these directions applied only to the manner of enjoyment, and that the equitable interest vested in the assignees at his bankruptcy.[6] The test is, would executors of the *cestui que trust* have a right to call for

Wilson *v.* Wilson, 4 Jur. (N. S.) 1076; 28 L. J. (N. S.) 95; Storrs *v.* Benbow, 3 De G., M. & G. 390; Cattlin *v.* Brown, 11 Hare, 372; Griffith *v.* Pownall, 13 Sim. 393; Merlin *v.* Blagrave, 25 Beav. 125; Greenwood *v.* Roberts, 15 Beav. 92; Dungannon *v.* Smith, 12 Cl. & Fin. 546; Seaman *v.* Wood, 22 Beav. 591; Vanderplank *v.* King, 3 Hare, 1; Webster *v.* Boddington, 26 Beav. 128; Curtis *v.* Lukin, 5 Beav. 147.

[1] Snowdon *v.* Dales, 6 Sim. 524; Green *v.* Spicer, 1 R. & M. 395; Groves *v.* Dolphin, 1 Sim. 66; Brandon *v.* Robinson, 18 Ves. 429; Ware *v.* Cann, 10 B. & Cr. 433; Bradley *v.* Peixoto, 3 Ves. 324; Hood *v.* Oglander, 34 Beav. 513; Bird *v.* Johnson, 18 Jur. 976.

[2] Younghusband *v.* Gisborne, 1 Coll. 400.

[3] Green *v.* Spicer, 1 R. & M. 395.

[4] Graves *v.* Dolphin, 1 Sim. 66.

[5] Peercy *v.* Roberts, 1 M. & K. 4.

[6] Snowdon *v.* Dales, 6 Sim. 524.

any arrears: if so, the assignees would have the right to call for the future income or interest.[1]

§ 387. There is one exception to the general rule, that an equitable interest, without the right to alienate, cannot be created; and that is in the case of trusts created for married women. It is not unusual to create trusts for married women, and give such women all the rights of unmarried women over their separate equitable interests, and at the same time to insert a clause against their anticipating the income, by which means they are unable to assign or transfer it, or in any way receive any benefit from the property, except by receiving the income, as it becomes due and payable.[2]

§ 388. But though a settlor cannot put a restraint upon alienation, or exclude the rights of creditors, he may settle property upon another in such manner that it cannot be alienated, and creditors and assignees cannot take it. But in such case the *cestui que trust* must lose the use of the property in case of his bankruptcy. Thus A. may settle property upon B. until alienation or bankruptcy, with a limitation over to C. upon either event. Or A. may give real or personal estate to B. with a *proviso*, that, on alienation or bankruptcy, it shall shift over to C.[3] But a clause divesting the property upon *alienation* alone, will embrace only the voluntary acts of the party, and will not apply to transfers by operation of law, as by bankruptcy,[4] unless it was intended that the clause should have so wide a signification.[5] Nor will a power to confess judgment be a voluntary act of alienation, unless it was within the contemplation of the parties;[6] nor will the marriage of a woman be an alienation of her *choses in action*.[7] So if there is a clause against anticipa-

[1] *Re* Sanderson's Trust, 3 Kay & J. 497.

[2] See this matter stated *post*, chap. on Trusts for Married Women.

[3] Muggeridge Trusts, John. Ch. (Eng.) 625; Kearsley *v.* Woodcock, 3 Hare, 185; Joel *v.* Mills, 3 K. & J. 458; Large's Case, 2 Leon. 82; Churchill *v.* Marks, 1 Coll. 441; Sharpe *v.* Cossent, 20 Beav. 470; Shee *v.* Hale, 13 Ves. 404; Lewes *v.* Lewes, 6 Sim. 304; Cooper *v.* Wyatt, 5 Mad. 482; Lockyer *v.* Savage, 2 Stra. 947; Yarnold *v.* Moorhouse, 1 R. & M. 364; Stephens *v.* James, 4 Sim. 499; *Ex parte* Oxley, 1 B. & B. 257; Rochford *v.* Hackman, 9 Hare, 475; *Ex parte* Hinton, 14 Ves. 598; Stanton *v.* Hall, 2 R. & M. 175.

[4] Lear *v.* Leggett, 2 Sim. 479; 1 R. & M. 690; Wilkinson *v.* Wilkinson, G. Coop. 259; 3 Swans. 528; Whitfield *v.* Prickett, 2 Keen, 608.

[5] Cooper *v.* Wyatt, 5 Mad. 482; Dommett *v.* Bedford, 6 T. R. 684.

[6] Avison *v.* Holmes, 1 John. & H. 530; Barnet *v.* Blake, 2 Dr. & Sm. 117.

[7] Bonfield *v.* Hassell, 32 Beav. 217.

tion, an assignment of arrears already accrued, and not of future income, is good.[1] An assignment in general words will not embrace property which would be forfeited by such assignment.[2]

§ 389. If a testator devises his real estate in strict settlement, and then gives his personal estate to such tenant in tail as first attains the age of twenty-one, if the tenant in tail is not of age at the testator's death, the event may never occur and the trust is void. But if the personal property is given upon trusts that correspond to the settlement of the real estate, with a proviso that it should not vest absolutely in any tenant in tail unless he attained twenty-one, the trust is good.[3]

§ 390. Thus where trusts are complete in themselves, or are what are termed executed trusts, courts will not mould, alter, or put any peculiar construction on them, in order to avoid or evade the rule against perpetuities. The ordinary rules of construction will be adhered to without regard to the consequences of avoiding trusts that are illegal.[4] But in cases of executory trusts, where trustees are directed to settle a formal deed of trust upon terms which are faintly and incompletely sketched, another rule will be applied. If from the articles or will it appears that a perpetuity was intended, that must be the end of the trust, whether executed or executory. But if the direct object of the limitations suggested in the articles is not the creation of a perpetuity, and if the remoteness is confined to some of the distant links only in the chain of limitations, equity, in decreeing the settlement, will carry into effect the general intention, especially if the expression of that intention clearly indicates that the limitations are to be carried out so far as the law allows.[5]

[1] *Re* Stulz Trusts, 4 De G., M. & G. 404; 1 Eq. R. 334.

[2] *Re* Waley's Trust, 3 Eq. R. 380. And as to the general effect of proceedings in insolvency and bankruptcy, and of annulling the proceedings, see Lloyd *v.* Lloyd, 1 W. N. 307; Pym *v.* Lockyer, 12 Sim. 394; Brandon *v.* Aston, 2 Y. & C. Ch. 24; Churchill *v.* Marks, 1 Coll. 441; Townsend *v.* Early, 34 Beav. 23; Martin *v.* Margham, 14 Sim. 230; Graham *v.* Lee, 23 Beav. 388.

[3] Gosling *v.* Gosling, 1 De G., J. & S. 1, 17; Lincoln *v.* Newcastle, 12 Ves. 218; Dungannon *v.* Smith, 12 Cl. & Fin. 546; Scarsdale *v.* Curzon, 1 John. & H. 40.

[4] Blagrave *v.* Hancock, 16 Sim. 371.

[5] *Ante,* § 376; Bankes *v.* Le Despencer, 10 Sim. 576; 7 Jur. 210; 11 Sim. 508; Lincoln *v.* Newcastle, 3 Ves. 387; 12 Ves. 218; Phipps *v.* Kelynge, 2 V. & B. 57 n.; Woolmore *v.* Burrows, 1 Sim. 512; Dorchester *v.* Eppingham, 10

§ 391. In some of the States, legislation has been had whereby the period within which estates must vest is shortened. Thus in Alabama [1] estates may be given to wife and children, or children only, severally, successively, and jointly, and to the heirs of the body of the survivor, if they come of age, and in default thereof over. But gifts to others than wife and children must vest within the term of three lives in being, and ten years thereafter. In Connecticut [2] no estate can be given by deed or will to any person or persons, except such as are in being, or to the immediate issue or descendants of such as are in being at the time of making the deed or will. In New York,[3] Michigan,[4] Minnesota,[5] and Wisconsin,[6] the absolute power of alienation cannot be suspended, by any limitation or condition, for a longer period than the continuance of two lives in being at the creation of the estate, except that a contingent remainder in fee may be limited on a prior remainder in fee to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined during their minority. Successive limitations of estates for life are not valid except to persons in being at the time of their creation. And if a remainder is limited on more than two successive estates for lives in being, all the subsequent successive estates are void; and, upon the death of those two persons the remainder will take effect as if no other life-estate had been created. No remainder can be created for the life of a person other than the grantee or devisee of such estate, unless such remainder is in fee;

Sim. 587, 588 n.; 3 Beav. 180; Kampf *v.* Jones, 2 Keen, 756; Tregonell *v.* Sydenham, 3 Dow, 194; 1 Jar. on Wills, 235 n.; see argument of Sir Edward Sugden in Bengough *v.* Edridge, 1 Sim. 226, 227; Mogg *v.* Mogg, 1 Mer. 654; 1 Jar. on Pow. Dev. 414 and note; Trevor *v.* Trevor, 13 Sim. 108; 1 H. L. Ca. 239; Tennent *v.* Tennent, Drury, 161; Boydell *v.* Golightly, 14 Sim. 346; White *v.* Briggs, 15 Sim. 17; Vanderplank *v.* King, 3 Hare, 5; Monypenny *v.* Dering, 7 Hare, 568; 2 De G., M. & G. 145; 16 M. & W. 418; Hale *v.* Penn, 25 Beav. 335; Humberston *v.* Humberston, 2 Vern. 737; 1 P. Wms. 332; Pr. Ch. 455; Deerhurst *v.* St. Albans, 5 Mad. 232; Jervoise *v.* Northumberland, 1 J. & W. 559; Blackburn *v.* Stables, 2 V. & B. 367; Rowland *v.* Morgan, 2 Phil. 763; Parfitt *v.* Hember, L. R. 4 Eq. 443.

[1] Code, 1852, § 1309.

[2] Comp. Stat. 1854, p. 630, § 4.

[3] 2 Rev. Stat. (4th ed.) 133, §§ 15–20.

[4] Comp. Laws, 1857, c. 85, §§ 15–26.

[5] Comp. Stat. 1859, c. 31, §§ 15–26.

[6] Rev. Stat. 1858, c. 83, §§ 15–26.

nor can a remainder be created upon such an estate in a term of years, unless it is for the whole residue of the term. If more than two lives are named, the remainder takes effect upon the death of the two persons first named, in the same manner as if no other persons had been named or lives introduced. A contingent remainder cannot be limited on a term for years, unless the contingency on which it is limited is such that it must vest during the continuance of two lives in being at the creation of such remainder, or at the termination of such term of years. Thus a limitation to A. for life, remainder to B. for life, remainder to C. and D., and the survivor of them, is within the statute, and void as to C. and D. as a limitation upon more than two lives in being.[1]

§ 392. In Ohio,[2] no estate can be limited to any person or persons, except they are in being, or to the immediate descendants of such as are in being at the time of making of the deed or will. In Mississippi,[3] fees-tail are prohibited, and converted into fees-simple; and estates may be limited in succession to two donees in being, and to the heirs of the body of the remainder-man, and in default thereof to the heirs of the donor in fee. In Indiana,[4] the power of selling lands cannot be suspended, by any limitation or condition, longer than the continuance of any number of specified lives in being at the time of the creation of the estate; except that contingent remainders in fee may be limited on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall be under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined during their minorities. In Kentucky,[5] the absolute power of alienation cannot be suspended by limitations or conditions for a longer period than during a life or lives in being and twenty-one years and ten months; which is substantially the common-law rule in the form of a statute. So, in Iowa,[6] alienation cannot be suspended for a period longer than lives in being and twenty-one years. In Arkansas[7] and Vermont,[8] their constitutions declare that a perpetuity shall not be allowed. What is a perpetuity in those States would neces-

[1] Arnold *v.* Gilbert, 5 Barb. 190.
[2] Rev. Stat. 1854, c. 42, § 1.
[3] Code, 1857, c. 38, § 1, art. 3; See Jordan *v.* Roach, 32 Miss. 481.
[4] Rev. Stat. 1852, p. 238, § 40.
[5] Rev. Stat. c. 80, § 34.
[6] Code, 1851, p. 1191.
[7] Const. art. 2, § 19.
[8] Const. pt. 2, § 36; Gen. Stat. 1863, pp. 25, 446.

sarily, in the absence of legislation, be determined by the common-law rule. So it is conceived that the common law prevails in those States. In all the other States, except perhaps Louisiana, where the rules of property were derived from the civil law or the code of France, and California, where they were derived from the Spanish laws, the common-law rules as to perpetuities are in force, and trusts that are contrary to these rules are void.

§ 393. Intimately connected with this matter is the rule against accumulations. Trusts for accumulation must be strictly confined within the limits of the rule against perpetuities. It has been seen that a settlor may restrain the alienation of property for a life or lives in being and twenty-one years; and, in case the beneficiary is then *en ventre sa mère*, an addition of nine months may be made to the term. In analogy to this rule, a settlor may prevent the beneficial enjoyment of property for the same length of time, by directing an accumulation of the interest, income, rents, or profits.[1] If a trust for accumulation may possibly exceed this limit, it is wholly void, and it cannot be cut down to the legal limit.

§ 394. The above is the rule where there are no statutes to control it. Trusts, by which the vesting, alienation, or enjoyment of property is postponed beyond the legal period, are considered as contrary to public policy, and therefore void; and, as courts cannot substitute legal directions in the place of illegal provisions in a will, the whole fails if there is an illegal gift for accumulation. The period during which accumulation might go on was found to be inconvenient in case a settlor availed himself of all its terms. Thus Mr. Thellusson, by an ingenious and skilful use of these legal limitations, constructed a will by which a fortune of £600,000 was left to accumulate for some person to come into existence in the future, answering a certain description, while mere pittances were given to his children and grandchildren then in being. It

[1] Fosdick *v.* Fosdick, 6 Allen, 43; Hooper *v.* Hooper, 9 Cush. 122; Thorndike *v.* Loring, 15 Gray, 391; Boughton *v.* James, 1 Coll. 26; 1 H. L. Ca. 406; Southampton *v.* Hertford, 2 V. & B. 54; Marshall *v.* Holloway, 2 Swans. 432; Curtis *v.* Lukin, 5 Beav. 147; Brown *v.* Stoughton, 14 Sim. 369; Scarisbrooke *v.* Skelmersdale, 17 Sim. 187; Turvin *v.* Newcome, 3 K. & J. 16; Craig *v.* Craig, 3 Barb. Ch. 76; Mathews *v.* Keble, L. R. 1 Eq. 467; L. R. 3 Ch. 691; Killam *v.* Allen, 52 Barb. 605; Dutch Reform Church *v.* Brandon, 52 Barb. 228; White *v.* Howard, 52 Barb. 294; Hillyard *v.* Miller, 10 Barr, 326.

was calculated that accumulations might go on under this will from seventy-five to one hundred years, and that the gross accumulation would amount to a sum from £32,000,000 to £100,000,000, according to the time during which it might accumulate. The will was most carefully considered and discussed in all the courts, but it was found to be drawn carefully within the law, and all its provisions were sustained.[1] Thereupon Parliament interfered, and passed a statute, usually called the Thellusson act, which curtailed the period during which accumulations might be directed.[2] This act established four alternate periods during which accumulations might be made: (1.) The life of the settlor; (2.) Twenty-one years from the death of the settlor; (3.) The minority or minorities of any persons living at the death of the settlor; (4.) During the minority or minorities of any person or persons who, if of full age, would be entitled under the limitations to the income which is directed to be accumulated.

§ 395. It has been determined that these four periods are alternative and not cumulative, and that accumulations must be confined to one of them.[3] If the accumulation does not begin until several years after the testator's death, it must cease at the end of twenty-one years from his death,[4] excluding the day of his death.[5] The act further directs, that any accumulation directed contrary to its provisions shall be void. By these words accumulations directed contrary to the statute are not wholly void, as at common law, but only the excess beyond the time allowed by the statute is void.[6] Mr. Lewis calls this a "rule of construction entirely

[1] Thellusson *v.* Woodford, 4 Ves. 227; 11 Ves. 112; 4 Kent, Com. 285.

[2] Stat. 39 and 40; Geo. III. c. 98.

[3] Ellis *v.* Maxwell, 3 Beav. 587; Rosslyn's Trust, 16 Sim. 391; Wilson *v.* Wilson, 1 Sim. (N. S.) 288.

[4] Nettleton *v.* Stephenson, 3 De G. & Sm. 366; Att'y-Gen. *v.* Poulden, 3 Hare, 555; Webb *v.* Webb, 2 Beav. 493; Shaw *v.* Rhodes, 1 My. & Cr. 135.

[5] Toder *v.* Sansom, 1 Brown, P. C. 468; Lester *v.* Garland, 15 Ves. 248; East *v.* Lowndes, 11 Sim. 434. And the day of the death was excluded by the rules of the common law, independently of the statute. Toder *v.* Sansom, *ut supra.*

[6] Griffiths *v.* Vere, 9 Ves. 127; Palmer *v.* Holford, 4 Russ. 403; Langdon *v.* Simson, 12 Ves. 295; Rosslyn's Trust, 16 Sim. 391. There are a great number of cases upon this construction, but they are not important in America. The reader can see 1 Jar. on Wills, 286; Hill on Trustees, 394; Lade *v.* Holford, Amb. 479; Eyre *v.* Marsden, 2 Keen, 564; 4 My. & Cr. 231; Marshall *v.*

novel."[1] It is also said, that the act is one of restraining force, and cannot give validity to trusts for accumulation, which are in themselves void, as transgressing the common-law limits of a perpetuity. Thus a direction to accumulate beyond the time allowed by the statute, but within the time allowed by the common law, will be good for the actual time allowed by the statute, and void only for the excess; but a direction to accumulate, beyond the rule of the common law against perpetuity, is wholly void notwithstanding the statute. Consequently, in England a trust for accumulation may verge *almost* upon the outside of the limit of a perpetuity, and yet be void only for the excess beyond the time established in the statute; but if a trust for accumulation transcends in the slightest degree the boundary of a perpetuity, it is wholly void, and will fail without regard to the actual course of events.[2]

§ 396. If a good bequest is made to a devisee, subject to an illegal or void direction to accumulate, as where such direction is independently engrafted upon the devise, and can be stricken out without destroying the substantial form of the gift, the gift may be held to be good, but the direction to accumulate void.[3] But where the gift is limited to take effect *after* a prescribed period of accumulation, and out of the accumulated fund, as part of the subject-matter of the gift, and such period of accumulation is illegal or too remote, the gift itself will fail, as the form of the gift in such case is of the substance of it.[4] If the gift and all its accumulations are of necessity to vest in some person absolutely, in such manner that he will have a right to call for the fund, and stop the accumulations within the legal period, the bequest will be good, although such persons should allow the accumulations to go on as directed;[5]

Holloway, 3 Swans. 432; Southampton *v.* Hertford, 2 V. & B. 61; Haly *v.* Bannister, 4 Mad. 277.

[1] Lewis on Per. 593.

[2] Lewis on Per. 593, 594; Hargrave, Accum. 91, 110; 1 Pow. on Devi. by Jar. 419; 2 Prest. Abst. 183.

[3] Haxtun *v.* Corse, 2 Barb. Ch. 506; Craig *v.* Craig, 3 Barb. Ch. 76; Martin *v.* Margham, 14 Sim. 230; Williams *v.* Williams, 4 Selden, 525; Phelps *v.* Pond, 23 N. Y. 69; Kilpatrick *v.* Johnson, 15 N. Y. 322; Hawley *v.* James, 5 Paige, 318; Philadelphia *v.* Girard, 45 Penn. St. 1.

[4] Amory *v.* Lord, 5 Selden, 403.

[5] Phipps *v.* Kelynge, 2 Ves. & B. 57 n, 62, 63; Tregonell *v.* Sydenham, 3 Dow, 194; Lewis on Per. 640; Conner *v.* Ogle, 4 Md. Ch. 443; Saunders *v.* Vautier, 4 Beav. 115; Cr. & Phil. 240; Oddie *v.* Brown, 4 De G. & J. 179;

that is, the same rule applies as in the case of perpetuities. The law concerns itself with the possibilities of an illegal accumulation, and not with the fact, whether a person, having an absolute vested right to a fund, allows it to go on accumulating in accordance with a void direction.[1]

§ 397. When a direction to accumulate is void for a part of the term, the income during such void part will belong to the heir or next of kin, or to the residuary legatee. Mr. Jarman has pointed out the destination of such income as follows: (1.) Where there is a present gift in possession, and the direction for accumulation is merely to govern the mode of enjoyment, the result is to give those entitled the present income, the same as if the direction had not been given;[2] (2.) Where the trust for accumulation is grafted upon an estate where vesting is deferred or made contingent, until after the period of accumulation, the statute by stopping the accumulation does not hasten the vesting or the possession, and the income goes to the residuary legatee or the heir, according as it is personal or real estate, until the vesting or possession of the estate is matured. But where the residue is not given absolutely, but only for life or years, the interest upon a legacy thus directed to be accumulated beyond the legal period goes into the residue of the estate as capital.[3] (3.) Where a residue is directed to be accumulated, the income, when its accumulation becomes illegal, will go to the heir or next of kin, according as the property may be real or personal estate.[4] (4.) The income of the accumulations fol-

Bateman *v.* Hotchkin, 10 Beav. 426; Bacon *v.* Proctor, T. & R. 31; Briggs *v.* Oxford, 1 De G., M. & G., 363; Williams *v.* Lewis, 6 H. L. Ca. 1013.

[1] *Ante*, § 381.

[2] Trickey *v.* Trickey, 3 My. & K. 560; Clulow's Trust, 5 Jur. (N. S.) 1002; 28 L. J. Ch. 696; Combe *v.* Hughes, 11 Jur. (N. S.) 194; 1 Jar. on Wills, 292; Hawley *v.* James, 5 Paige, 318.

[3] Jones *v.* Moggs, 10 Hare, 605; Macdonald *v.* Brice, 2 Keen, 276; Eyre *v.* Marsden, 2 Keen, 574; Ellis *v.* Maxwell, 3 Beav. 587; Nettleton *v.* Stephenson, 3 De G. & Sm. 366; Barrington *v.* Liddell, 10 Hare, 429; Att'y-Gen. *v.* Poulden, 3 Hare, 555; Crawley *v.* Crawley, 7 Sim. 427; Morgan *v.* Morgan, 4 De G. & Sm. 175; Hull *v.* Hull, 24 N. Y. 647; 1 Jar. on Wills, 292.

[4] Skrymsher *v.* Northcote, 1 Swans. 566; Macdonald *v.* Brice, 2 Keen, 276; Pride *v.* Fooks, 2 Beav. 437; Elborne *v.* Goode, 14 Sim. 165; Wilson *v.* Wilson, 1 Sim. (N. S.) 288; Bourne *v.* Buckton, 2 Sim. (N. S.) 91; Oddie *v.* Brown, 4 De G. & J. 179; Halford *v.* Stains, 16 Sim. 488; Wilde *v.* Davis, 1 Sm. & G. 475; Eyre *v.* Marsden, 2 Keen, 564; 4 My. & Cr. 431; Edwards *v.* Tuck, 3 De G., M. & G. 40; Burt *v.* Sturt, 10 Hare, 415; 1 Jar. on Wills, 292.

lows the same rule as the accumulation.[1] These are substantially the same rules that apply to the distribution of income which is illegally directed to be accumulated at common law.

§ 398. In New York,[2] Michigan,[3] Wisconsin,[4] and Minnesota,[5] the common-law rules in relation to accumulations are changed by statutes, which are substantially the same in each State. In those States, accumulations may be directed by deed or will, during the minority of one or more persons, to commence with the creation of the estate out of which the accumulation is to be made, and to end with the minority of the persons named. If there is a direction for an accumulation for a longer period, the excess only is void. In Alabama,[6] accumulations can go on only for ten years, unless they are for the benefit of a minor child in being at the creation of the trust, or at the death of the testator, in which case they may continue during its minority. In Pennsylvania,[7] trusts for accumulation cannot be created for a longer term than the life or lives of the grantor or testator, and the term of twenty-one years from the death of such grantor or testator, and if these limits are exceeded, the excess is void. In the other States, the common-law rules, as before stated, are supposed to prevail. The rule in regard to accumulation is analogous to the rules in regard to the vesting of executory estates. At common law, the same rule prevails in both cases. In many of the States, the rules regulating the vesting of such estates have been altered by statutes. Whether the modification of those rules by statute, without reference to the rule as to accumulations, would also alter the rule as to accumulations in those States does not seem to have been considered.

§ 399. Where there are no statutes regulating accumulations, a direction to accumulate a fund for a charity, for a term beyond the common-law limit, does not vitiate the gift for the charity,[8] although no limit has been determined by courts, during which

[1] Crawley v. Crawley, 7 Sim. 427; O'Neill v. Lucas, 2 Keen, 316; Morgan v. Morgan, 4 De G. & Sm. 175; 20 L. J. Ch. 441; 1 Jar. on Wills, 292.

[2] Rev. Stat. (4th ed.) p. 135; Craig v. Craig, 3 Barb. Ch. 76; Killam v. Allen, 52 Barb. 605.

[3] Comp. Laws, 1857, c. 85, §§ 15–26.

[4] Rev. Stat. 1858, c. 83, §§ 15–26.

[5] Comp. Stat. 1859, c. 31, §§ 15–26.

[6] Code, 1852, § 1310.

[7] Purd. Dig. 1861, p. 853, § 9.

[8] Odell v. Odell, 10 Allen, 1; but see Hillyard v. Miller, 10 Penn. St. 326; Philadelphia v. Girard, 45 Penn. St. 1.

an accumulation for a charity may be permitted. It is probable that courts would take care that no extraordinary or extravagant term for accumulation should be allowed for a future and prospective good. But where there are statutes against accumulations, charities will be governed by the same rules unless they are specially excepted.[1]

§ 400. In Bassil *v.* Lister,[2] it was determined that a direction of a testator that premiums on policies of insurance should be paid out of his estate, upon the lives of his sons during their lives, was not a direction for an accumulation within the prohibition of the statute. The case is severely criticised in Jarman on Wills;[3] but it would seem, that it would not be illegal for a testator to direct the premiums to be paid upon a life policy, if the primary object of such a direction is not accumulation, but security or safety. The question cannot arise, however, in the absence of statutory provisions upon the subject of accumulations; for it can be an accumulation for one life only in being at the time, and such an accumulation is legal by the rules of the common law.

[1] Martin *v.* Margham, 14 Sim. 230.

[2] Bassil *v.* Lister, 9 Hare, 177.

[3] 1 Jarm. 294–297.

CHAPTER XIV.

GENERAL PROPERTIES AND DUTIES OF THE OFFICE OF TRUSTEE.

§ 401. A trustee, having accepted the office, is bound to discharge its duties.
§ 402. He cannot delegate his authority.
§ 403. Not responsible if he follow directions in employing agents.
§ 404. Where agents must be employed.
§ 405. When responsible for agents and attorneys.
§ 406. When not responsible.
§ 407. Difference of liability in law and equity.
§ 408. Trustees responsible for all mischiefs arising from delegating discretionary powers.
§ 409. Employing agents or attorneys may not be a delegation of authority or discretion.
§ 410. A sale or devise of the trust estate not a delegation of the trust.
§ 411. Several trustees constitute but one collective trustee.
§§ 412, 413. When they must all act and when not.
§ 414. As to the survivorship of the office of trustee.
§ 415. General rule as to liability for cotrustees.
§ 416. May make themselves liable, where otherwise they would not be.
§ 417. Trustees must use due diligence in all cases or they will be liable for cotrustees.
§ 418. Cases of a want of due care and prudence.
§ 419. In case of collusion or gross negligence, a trustee will be liable for acts of cotrustees.
§ 420. When cotrustees are liable for others upon sales of real estate under a power.
§ 421. As to liability of coexecutors for the acts of each other.
§ 422. An executor must not enable his coexecutor to misapply the funds.
§ 423. When executors must all join they are not liable for each other's acts; but they must use due diligence.
§ 424. An executor must not allow money to remain under the sole control of his coexecutor.
§ 425. Executors and administrators governed by the same rules.
§ 426. Rule where coexecutors or cotrustees give joint bonds for security of the administration of the estate.
§ 427. Trustees can make no profit out of the office.
§ 428. Cannot buy up debts against the estate or *cestui que trust* at a profit.
§ 429. Cannot make a profit from the use of trust funds in business, trade, or speculation.
§ 430. All persons holding a fiduciary relation, subject to the same rule.
§ 431. All persons holding fiduciary relations to an estate, subject to the same rule.
§ 432. Can receive no profit for serving in their professional characters a trust estate.
§ 433. Trustees can set up no claim to the trust estate, and ought not to betray the title of the *cestui que trust.*
§ 434. In England, upon failure of heirs to the *cestui que trust*, trustee may hold real estate to his own use.
§ 435. Speculative questions.
§ 436. In the United States, the interest of the *cestui que trust* in real estate escheats.
§ 437. So it does in England and the United States in personalty.

§ 401. A TRUSTEE, having accepted a trust, cannot renounce it. If any one undertakes an office for another, he is bound to discharge

its duties, and he cannot free himself from liability by mere renunciation. He must be discharged by a court of equity, or by a special power in the instrument of trust, or by the consent of all parties interested in the estate, if they are *sui juris*: if all the parties are not *sui juris*, recourse must be had to a court of equity, in the absence of any provisions in the instrument of trust.[1] Nor can a party qualify his own acts. Where he is named trustee or executor, and acts in behalf of certain parties in the management of the estate, he cannot protest that he is not acting generally, and that he will not be responsible for any mismanagement. On the contrary, if he so acts, and his coexecutors accept the trust, and commit a *devastavit*, he will be equally responsible.[2] Even if a trustee gives a bond for the due execution of the trust, and in a suit upon the bond is obliged to pay the full amount, he is not discharged from the trust, nor does the trust property vest in him beneficially. He is still a trustee, and must account for the trust property, and all the income and profits. Courts of equity, however, in such cases have power to do equity; and the trustee would not be ordered to convey the trust property without repayment to him of the money paid out on his bond.[3]

§ 402. The office of trustee is one of personal confidence, and cannot be delegated. If a person takes upon himself the management of property for the benefit of another, he has no right to impose that duty on others, and if he does, he will be responsible to the *cestui que trust*, to whom he owes the duty.[4] Therefore if a trustee confides his duties or the trust fund to the care of a stranger,[5]

[1] Doyle *v.* Blake, 2 Sch. & L. 245; Chalmer *v.* Bradly, 1 J. & W. 68; Read *v.* Truelove, Amb. 417; Manson *v.* Baillie, 2 Macq. H. L. Ca. 80; Switzer *v.* Skiles, 3 Gilm. (Ill.) 529; Diefendorf *v.* Spraker, 6 Seld. 246; Shepherd *v.* McEvers, 4 John. Ch. 136; Matter of Jones, 4 Sandf. 615; Cruger *v.* Halliday, 11 Paige, 314; Courtenay *v.* Courtenay, 3 Jo. & La. 529.

[2] Lowry *v.* Fulton, 9 Sim. 123; Doyle *v.* Blake, 2 Sch. & L. 231; Read *v.* Truelove, Amb. 417; Urch *v.* Walker, 3 M. & Cr. 702; Van Horn *v.* Fonda, 5 John. Ch. 403.

[3] Moorcroft *v.* Dowding, 2 P. Wms. 314.

[4] Turner *v.* Corney, 5 Beav. 517.

[5] Adams *v.* Clifton, 1 Russ. 297; Kilbee *v.* Sneyd, 2 Moll. 199; Hardwick *v.* Mynd, 1 Anst. 109; Venables *v.* Foyle, 1 Ch. Ca. 2; Douglass *v.* Browne, Mont. 93; *Ex parte* Booth, Mont. 248; Walker *v.* Symonds, 3 Swans. 79 n. (a); Char. Corp. *v.* Sutton, 2 Atk. 405; Wilkinson *v.* Parry, 4 Russ. 272; Hulme *v.* Hulme, 2 M. & K. 682; Black *v.* Irwin, Harp. L. 411; Berger *v.* Duff, 4 John. Ch. 368; Pearson *v.* Jamison, 1 McLean, 199; Newton *v.* Bronson, 3 Kern. 587; Andrew *v.* N. Y. Bible Soc., 4 Sand. 156; Niles *v.* Stevens, 4 Denio, 399; Beekman *v.* Bonsor, 23 N. Y. 298.

or to his attorney,[1] or even to his cotrustee or coexecutor,[2] he will be personally responsible. But, before this responsibility can arise, the trustee must have accepted the office. Where a person named executor received a bill by post, and passed it over to a coexecutor who had accepted the trust, it was held that the act might be considered as the act of a stranger, and did not impose any responsibility.[3] So where a coexecutor collected money, and paid it to a banker, who was also his coexecutor, and whom the testator employed as his banker, he was held excused for trusting the same person as his coexecutor whom the testator trusted as his banker.[4]

§ 403. So trustees are not responsible, if they follow the directions of the settlor. Thus where a testator recommended his executors to employ a person who had been his own agent and clerk, and they employed him to collect moneys, and he became insolvent, it was held that, as the testator pointed out the agent to whom certain business might be delegated, the executors were not liable for the loss, if they used due diligence to recover the money.[5] So if an executor pays over money which he has no right to retain. Thus a testator appointed A., B., and C. his executors, and authorized A. to sell real estate for certain purposes. A. employed B. as his agent to sell the real estate; B. sold the estate and paid the money over to A., who misapplied it; and it was held that B. received the money, not as executor, but as agent of A., and as A. had authority to sell, he had a right to the money, and that B. could not retain it, and was not responsible for it.[6]

[1] Chambers *v.* Minchin, 7 Ves. 196; Griffiths *v.* Porter, 25 Beav. 236; Ingle *v.* Partridge, 32 Beav. 661; 34 Beav. 411; Bostock *v.* Floyer, L. R. 1 Ch. 26; *Ex parte* Townsend, 1 Moll. 139; Ghost *v.* Waller, 9 Beav. 497; Turner *v.* Corney, 5 Beav. 115; Sinclair *v.* Jackson, 8 Cow. 582.

[2] Langford *v.* Gascoyne, 11 Ves. 333; Clough *v.* Bond, 3 M. & Cr. 497; Eaves *v.* Hickson, 30 Beav. 136; Davis *v.* Spurling, 1 R. & M. 66; Anon., Mos. 35, 36; Harrison *v.* Graham, 1 P. Wms. 241 n. (y); Kilbee *v.* Sneyd, 2 Moll. 200; Marriott *v.* Kinnersley, Tam. 470; Thompson *v.* Finch, 22 Beav. 316; 8 De G., M. & G. 560; Dines *v.* Scott, T. & R. 361; Cowell *v.* Gatcombe, 27 Beav. 568; Trutch *v.* Lamprell, 20 Beav. 116; *Ex parte* Winnall, 3 D. & C. 22; Burger *v.* Duff, 4 John. Ch. 368.

[3] Balchen *v.* Scott, 2 Ves. Jr. 678.

[4] Churchill *v.* Hobson, 1 P. Wms. 241; Chambers *v.* Minchin, 7 Ves. 198. And see 1 P. Wms. 241, n. (y.)

[5] Kilbee *v.* Sneyd, 2 Moll. 199; Doyle *v.* Blake, 2 Sch. & L. 239.

[6] Davis *v.* Spurling, 1 R. & M. 64; Tam. 199; Keane *v.* Roberts, 4 Mad. 332, 356; Crisp *v.* Spranger, Nels. 109.

§ 404. But there are circumstances where the trustees must employ agents. Lord Hardwicke said, "There are two sorts of necessity, *legal* necessity and *moral* necessity. As to the first a distinction prevails. Where two *executors* join in giving a discharge for money, and only one of them receives it, they are both answerable for it; because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if *trustees* join in giving a discharge, and one receives, the other is not answerable, because his joining in the discharge was necessary. *Moral* necessity is from the usage of mankind, if the trustee acts prudently for the trust, as he would have done for himself, 'and according to the usage of business;' as if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable. So in the employment of stewards and agents; for none of these cases are on account of necessity, but because the persons acted in the usual method of business."[1] Other cases have held, that "necessity includes the usual course of business."[2] Thus where an executor in London remitted money to an executor in the country to pay debts there due, it was held to be a *necessary* transaction in the course of business, and the executor in London was not responsible for the loss of the money by his coexecutor in the country.[3] So where A. and B. were assignees of a bankrupt, and A. signed dividend checks and delivered them to B. for his signature, and for delivery to the creditors, and they were stolen from B. and negotiated at the bank, it was held that A. was not responsible for the loss, as he had delegated the checks to B. in the necessary course of the business.[4] So a trustee is not called upon, in the ordinary course of business, to take security from the agent or other person whom he employs.[5] One trustee may employ

[1] *Ex parte* Belchier, Amb. 219.

[2] Bacon *v.* Bacon, 5 Ves. 335; Clough *v.* Bond, 3 M. & C. 497; Joy *v.* Campbell, 1 Sch. & L. 341; Chambers *v.* Minchin, 7 Ves. 193; Langford *v.* Gascoyne, 11 Ves. 335; Davis *v.* Spurling, 1 R. & M. 66; Munch *v.* Cockerell, 5 M. & Cr. 214; Hawley *v.* James, 5 Paige, 487; May *v.* Frazer, 4 Lit. 391; Telford *v.* Barry, 1 Io. 591; Blight *v.* Schenk, 10 Barr, 285; Lewis *v.* Reed, 11 Ind. 239; Mason *v.* Wait, 4 Scam. 132.

[3] Joy *v.* Campbell, 1 Sch. & Lef. 341; Barrings *v.* Willing, 4 Wash. C. C. 251; Jones's App. 8 W. & S. 147; State *v.* Guilford, 15 Ohio, 593; Deadrick *v.* Cantrell, 10 Yerg. 254; Thomas *v.* Scruggs, 10 Yerg. 401; Maccubbin *v.* Cromwell, 7 G. & J. 157.

[4] *Ex parte* Griffin, 2 Gl. & J. 114; Wackerbath *v.* Powell, Buck, 495; 2 Gl. & J. 151.

[5] *Ex parte* Belchier, Amb. 220.

his cotrustee as his agent, or one trustee may act for the whole, within the scope of those duties where an agent may be employed.[1]

§ 405. It was held in one case, that assignees were responsible for the loss of money by an attorney employed by them to collect debts due the estate, on the ground that there was no *necessity* for them to allow the attorney to receive a shilling of the money except the costs, as he could not give a valid receipt for the same;[2] and Lord Eldon was cited as an authority for this. Mr. Lewin questions this case, and says that trustees must not allow money to remain in the hands of an attorney, but that the authorities are doubtful which say that money may not pass through the hands of an attorney in the ordinary course of business. The case is authority, however, thus far, that attorneys cannot sign receipts for trustees, and if they authorize them so to do, the trustees will be responsible as for the acts of an agent improperly appointed.[3]

§ 406. If money is to be transmitted to a distant place, a trustee may do so through the medium of a responsible bank, or he may take bills from persons of undoubted credit, payable at the place where the money is to be sent; but the bills must be taken to him *as trustee:* if he neglects these precautions he will be responsible for any loss.[4]

§ 407. It is said that there is a difference in the rule, as applied to executors in a court of law and a court of equity. Thus, in a court of law, an executor will be charged with all the assets that come to his hands to be administered, and he must discharge himself by showing a legal administration of all of them; and he cannot discharge himself at law by showing that he intrusted them to another in the ordinary course of business; that he used due caution and prudence, and reposed a reasonable confidence in such other person; and that the assets were lost without negligence or default on his part. Such a state of facts would not sustain a plea of *plene administravit* in a court of law. But a court of equity

[1] *Ex parte* Rigby, 19 Ves. 463; Abbott *v.* American Hard Rubber Co., 33 Barb. 579; Sinclair *v.* Jackson, 8 Cow. 543; Webb *v.* Ledsom, 1 K. & J. 385; Leggett *v.* Hunter, 19 N. Y. 445; Bowers *v.* Seeger, 3 W. & S. 222.

[2] *Ex parte* Townsend, 1 Moll. 139; Anon., 12 Mod. 560; *Re* Fryer, 3 K. & J. 317.

[3] Lewin, 208.

[4] Wren *v.* Kirton, 11 Ves. 380; *Ex parte* Belchier, 219; Routh *v.* Howell, 3 Ves. 566; Massey *v.* Banner, 1 J. & W. 247; Knight *v.* Plymouth, 1 Dick. 120; 3 Atk. 480.

would adjust the account of the executor upon equitable principles.[1] A court of probate, in taking the account, would also act upon equitable principles.[2]

§ 408. If the trust is of a *discretionary* nature, the trustee will be responsible for all the mischievous consequences of the delegation, and the exercise of the discretion will be absolutely void in the substitute.[3] Nor can a *discretionary* trust be delegated to a cotrustee.[4] Where a sum of money was given to three trustees to be distributed in charity in their *discretion*, and they divided it into three parts, and each took control of a third, Lord Hardwicke said: "I am of opinion that the trustees could not divide the charity into three parts, and each trustee nominate a third absolutely, because the determination of the propriety of every object was left by the testator to the discretion of *all* the executors."[5]

§ 409. But it must be observed that the appointment of an attorney, proxy, or agent, is not necessarily a delegation of the trust. The trustee must act at times through attorneys or agents, and if he determines in his own mind how to exercise the discretion, and appoints agents or instruments to carry out his determination, he cannot be said to delegate the trust, even though deeds or other instruments are signed by attorneys in his name. So if he gives instructions to his attorneys and agents how to act, it cannot be said to be a delegation of the trust.[6]

§ 410. It has been before stated that a sale or devise of the trust estate by the trustee will not be a delegation or communication of a discretionary trust to the vendee or devisee, unless the original instrument of trust contemplated and authorized such an act by vesting the trust or power annexed to the estate in the trustee and his assigns or devisees.

[1] Cross *v.* Smith, 7 East, 246; Jones *v.* Lewis, 2 Ves. 241; Poole *v.* Munday, 103 Mass. —; Upson *v.* Badeau, 3 Bradf. Sur. 13.

[2] Ibid.

[3] Alexander *v.* Alexander, 2 Ves. 643; Att'y-Gen. *v.* Scott, 1 Ves. 413; Wilson *v.* Dennison, Amb. 82; 7 Bro. P. C. 296; Bradford *v.* Belfield, 2 Sim. 264; Hitch *v.* Leworthy, 2 Hare, 200.

[4] Crewe *v.* Dicken, 4 Ves. 97.

[5] Att'y-Gen. *v.* Gleg, 1 Atk. 356.

[6] Att'y-Gen. *v.* Scott, 1 Ves. 413; *Ex parte* Rigby, 19 Ves. 463; Ord *v.* Noel, 5 Mad. 498; Sinclair *v.* Jackson, 8 Cow. 582; Hawley *v.* James, 5 Paige, 487; Newton *v.* Bronson, 3 Kern. 587; Blight *v.* Schenck, 10 Barr, 285; *Ex parte* Belchier, Amb. 219; Bacon *v.* Bacon, 5 Ves. 335; Clough *v.* Bond, 3 M. & Cr. 497; Lewis *v.* Reed, 11 Ind. 239; Mason *v.* Wait, 4 Scam. 132.

§ 411. Where a settlor vests his property in several cotrustees, they all form, as it were, one collective trustee; therefore they must perform their duties in their joint capacity.[1] In law there is no such person known as an *acting* trustee apart from his cotrustees. All who accept the office are acting trustees. If any one trustee who has accepted, refuses to join in the proposed act, or is incapable, the others cannot proceed without him, but an application must be made to the court.[2] So if trustees bring suits, or defend suits in court, they must act jointly, and they should all employ the same counsel. If they sever in their defence and incur extra costs, they might be compelled to bear them personally.

§ 412. A receipt for money, in the absence of special directions in the instrument of trust, must be signed by all the trustees, or it will be invalid.[3] Where the trustees are numerous, the court generally inserts an order that moneys may be paid to two or more.[4] This rule is, however, relaxed in the United States; and it has been held that payment of a mortgage to one of two trustees is a valid payment.[5] So all the trustees must join in proving a debt against a bankrupt;[6] but, under special circumstances, the court may order the proof to be made by one or more, even when payment must be made to all the trustees.[7] A different rule prevails in regard to bank stocks, for the bank recognizes only the legal title, and at law one joint-tenant may receive moneys; so one trustee may

[1] *Ex parte* Griffin, 5 Gl. & J. 116; Shook *v.* Shook, 19 Barb. 653; De Peyster *v.* Ferrers, 11 Paige, 13; Franklin *v.* Osgood, 14 John. 560; Cox *v.* Walker, 26 Me. 504; Hill *v.* Josselyn, 13 Sm. & M. 597; Crewe *v.* Dicken, 4 Ves. 97; Fellows *v.* Mitchell, 1 P. Wms. 83; 2 Vern. 516; Churchill *v.* Hobson, 2 Vern. 241; Chambers *v.* Minchin, 7 Ves. 198; Leigh *v.* Barry, 3 Atk. 584; Belchier *v.* Parsons, Amb. 219; *Ex parte*, Rigby, 19 Ves. 463; Webb *v.* Ledsam, 1 K. & J. 385; Latrobe *v.* Tiernan, 2 Md. Ch. 480; Vandever's App., 8 W. & S. 405; Sinclair *v.* Jackson, 8 Cow. 544; Ridgeley *v.* Johnson, 11 Barb. 527.

[2] Doyley *v.* Sherratt, 2 Eq. Ca. Ab. 742; *Re* Cong. Church *v.* Smithwick, 1 W. N. 196; Scruggs *v.* Driver, 31 Ala. 274; Matter of Wadsworth, 2 Barb. Ch. 381; Matter of Mechanics' Bank, 2 Barb. Ch. 446; Burrill *v.* Sheil, 2 Barb. 457; Wood *v.* Wood, 5 Paige, 596; Davis *v.* McNeil, 1 Ired. Eq. 344; Matter of Van Wyke, 1 Barb. Ch. 565; Guyton *v.* Shane, 7 Dana, 498; Ridgley *v.* Johnson, 11 Barb. 527; *Ex parte* Belchier, Amb. 219.

[3] Walker *v.* Symonds, 3 Swans. 63; Hall *v.* Franck, 11 Beav. 519.

[4] Att'y-Gen. *v.* Brickdale, 8 Beav. 223.

[5] Bowers *v.* Seeger, 8 W. & S. 222.

[6] *Ex parte* Smith, 1 Dea. 191; M. & A. 506; *Ex parte* Phillips, 2 Dea. 334.

[7] Ibid.

receive dividends upon public stocks,[1] or the rents of real estate, unless the tenant has had notice not to pay to one;[2] but both trustees must join in conveying such stocks or in executing a conveyance of land.[3] A deed of land executed by one trustee does not convey his share, as in the case of ordinary joint-tenants.[4] Where a deed was executed by two of three trustees, the burden was put upon the purchaser to prove that the other trustee was dead.[5] It has been said, however, that in a case of necessity, and after considerable time, the concurrence of a cotrustee may be presumed in some transactions.[6] A banker may require checks to be signed by one only, or by all the trustees. But if trustees place money at a banker's in such manner that one of their number can withdraw it in his sole name, all the trustees will be liable in case of a loss under such an arrangement.[7]

§ 413. In the case of a public trust, where there are several trustees, the act of the majority is held to be the act of the whole number;[8] but the act of the majority must be strictly within the sphere of their power and duty.[9] When a special power is given to trustees, it cannot be exercised by a majority only: all must join.[10] If a settlement declares, that, on the death or resignation of a trustee, the surviving trustees shall appoint his successor, all the surviving trustees must join in the appointment.[10] Where the trustees are numerous, as in the case of a charity, the court may direct that a majority shall form a quorum. Private trusts, where the rule prevails that all must join, cannot be affected by these principles, or by any agreements that may be made by the parties.[11] But an instrument of trust may contain express directions that the

[1] Williams v. Nixon, 2 Beav. 472.

[2] Ibid.; Townley v. Sherborne, Bridg. 35; Gouldsworth v. Knight, 11 M. & W. 337; Husband v. Davis, 1 C. B. 645; see Webb v. Ledsam, 1 K. & J. 385; Mendes v. Guedalla, 2 John. & H. 259.

[3] Ibid.

[4] Sinclair v. Jackson, 8 Cow. 543.

[5] Ridgeley v. Johnson, 11 Barb. 527.

[6] Vandever's App., 8 W. & S. 405.

[7] Townley v. Sherborne, Bridg. 35.

[8] Wilkinson v. Malin, 2 Tyr. 544; Perry v. Shipway, 1 Gif. 1; 4 De G. & J. 353; Att'y-Gen. v. Shearman, 2 Beav. 104; Att'y-Gen. v. Cuming, 2 Y. & C. Ch. 139; Younger v. Welham, 3 Swans. 180; Att'y-Gen. v. Scott, 1 Ves. 413; Wilson v. Dennison, Amb. 82.

[9] Ward v. Hipwell, 3 Gif. 547.

[10] *Re* Cong. Church v. Smithwick, 1 W. N. 196.

[11] Swale v. Swale, 22 Beav. 585; State v. Lord, 31 L. J. Ch. 391.

trust shall be administered according to the will of the majority of the trustees, in which case the minority will be compelled to give effect to the determinations of the majority.[1] So trustees are bound to concur in every merely ministerial act necessary for the execution of the trust; and, if they refuse, they may be compelled by order of the court. But where it is a mere matter of personal discretion, the court cannot interfere, unless a cotrustee refuses to act from a corrupt or selfish motive.[2] But a majority of trustees cannot deprive one of their number of his right and interest in the trust property.[3]

§ 414. A *bare authority*, committed to several persons, ceases upon the death of one; but if the authority is coupled with an interest, it passes to the survivors.[4] The committee of a lunatic's estate are mere protectors without any interest, and the death of one extinguishes the office.[5] An executorship survives, for the joint executors have an interest in the estate.[6] So testamentary guardianship survives, as such guardians have an authority over the estate.[7] So cotrustees have an authority coupled with an interest in the legal title of the estate, and the office is impressed with the quality of survivorship.[8] If land is given to two trustees in trust to sell, and one dies, the other may sell, as he holds the legal

[1] Att'y-Gen. *v.* Cuming, 2 Y. & C. Ch. 139; Taylor *v.* Dickinson, 15 Io. 483.

[2] Clarke *v.* Parker, 19 Ves. 1; Tomlin *v.* Hatfield, 12 Sim. 167; Gouldsworth *v.* Knight, 11 M. & W. 337; Burrill *v.* Sheil, 2 Barb. 457; Matter of Mechanics' Bank, 2 Barb. 446.

[3] Methodist Episcopal Church *v.* Stewart, 27 Barb. 553.

[4] Co. Lit. 113 a; Eyre *v.* Shaftsbury, 2 P. Wms. 108, 121, 124; Attorney-General *v.* Gleg, 1 Atk. 356; Amb. 584; Mansell *v.* Vaughn, Wilm. 49; Butler *v.* Bray, Dyer, 189 b; Peyton *v.* Bury, 2 P. Wms. 628.

[5] *Ex parte* Lyne, t. Talb. 143.

[6] Adams *v.* Buckland, 2 Vern. 514; Hudson *v.* Hudson, t. Talb. 129.

[7] Eyre *v.* Shaftsbury, 2 P. Wms. 102. But if joint guardians are appointed by the court, the death of one destroys the guardianship. Bradshaw *v.* Bradshaw, 1 Russ. 528; Hall *v.* Jones, 2 Sim. 41.

[8] Hudson *v.* Hudson, t. Talb. 129; Co. Lit. 113 a; Attorney-General *v.* Gleg, Amb. 585; Billingsley *v.* Mathew, Toth. 168; Gwilliams *v.* Rowell, Hard. 204; Stewart *v.* Peters, 10 Mo. 755; Butler *v.* Bray, Dyer, 189 b; Dominick *v.* Sayre, 3 Sand. 555; Belmont *v.* O'Brien, 2 Kern. 394; De Peyster *v.* Ferrers, 11 Paige, 13; Moses *v.* Murgatroyd, 1 John. Ch. 119; Shook *v.* Shook, 19 Barb. 653; Gregg *v.* Currier, 36 N. H. 200; Powell *v.* Knox, 16 Ala. 364; Parsons *v.* Boyd, 20 Ala. 112; Leggett *v.* Hunter, 19 N. Y. 445; Aubuchon *v.* Lory, 23 Mo. 99; Barton *v.* Tunnell, 5 Harr. 182; Smith *v.* McConnell, 17 Ill. 135; Hopper *v.* Adee, 3 Duer, 235; Britton *v.* Lewis, 8 Rich. Eq. 271.

title in the land, and the office of trustee.[1] Otherwise, the precaution taken by a settlor to guard his estate, by increasing the number of trustees, would be futile; for the death of one of them might result in defeating his whole trust. Where the trust was to raise £2000 out of the testator's estate, by sale or otherwise at the discretion of the trustees, who should invest the same in their own names upon trust, one of the trustees died and the other sold; and Vice-Chancellor Wood held that the survivor could make a good title. He said: "I find a clear estate in the vendor, and a clear duty to perform. Is it to be said that the sale is a breach of trust, because the cotrustee is dead? If I were to lay down such a rule, it would come to this, that when an estate is vested in two or more trustees, to raise a sum by sale or mortgage, you must come into this court on the death of one of the trustees."[2] The survivorship of the trust will not be defeated, because the settlement contains a power for restoring the original number of trustees by new appointments,[3] unless there is something in the instrument that specially manifests such an intention.[4] Where an act of Parliament declared that "survivors should, and they were thereby required" to appoint new trustees, the court expressed an opinion that the clause was not imperative, but simply directory.[5]

§ 415. The general rule is, that one trustee shall not be responsible or liable for the acts or defaults of his cotrustee. This rule was established in the time of Charles the First, after very great consideration and consultation by the judges in the case of Townley *v.* Sherborne,[6] wherein it was resolved "that where lands

[1] Warburton *v.* Sandys, 14 Sim. 622; Watson *v.* Pearson, 2 Exch. 594; Attorney-General *v.* Litchfield, 5 Ves. 285; Attorney-General *v.* Cuming, 2 Y. & C. Ch. 139; Slater *v.* Wheeler, 9 Sim. 156.

[2] Lane *v.* Debenham, 11 Hare, 188; Hind *v.* Poole, 1 K. &. J. 383.

[3] Doe *v.* Godwin, 1 D. & R. 259; Attorney-General *v.* Cuming, 2 Y. & C. Ch. 139; Jacob *v.* Lucas, 1 Beav. 436; Warburton *v.* Sandys, 14 Sim. 622; Hall *v.* Dewes, Jac. 193; Attorney-General *v.* Floyer, 2 Vern. 748; Townsend *v.* Wilson, 1 B. & Ald. 608.

[4] Foley *v.* Wontner, 2 J. & W. 245; Jacob *v.* Lucas, 1 Beav. 436.

[5] Doe *v.* Godwin, 1 D. & R. 259. And see Attorney-General *v.* Locke, 3 Atk. 166; Stamper *v.* Millar, 3 Atk. 212; Rex *v.* Flockwood, 2 Chit. 252.

[6] Townley *v.* Sherborne, Bridg. 35; 3 Lead. Ca. Eq. 718, and notes; Bowes *v.* Seegar, 8 W. & S. 222; Sinclair *v.* Jackson, 8 Cow. 543; Vandever's App., 8 W. & S. 405. And see Leigh *v.* Barry, 3 Atk. 584; Anon., 12 Mod. 560; Taylor *v.* Benham, 5 How. 233; Ochiltree *v.* Wright, 1 Dev. & B. Eq. 336; Ray *v.* Doughty, 4 Blackf. 115; Jones's App., 8 W. & S. 143; Peters *v.* Beverly, 10

or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his cotrustee shall not be charged or be compelled in chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust; *for they being by law joint-tenants*, or tenants in common, every one by law may receive either all or as much of the profits as he can come by; it is no breach of trust to permit one of the trustees to receive all or the most part of the profits; it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt of the profits. But his lordship and the said judges did resolve, that if, upon the proofs or circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing." And the same doctrine has been acted upon from that day to this.[1]

§ 416. In the same case of Townley *v.* Sherborne, it was determined that if the trustees joined in signing a receipt for money, they should each be responsible for it.[2] But where the administration of a trust is vested in several trustees, they must all join in signing a receipt for the principal or capital sum of the trust fund; and it is now established that a trustee who joins in the receipt for *conformity*, but without receiving any of the money, shall not be answerable for the misapplication of the money by his cotrustee who receives it; as it would be tyranny to punish a trustee for an act which the nature of his office compelled him to do.[3]

Peters, 532; 1 How. 134; Taylor *v.* Roberts, 3 Ala. 86; State *v.* Guilford, 18 Ohio, 509; Latrobe *v.* Tiernan, 2 Md. Ch. 480; Worth *v.* McAden, 1 Dev. & B. Eq. 109; Boyd *v.* Boyd, 3 Grat. 114; Glen *v.* McKim, 3 Gill, 366; Stell's App., 10 Barr, 149; Banks *v.* Wilkes, 3 Sandf. Ch. 99. And see Royall *v.* McKenzie, 25 Ala. 363.

[1] Ibid.

[2] Townley *v.* Sherborne, Bridg. 35; Spalding *v.* Shalmer, 1 Vern. 303; Sadler *v.* Hobbs, 2 Bro. Ch. 114; Bradwell *v.* Catchpole, cited 3 Swans. 78, note (a); Fellowes *v.* Mitchell, 2 Vern. 516.

[3] *In re* Freyer, 3 K. & J. 317; Price *v.* Stokes, 11 Ves. 324; 3 Lead. Ca. Eq. 730; Harden *v.* Parsons, 1 Eden, 147; Westley *v.* Clarke, 1 Eden, 359; Heaton *v.* Marriott, cited Pr. Ch. 173; *Ex parte* Belchier, Amb. 219; Leigh *v.* Barry, 3 Atk. 584; Fellowes *v.* Mitchell, 1 P. Wms. 81; Gregory *v.* Gregory, 2 Y. & C. 316; Sadler *v.* Hobbs, 2 Bro. Ch. 117; Chambers *v.* Minchin, 7 Ves. 198;

But in such case the burden is on the trustee to prove that his acknowledgment of the receipt of the money was merely for conformity, and that in fact he received none of the money, and that his cotrustee received it all.[1] If there is no evidence upon this point, all the trustees who join in signing the receipt will be held responsible *in solido*, on the ground that the acknowledgment in the receipt is *prima facie* evidence of the facts stated.[2] At law the receipt is *conclusive* evidence, and estops the trustee from denying that he received any of the money;[3] but a court of equity rejects estoppels, and pursues the actual truth; and will determine and decree according to the verity and justice of the fact.[4] But if a trustee, signing a receipt, receives any part of the money, and it does not appear how much, he will be answerable for the whole; as, where he mixes his corn with another's heap, he must lose the whole.[5]

§ 417. It was said in Townley *v.* Sherborne,[6] that individuals are sometimes joined in a trust, where it is not expected that they are to take an active part in its management; and it is well settled that each of several trustees is not bound to take upon himself the active management of every part of a trust; and it seems that the management of the whole may be left to any one of the

Shipbrook *v.* Hinchinbrook, 16 Ves. 479; Harrison *v.* Graham, 3 Hill's MS., 239, cited 1 P. Wms. 241; Carsey *v.* Barsham, cited 1 Sch. & Lef. 344; Anon., Mose. 35; *Ex parte* Wackerbath, 2 Gl. & J. 151; Kip *v.* Deniston, 4 John. 23; Jones's App., 8 W. & S. 147; Irwin's App., 35 Penn. St. 294; Sterrett's App., 2 Penn. 419; Wallis *v.* Thornton, 2 Brock. 434; Monell *v.* Monell, 5 John. Ch. 283; Deaderick *v.* Cantrell, 10 Yerg. 264; Aplyn *v.* Brewer, Pr. Ch. 172; Churchill *v.* Hodson, 1 P. Wms. 241; Attorney-General *v.* Randell, 7 Bacon, Ab. 184; Murrell *v.* Cox, 2 Vern. 173; Terrell *v.* Mathews, 11 L. J. (N. S.) Ch. 31.

[1] Brice *v.* Stokes, 11 Ves. 324; Scurfield *v.* Howes, 3 Bro. Ch. 95, note (8); Chambers *v.* Minchin, 7 Ves. 186; Monell *v.* Monell, 5 John. Ch. 394; Hall *v.* Carter, 8 Ga. 388; Manahan *v.* Gibbons, 19 John. 427; Martindale *v.* Picquot, 3 K. & J. 317; Cottam *v.* Eastern Counties R.R. Co., 1 John. & H. 243.

[2] Ibid.; Westley *v.* Clarke, 1 Eden, 359; Maccubbin *v.* Cromwell, 7 Gl. & J. 157; Hengst's App. 12 Harris, 413. The answer of the trustee in chancery would not be sufficient evidence unless responsive to the bill. Monell *v.* Monell, 5 John. Ch. 283; Maccubbin *v.* Cromwell, 7 Gl. & J. 157. But as parties are now witnesses, the rule is not very important.

[3] Harden *v.* Parsons, 1 Eden, 147.

[4] Ibid.; Fellowes *v.* Mitchell, 1 P. Wms. 83.

[5] Ibid.

[6] Bridg. 35.

number.[1] So trustees may apportion their duties among themselves, as where one of two guardians accepted the trust, saying he would take care of the real estate, but would have nothing to do with receiving and disbursing money, which duties the other guardian assumed, it was held that the former was not answerable for the defaults of the latter.[2] It sometimes happens that the convenience or necessities of business require the trust funds to be in the hands of one trustee. If a loss happens from the default of such trustee, the others will not be held to answer. As where a bond is to be collected by one trustee, or money is put in the hands of one to be paid away; or where a fund was given to three trustees, one in London and two in Cornwall, to build an almshouse in London, it was held that the fund was properly in the hands of the trustee in London, and that during the construction of the almshouse the others were not answerable for the loss of part of it by his insolvency.[3] The same rule applies where the shares of a company are required to be in the name of a single individual;[4] and so where the settlor appoints one of the trustees to perform certain acts, or make certain sales, or receive certain moneys.[5] But if trustees expressly agree to be answerable for each other, courts will hold them to their agreement.[6] So this power to apportion the duties of the trust, or the rule that a trustee not receiving the money shall not be liable for the defaults of his cotrustees, does not excuse him for not exercising a general superintendence and care over the trust, or for not intervening, if the fact come to his knowledge that the fund is unsafe, or that it ought not longer to remain under the control of the other trus-

[1] Ray *v.* Doughty, 4 Blackf. 115; Ochiltree *v.* Wright, 1 Dev. & B. Eq. 336; Jones's App., 8 W. & S. 143; State *v.* Guilford, 18 Ohio, 500.

[2] Jones's App., 8 W. & S. 143. But see Gill *v.* Attorney-General, Hardr. 314.

[3] Attorney-General *v.* Randell, 2 Eq. Ca. Ab. 742; 7 Bacon, Ab. 184; Clough *v.* Bond, 3 M. & Cr. 497; Townley *v.* Sherborne, Bridg. 35; 3 Lead. Ca. Eq. 718, notes; *Ex parte* Griffin, 2 Gl. & J. 114; Bacon *v.* Bacon, 5 Ves. 231; Hovey *v.* Blakeman, 4 Ves. 596; Williams *v.* Nixon, 2 Beav. 472; Curtis *v.* Mason, 12 L. J. (N. S.) Ch. 442; Broadhurst *v.* Balguy, 1 N. C. C. 28; Hanbury *v.* Kirkland, 3 Sim. 265. But see Cowell *v.* Gatchcombe, 27 Beav. 568.

[4] Consterdine *v.* Consterdine, 31 Beav. 331.

[5] Davis *v.* Spurling, 1 R. & M. 64; Paddon *v.* Richardson, 7 De G., M. & G. 563; Birls *v.* Betty, 6 Mad. 90.

[6] Leigh *v.* Barry, 3 Atk. 583; Brazer *v.* Clark, 5 Pick. 96; Town *v.* Ammidown, 2 Pick. 535.

tee.[1] Even a direct provision in the deed of settlement, that trustees shall not be liable for the defaults of their cotrustees, does not excuse them from this general care and superintendence, and from the duty of intervening, if they hear any fact tending to call for their intervention; nor will it justify them in paying over the money to the sole credit of one trustee; and generally it will not authorize them to do any acts which would be a breach of trust, if such clause was not in the deed or will.[2] So if the trustees join in accounting, and hold themselves out, in joint accounts, as acting together and as jointly liable, they will be estopped to deny their joint liability to those who have acted on a knowledge of such accounts; and this would be almost conclusive evidence of a joint liability in all cases.[3] So if the will makes them all liable for the acts of each, or contemplates the joint action and joint liability of all, they cannot excuse themselves if they accept the trust.[4]

§ 418. Though a trustee may join in a receipt without receiving any of the money, and may not be liable or answerable for it, yet he may be responsible for the whole, though he receives none; thus, if knowing that his cotrustee has no character or credit, and is unfit to manage the trust funds, he suffers the money to be received by him, or to remain in his hands, he will be answerable, as if he receives it himself, on the ground that he has committed a breach of trust in not using due care and diligence;[5] and the same

[1] Clark v. Clark, 8 Paige, 153; Evans's Est. 2 Ash. 470.

[2] Mucklow v. Fuller, Jac. 198; Williams v. Nixon, 2 Beav. 472; Leigh v. Barry, 3 Atk. 584; Dawson v. Clark, 18 Ves. 254; Underwood v. Stevens, 1 Mer. 712; Hanbury v. Kirkland, 3 Sim. 265; Langston v. Olivant, Coop. 33; Brumridge v. Brumridge, 27 Beav. 5; Rehden v. Wesley, 29 Beav. 213; Drosier v. Brereton, 15 Beav. 409; Fenwick v. Greenwell, 10 Beav. 418; Pride v. Fooks, 2 Beav. 430; Sadler v. Hobbs, 2 Bro. Ch. 114; Bone v. Cook, M'Clel. 168; 13 Price, 332; Clough v. Dixon, 8 Sim. 594; 3 M. & Cr. 490; Dix v. Burford, 19 Beav. 409; Litchfield v. White, 3 Selden, 438; Wilkins v. Hogg, 3 Gif. 116; 10 W. R. 47; Morrill v. Harford, 8 Ves. 8; Moyle v. Moyle, 2 R. & M. 170; Munch v. Cockerell, 9 Sim. 339; 5 M. & Cr. 178; Macdonnel v. Harding, 7 Sim. 176. But a testator can draw the indemnity clause so broad that cotrustees will not be liable even for gross negligence. Wilkins v. Hogg, 3 Gif. 116; 10 W. R. 47.

[3] Hengst's App., 12 Harris, 413; Clark's App., 6 Harris, 175; Duncommun's App., 5 Harris, 268.

[4] Burrill v. Sheil, 2 Barb. 457; Contee v. Dawson, 2 Bland, 264; Wood v. Wood, 5 Paige, 596; Weigand's App., 4 Casey, 471.

[5] Clark v. Clark, 8 Paige, 153; Wayman v. Jones, 4 Md. Ch. 500; Elmendorf

rule will apply if he suffers the money to remain in the hands of his cotrustee, however competent and responsible, longer than is necessary.[1] It is also the duty of the trustee to ascertain the actual facts, and not rely upon the bare assertion of his cotrustee, in relation to the condition of the trust fund.[2] Thus where two trustees allowed their cotrustee to open a box at their banker's in which were stocks and bonds, and he converted some of the trust property to his own use, but assured his cotrustees that all was right, they were held to answer for the loss, because they had not taken the pains to ascertain the facts, but had relied upon the assertion of their cotrustee.[3] So trustees must ascertain the condition of the funds at all times within which a reasonable man should ascertain the condition of his own property; as where a mortgage to three trustees had been paid off, and the money came to the hands of one, and was invested in bills and notes of the East India Company payable in two years, and these were paid into the hands of the same trustee to whom the mortgage had been paid, and the acting trustee asked to have the money remain in his hands on a mortgage to be given; and it so remained for a year, no mortgage being executed, the other trustees taking no active steps for several years to know the actual condition of the trust fund; this was held to be a breach of trust and they were decreed to make good the loss.[4] A trustee is bound to inquire and ascertain for what purpose a cotrustee desires the money; what investments he proposes to make, and what securities he proposes to take, and he must take pains to see that the proposed investments are actually made.[5] If a trustee performs his duty in these re-

v. Lansing, 4 John. Ch. 562; Ringgold *v.* Ringgold, 1 H. & G. 11; State *v.* Guilford, 15 Ohio, 593; Pim *v.* Downing, 11 S. & R. 71; Evans's Est., 2 Ash. 470; Jones's App., 8 W. & S. 147. But the circumstances must be such as would put a reasonable man upon his guard in relation to his own property. Jones's App., 8 W. & S. 147.

[1] Brice *v.* Stokes, 11 Ves. 319; *Re* Freyer, 3 K. & J. 317; Gregory *v.* Gregory, 2 Y. & C. 313; Bone *v.* Cook, McClel. 168; Thompson *v.* Finch, 22 Beav. 316; Lincoln *v.* Wright, 4 Beav. 427.

[2] Thompson *v.* Finch, 22 Beav. 316; 8 De G., M. & G. 560; Hanbury *v.* Kirkland, 3 Sim. 265.

[3] Mendes *v.* Guedalla, 2 John. & Hem. 259.

[4] Walker *v.* Symonds, 3 Swans. 1. See Thompson *v.* Finch, 22 Beav. 326.

[5] Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Thompson *v.* Finch, 22 Beav. 326.

spects, and his cotrustee, in spite of these precautions, squanders or wastes the fund, he will not be answerable therefor. So if the cotrustee gets possession of the trust fund by a fraud or crime, the others will not be liable.[1] But if a trustee receive any portion of the funds from a transaction, he must personally see to the application of them: he cannot pass them over to his cotrustee for investment or distribution; and, if he do so, he will be personally responsible for the acts and defaults of such cotrustee.[2]

§ 419. In the original case of Townley *v.* Sherborne, it was determined that if there was any *dolus malus*, or any evil practice, or fraud, or ill intent in him that permitted his companion to receive the whole fund, *he* should be charged that received nothing.[3] Thus, if one trustee stands by and sees his cotrustee misemploy or misapply the money;[4] or acquiesces in the wrongful use of the money by his cotrustee;[5] or if a trustee acquiesces in his cotrustee's retaining the money in his hands unnecessarily;[6] or if he connives at a breach of trust by his cotrustee;[7] or conceals such breach;[8] or makes any misrepresentation respecting the investment of the fund;[9] or if he does any act to put the money out of his own control and into the sole power of his cotrustee, as by joining in a conversion of the property and allowing his cotrustee to receive

[1] Cottam *v.* Eastern Counties R.R. Co., 1 Johns. & Hem. 243; Mendes *v.* Guedalla, 2 Johns. & Hem. 259; Barnard *v.* Bagshaw, 9 Jur. (N. S.) 220; Trutch *v.* Lamprell, 20 Beav. 116; Baynard *v.* Woolley, 20 Beav. 583; Griffiths *v.* Porter, 25 Beav. 236; Eager *v.* Barnes, 31 Beav. 579; Margetts *v.* Perks, 34 L. J. Ch. 109.

[2] Sterrett's App., 2 Penn. 219; Clark's App., 6 Harris, 175; Nyce's App., 5 W. & S. 254; Commonwealth *v.* McAlister, 4 Casey, 480; Deaderick *v.* Cantrell, 10 Yerg. 263; McMurray *v.* Montgomery, 2 Swans. 374; Hughlett *v.* Hughlett, 5 Humph. 453; Mumford *v.* Murray, 6 John. Ch. 1; Ray *v.* Doughty, 4 Blackf. 115; Worth *v.* McAden, 1 Dev. & B. Eq. 199; Graham *v.* Davidson, 2 Dev. & B. Eq. 155; Sparhawk *v.* Buell, 9 Vt. 41; Edmonds *v.* Grenshaw, 14 Peters, 166.

[3] Townley *v.* Sherborne, Bridg. 35; Mucklow *v.* Fuller, Jac. 198.

[4] Williams *v.* Nixon, 2 Beav. 475.

[5] Booth *v.* Booth, 1 Beav. 125; Dix *v.* Burford, 19 Beav. 409.

[6] Lincoln *v.* Wright, 4 Beav. 427; James *v.* Frearson, 1 N. C. C. 370; Evans's Est., 2 Ash. 470; Pim *v.* Downing, 11 S. & R. 71; Stiles *v.* Guy, 1 H. & Tw. 523; 1 Mac. & Gor. 422; 16 Sim. 230; Scully *v.* Delany, 2 Ir. Eq. 165; Egbert *v.* Butter, 21 Beav. 560; West *v.* Jones, 1 Sim. (N. S.) 205.

[7] Boardman *v.* Mosman, 1 Bro. Ch. 68.

[8] Ibid.

[9] Bates *v.* Scales, 12 Ves. 402.

and retain the proceeds exclusively;[1] or if he makes over the trust fund exclusively to his cotrustee;[2] or executes a power of attorney to him;[3] or signs a draft or order, or assigns a mortgage, enabling his cotrustee to deal with the investments exclusively;[4] or if he suffers the trust fund to be invested in the sole name of his cotrustee;[5] or to be paid into bank to his sole credit;[6] in all these cases, there is an actual or constructive breach of trust, which renders all the trustees liable for any loss; and so if a trustee does not collect a debt due to the estate from his cotrustee.[7] In all cases, if a trustee becomes aware of any fact tending to show that his cotrustee is committing a breach of trust, or if he learns any fact endangering the trust fund, he must communicate it to his cotrustees or make application to the court,[8] and take active measures to protect the fund, or he will be personally liable for its loss. If a trustee himself receives the trust fund or part of it, and pays it over to his cotrustee, who wastes it, he will be liable for it;[9] and so if he permits his cotrustee to receive money, having notice that it will be misapplied.

[1] Sadler v. Hobbs, 2 Bro. Ch. 114; Chambers v. Minchin, 7 Ves. 198; Hanbury v. Kirkland, 3 Sim. 265; Clough v. Bond, 3 M. & Cr. 496; Scurfield v. Howes, 3 Bro. Ch. 90; Shipbrook v. Hinchinbrook, 11 Ves. 252; Brice v. Stokes, 11 Ves. 319; Underwood v. Stevens, 1 Mer. 713; Bradwell v. Catchpole, 3 Swans. 78, n.; Williams v. Nixon, 2 Beav. 472; Broadhurst v. Balguy, 1 N. C. C. 16; Curtis v. Mason, 12 L. J. (N. S.) Ch. 443.

[2] Keble v. Thompson, 3 Bro. Ch. 111; Langford v. Gascoyne, 11 Ves. 333; French v. Hobson, 9 Ves. 103; Joy v. Campbell, 1 Sch. & L. 341; Moses v. Levi, 3 Y. & C. 359.

[3] Harrison v. Graham, 1 P. Wms. 241, n.; Hewett v. Foster, 6 Beav. 259; Monell v. Monell, 5 John. Ch. 283; Pim v. Downing, 11 S. & R. 66; Duncommun's App. 5 Harris, 268.

[4] Sadler v. Hobbs, 2 Bro. Ch. 114; Broadhurst v. Balguy, 1 N. C. C. 16.

[5] Walker v. Symonds, 3 Swans. 58.

[6] Clough v. Bond, 3 M. & Cr. 490.

[7] Mucklow v. Fuller, Jac. 198; Candler v. Tillett, 22 Beav. 257.

[8] Wayman v. Jones, 4 Md. Ch. 506; Chertsey v. Market, 6 Price, 279; Powlet v. Herbert, 1 Ves. Jr. 297; Franco v. Franco, 3 Ves. 75; Walker v. Symonds, 3 Swans. 71; Brice v. Stokes, 11 Ves. 319; Olive v. Court, 8 Price, 166; Attorney-General v. Holland, 2 Y. & C. 699; Booth v. Booth, 1 Beav. 125; Williams v. Nixon, 2 Beav. 472; Blackwood v. Burrows, 2 Conn. & Laws. 477.

[9] Mumford v. Murray, 6 John. Ch. 1; Monell v. Monell, 5 John. Ch. 283; Clark v. Clark, 8 Paige, 153; Ringgold v. Ringgold, 1 H. & G. 11; Glenn v. McKim, 3 Gill, 366; Evans's Est., 2 Ash. 470; Graham v. Austin, 2 Grat. 273; Graham v. Davidson, 2 Dev. & B. Eq. 155.

§ 420. In a few cases, it has been held that, if trustees join in executing a power of sale, and one receive the money, all must be held answerable, if it is lost by the one that receives it.[1] These decisions have been founded upon the rule, that all the trustees who join in any transaction must be responsible for carrying it through. But they ignore the other rule, that a power must be strictly executed by all the persons to whom it is given, and that if a trustee joins in the power, and signs receipts for conformity, but receives none of the money, omits no duty, and does no act tending to a breach of the trust, he will not be held for a loss occasioned by a breach of trust by the other trustees. The great preponderance of authority is, that a sale under a power is not different from the execution of a receipt for the trust moneys.[2] If, however, a proper investment of the money received under a sale is once made, the liability of a non-acting trustee ceases under all the cases.[3] If a trustee renounces the trust, he, of course, cannot be liable for a breach of the trust by the other trustees, unless the trust fund is in some manner in his hands, and is misapplied by him.[4] So the estate of a deceased trustee cannot be liable for a breach of trust by a surviving trustee, after the decease of a cotrustee.[5] A distinction has been attempted between discretionary trusts and directory trusts as follows: it has been said, that, in discretionary trusts, that is, where the funds may be invested or employed according to the discretion of the trustees, a non-acting trustee will not be responsible for a misapplication of the fund by a cotrustee, unless he is guilty of some fraud or negligence that amounts to a breach of trust, upon the principles before stated;[6] but where a will is per-

[1] Spencer *v.* Spencer, 11 Paige, 299; Ringgold *v.* Ringgold, 1 H. & G. 11; Maccubbin *v.* Cromwell, 7 G. & J. 157; Deaderick *v.* Cantrell, 10 Yerg. 263; Wallace *v.* Thornton, 2 Brocken. 434; Hauser *v.* Lehman, 2 Ired. Eq. 594.

[2] See *ante*, § 416, note; Griffin *v.* Macauley, 7 Grat. 476; Atcheson *v.* Robertson, 3 Rich. Eq. 132; Kip *v.* Deniston, 14 John. 23; Jones's App., 8 W. & S. 147; Boyd *v.* Boyd, 3 Grat. 114. But if a trustee not only join in the execution of the power, but in receiving the money, he must keep it in the joint names of the trustees until invested; and he cannot pay it over to his cotrustee without being responsible for it if lost. Ringgold *v.* Ringgold, 1 H. & G. 11; Glenn *v.* McKim, 3 Gill, 366.

[3] Glenn *v.* McKim, 3 Gill, 366.

[4] Claggett *v.* Hall, 9 G. & J. 80.

[5] Brazer *v.* Clark, 5 Pick. 96; Town *v.* Ammidown, 20 Pick. 535.

[6] Deaderick *v.* Cantrell, 10 Yerg. 264; Thomas *v.* Scruggs, 10 Yerg. 400.

emptory that certain investments shall be made by the trustees, all the trustees will be liable if the directions of the will are not carried out.[1] But these directory trusts may be executed by a part of the trustees, and the others may join for *conformity*, without doing more than is absolutely necessary to accomplish the trust, and therefore these trusts fall within the rule, that a trustee who signs receipts for *conformity*, and does no more, is not liable for a breach of trust by his cotrustee.[2] But if the will expressly provide for the joint action and responsibility of the executors or trustees, it will be binding upon all those who assume the trust, and render them all liable for any loss through the default of one.[3]

§ 421. Following the rule as to cotrustees, executors are generally liable only for their own acts, and not for the acts of their coexecutors.[4] But while cotrustees may not be liable for money which they did not receive, although they joined in the receipt, coexecutors are always liable if they join in the receipts. The reason is this, trustees *must* join in many acts, they having for the most part a joint power, while executors have a several power, over the estate. Each executor has an independent right over the personal property of his testator: he may sell it, and receive the purchase-money, and give receipts in his own name. If, therefore, an executor joins his coexecutor in signing a receipt, he does an unmeaning act, unless he intended to render himself jointly answerable for the money; and so the court hold, that if an executor joins in giving a receipt for money he shall be answerable, whether he received any of it or permitted his coexecutor to receive the whole.[5] So if an executor joins in executing a power of sale,

[1] Ibid.

[2] *Ante*, § 416, note.

[3] Weigand's App., 4 Casey, 471; Wood *v.* Wood, 5 Paige, 596; Contee *v.* Dawson, 2 Bland, 264; Burrill *v.* Sheil, 2 Barb. 457.

[4] Hargthorpe *v.* Milforth, Cro. Eliz. 318; Anon., Dyer, 210 a; Went. Ex. 306; Williams *v.* Nixon, 2 Beav. 472; Peters *v.* Beverly, 10 Peters, 532; 1 How. 134; Sutherland *v.* Brush, 7 John. Ch. 17; White *v.* Bullock, 20 Barb. 91; Douglas *v.* Satterlee, 11 John. 16; Banks *v.* Wilkes, 3 Sand. Ch. 99; Moore *v.* Tandy, 3 Bibb, 97; Fennimore *v.* Fennimore, 2 Green, Ch. 292; Call *v.* Ewing, 1 Blackf. 301; Williams *v.* Maitland, 1 Ired. 92; Kerr *v.* Kirkpatrick, 8 Ired. Eq. 137; Clarke *v.* Blount, 2 Dev. Ch. 51; Clarke *v.* Jenkins, 3 Rich. Eq. 318; Knox *v.* Pickett, 4 Des. 190; Kerr *v.* Water, 19 Ga. 136.

[5] Aplyn *v.* Brewer, Pr. Ch. 173; Murrill *v.* Cox, 2 Vern. 560; *Ex parte* Belchier, Amb. 219; Leigh *v.* Barry, 3 Atk. 584; Harrison *v.* Graham, 1 P. Wms.

given in the will, he will be responsible for the appropriation of the proceeds, though his coexecutor received all the money.[1] An attempt has been made to break down these distinctions between executors and trustees, and to establish the rule, that no intention to be jointly answerable can be inferred from the mere fact of signing a receipt without receiving any part of the money either separately or jointly.[2] And it appears now to be well settled, that if the joint receipt is purely nugatory, and no funds pass upon it into the hands of either executor, a coexecutor will not be liable.[3] So far the doctrine of Lord Northington in Westerly *v.* Clarke has been agreed to, though the case itself seemed to go further.[4] Lord Harcourt, in Churchill *v.* Hobson,[5] started another distinction, that executors who joined in the receipt were liable to creditors, though they did not receive the money, while they were not liable to legatees or heirs; but this distinction has no standing in a court of equity, whatever may be the rule at law, and is now overruled.[6]

§ 422. If an executor does any act to transfer the property into the exclusive control of a coexecutor, and thus enables his coexec-

241, cited Darwell *v.* Darwell, 2 Eq. Ca. Ab. 456; Gregory *v.* Gregory, 2 Y. & C. 316; Hall *v.* Carter, 8 Ga. 388; Monell *v.* Monell, 5 John. Ch. 283; Monahan *v.* Gibbons, 19 John. 427; Sterritt's App., 2 Penn. 219; Jones's App., 8 W. & S. 143; Johnson *v.* Johnson, 2 Hill, Eq. 290; Clarke *v.* Jenkins, 3 Rich. Eq. 318.

[1] Ochiltree *v.* Wright, 1 Dev. & B. Eq. 336; Hauser *v.* Lehman, 2 Ired. Eq. 594; Mathews *v.* Mathews, 1 McMul. Eq. 410; Johnson *v.* Johnson, 2 Hill, Eq. 277; McMurray *v.* Montgomery, 2 Swans. 374; Deaderick *v.* Cantrell, 10 Yerg. 263.

[2] Westerly *v.* Clarke, 1 Ed. 537; 1 Dick. 329; Candler *v.* Tillett, 22 Beav. 257; Harden *v.* Parsons, 1 Ed. 147; Churchill *v.* Hobson, 1 P. Wms. 241, n.; Stell's App., 10 Barr, 152; McNair's App., 4 Rawle, 145; Ochiltree *v.* Wright, Dev. & B. Eq. 336; Doyle *v.* Blake, 2 Sch. & Lef. 242.

[3] Westerly *v.* Clarke, 1 Ed. 537; Scurfield *v.* Howes, 3 Bro. Ch. 94; Hovey *v.* Blakeman, 4 Ves. 608; Chambers *v.* Minchin, 7 Ves. 198; Brice *v.* Stokes, 11 Ves. 319; 3 Lead. Ca. Eq. 557, 558.

[4] Scurfield *v.* Howes, 3 Bro. Ch. 94; Hovey *v.* Blakeman, 4 Ves. 608; Chambers *v.* Minchin, 7 Ves. 198; Brice *v.* Stokes, 11 Ves. 325; 3 Lead. Ca. Eq. 725–759; Walker *v.* Symonds, 3 Swans. 64; Shipbrook *v.* Hinchinbrook, 16 Ves. 479; Joy *v.* Campbell, 1 Sch. & Lef. 341; Doyle *v.* Blake, 2 Sch. & Lef. 242.

[5] 1 P. Wms. 241; Gibbs *v.* Herring, Pr. Ch. 49; Harden *v.* Parsons, 1 Ed. 147.

[6] Sadler *v.* Hobbs, 2 Brown, Ch. 117; Doyle *v.* Blake, 2 Sch. & Lef. 239.

utor to misapply the same, he will be liable;[1] as if he joins in drawing[2] or indorsing[3] a bill or note, or delivers or assigns securities to his coexecutor to enable him to receive the money alone,[4] or if he gives him a power of attorney,[5] or does any other act that enables his coexecutor to misapply the money; and so it was held, "that, if by agreement between the executors, one be to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both."[6] Probably the case would not now be followed, but it illustrates the principle.

§ 423. But if the act is such that it is absolutely necessary that the executors should all join in it, their liability will be put upon the same ground as the liability of trustees joining; as, if it is necessary that they should indorse a bill in order to collect it,[7] or that they should join in transferring stock.[8] But even if the act is indispensable, it is still the duty of the executor to see that it is consistent with a due execution of the trust,[9] and he must not rely upon the representations or assertions of his coexecutor, as to its necessity. He must use due diligence and make due investigations to ascertain if the representations are true;[10] as where the debts should have been long paid in the ordinary course of administration a coexecutor applied to the other to join in a sale of stocks to pay the debts, and the executor inquired and learned that there were debts to be paid, but it afterwards appeared that the coexecutor had the money to pay the debts in his own hands;

[1] Townsend *v.* Barber, 1 Dick. 356; Moses *v.* Levi, 3 Y. & C. 359; Candler *v.* Tillett, 22 Beav. 263; Clough *v.* Dixon, 3 M. & C. 497; Dines *v.* Scott, T. & R. 361; Edmonds *v.* Crenshaw, 14 Pet. 166; Sparhawk *v.* Buell, 9 Vt. 41.

[2] Sadler *v.* Hobbs, 2 Bro. Ch. 114.

[3] Hovey *v.* Blakeman, 4 Ves. 608.

[4] Candler *v.* Tillett, 22 Beav. 236.

[5] Doyle *v.* Blake, 2 Sch. & L. 231; Lees *v.* Sanderson, 4 Sim. 28; Kilbee *v.* Sneyd, 2 Moll. 200.

[6] Gill *v.* Attorney-General, Hardw. 314; Moses *v.* Levi, 3 Y. & C. 359.

[7] Hovey *v.* Blakeman, 4 Ves. 608.

[8] Chambers *v.* Minchin, 7 Ves. 197; Shipbrook *v.* Hinchinbrook, 11 Ves. 254; 16 Ves. 479; Terrell *v.* Mathews, 1 Mac. & G. 434, n.; Murrill *v.* Cox, 2 Vern. 570; Scurfield *v.* Howes, 3 Bro. Ch. 94; Moses *v.* Levi, 3 Y. & C. 359.

[9] Ibid.; Underwood *v.* Stevens, 1 Mer. 712; Bick *v.* Motley, 2 M. & K. 312; Williams *v.* Nixon, 2 Beav. 472; Hewett *v.* Foster, 6 Beav. 259.

[10] Ibid.

the executor who joined in conveying the stocks was held for the default of his coexecutor, on the ground of negligence in not knowing how the assets in the hands of the coexecutor were disposed of, and how it happened that the debts remained unpaid.[1]

§ 424. So an executor will be called upon to make good the loss of money that he allows to remain two years or any other unreasonable time in the hands of his coexecutor;[2] but he will not be called upon to repay that part which he can show that his coexecutor actually expended in the execution of the trust.[3] So if an executor neglects for an unreasonable time to insist upon the payment of a debt to the estate due from his coexecutor, he will be liable to pay the debt himself.[4]

§ 425. The same rules that apply to the powers and liabilities of coexecutors, apply also to the powers and liabilities of joint administrators. There is one *dictum* that the liability of joint administrators is like the liability of cotrustees,[5] but it is well settled that the liability of joint administrators and coexecutors is identical.[6]

§ 426. It must be borne in mind, that in the United States, administrators, executors, guardians, and a large class of trustees, are appointed by judges of probate, surrogates, ordinaries, or officers exercising a similar jurisdiction. All trustees appointed under wills, proved and recorded in probate courts, are appointed by decrees of the court in the same manner as executors. In many cases, a bond with sureties is required as a prerequisite to an appointment and qualification to act, unless such bond is expressly waived by the testator or the *cestui que trust.* This bond generally runs to the judge or some officer for the use and protection of those beneficially interested in the estate. If it is a joint bond,

[1] Shipbrook *v.* Hinchinbrook, 11 Ves. 254; Bick *v.* Mathews, 3 M. & K. 312; Clark *v.* Clark, 8 Paige, 152.

[2] Scurfield *v.* Howes, 3 Bro. Ch. 91; Styles *v.* Guy, 1 Mac. & G. 422; 1 H. & Tw. 523; Egbert *v.* Butter, 21 Beav. 560; Lincoln *v.* Wright, 4 Beav. 427.

[3] Shipbrook *v.* Hinchinbrook, 11 Ves. 252; 16 Ves. 477; Williams *v.* Nixon, 2 Beav. 472; Kilbee *v.* Sneyd, 2 Moll. 213; Underwood *v.* Stevens, 1 Mer. 172; Brice *v.* Stokes, 11 Ves. 328; Hewett *v.* Foster, 6 Beav. 259.

[4] Styles *v.* Guy, 1 Mac. & G. 422; 1 H. & Tw. 523; Egbert *v.* Butter, 21 Beav. 560; Scully *v.* Delany, 2 Ir. Eq. 165; Candler *v.* Tillett, 22 Beav. 257; Carter *v.* Cutting, 5 Munf. 223.

[5] Hudson *v.* Hudson, 1 Atk. 460.

[6] Willand *v.* Fenn, 2 Ves. 267, cited; Murray *v.* Blatchford, 1 Wend. 583; O'Neall *v.* Herbert, 1 McMul. Eq. 495.

executed by all the joint administrators, guardians, coexecutors, or cotrustees, it is in the nature of an agreement to be answerable for each other's acts and defaults. The remedy for a breach of trust in such cases is a suit upon the bond in the name of the proper person for the benefit of those interested, against all the joint makers and sureties of the bond; and any breaches of trust, committed by either or all of the trustees, may be given in evidence, and a judgment against all will be rendered, although the breach of trust was committed by one alone.[1] This joint liability of all the cotrustees under a joint bond results from the nature of the bond, and from the technical nature of an action at law for a breach of the bond by a breach of the trust. If, however, one of the coexecutors or cotrustees dies, and a breach of trust is committed by the survivor after his death, the estate of the deceased executor cannot be made liable for the breach of the trust.[2] It will be seen at once, that very few of the rules heretofore stated in relation to the liabilities of executors or trustees for the acts and defaults of their coexecutors or cotrustees have any bearing upon the liability of cotrustees who have given a joint bond for the faithful execution of the trust. The statutes of many of the States, however, provide that separate bonds with sureties may be taken from each of the administrators, executors, guardians, or trustees, as the case may be. It is conceived that where separate bonds are taken from each of the executors or trustees, the liability of the executor or trustee for the acts and defaults of his coexecutor or cotrustee would be governed by the rules and principles hereinbefore stated.

§ 427. Trustees hold a position of trust and confidence. The legal title of the trust property is in them, and generally its whole management and control is in their hands. At the same time the beneficiaries of the trust may be women, or children, or persons incompetent to protect their own interests. For these reasons, to protect the weak and helpless on the one hand, and to prevent trustees from using their position and influence for their own gain

[1] Hill *v.* Davis, 4 Mass. 137; Brazer *v.* Clark, 5 Pick. 96; Towne *v.* Ammidown, 20 Pick. 535; Newcombe *v.* Williams, 9 Met. 525; Sparhawk *v.* Buell, 9 Vt. 41; Boyd *v.* Boyd, 1 Watts, 368; Bostick *v.* Elliott, 3 Head, 507; Braxton *v.* State, 25 Ind. 82; Jeffries *v.* Lawson, 39 Miss. 791; Gayden *v.* Gayden, 1 McMul. Eq. 435; Hughlett *v.* Hughlett, 5 Humph. 453; Clarke *v.* State, 6 G. & J. 288; South *v.* Hay, 3 Mon. 88; Anderson *v.* Miller, 6 J. J. Marsh. 568; Morrow *v.* Peyton, 8 Leigh, 54; Babcock *v.* Hubbard, 2 Conn. 539.

[2] Brazer *v.* Clark, 5 Pick. 96; Towne *v.* Ammidown, 20 Pick. 535.

and to prevent them from hazarding the trust property upon what they may think to be profitable speculations, on the other, they are not allowed to make any profit from their office. They cannot use the trust property, nor their relation to it, for their own personal advantage. All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee. No other rule would be safe; nor would it be possible for courts to apply any other rule, as between trustee and *cestui que trust.*[1] This rule is so stringent that Lord Eldon once sent a case to a master to inquire, whether the privilege of sporting on the trust estate could be let for the benefit of the *cestui que trust:* if not, he thought the game should belong to the heir; the trustee might appoint a game-keeper for the preservation of game for the heir, but he ought not to keep up a lodge for his own pleasure.[2] So where a trustee retired from the office in consideration that his successor paid him a sum of money, it was held that the money so paid must be treated as a part of the trust estate, and that the trustee must account for it, as he could make no profit, directly nor indirectly, from the trust property or from the position or office of trustee.[3]

§ 428. A trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase.[4] But if a trustee buys up an outstanding debt for the

[1] Burgess *v.* Wheate, 1 Ed. 226; Docker *v.* Somes, 2 M. & K. 664; O'Herlihy *v.* Hedges, 1 Sch. & Lef. 126; Bently *v.* Craven, 18 Beav. 75; Gubbins *v.* Creed, 2 Sch. & Lef. 218; *Ex parte* Andrews, 2 Rose, 412; Hamilton *v.* Wright, 9 Cl. & Fin. 111; Middleton *v.* Spicer, 1 Bro. Ch. 205; Sherrard *v.* Harborough, Amb. 165; *Re* Shrewsbury School, 1 M. & C. 647; Martin *v.* Martin, 12 Sim. 579; Cooke *v.* Cholmondeley, 3 Drew. 1; Hawkins *v.* Chappell, 1 Atk. 621; Johnson *v.* Barber, 22 Beav. 562; 6 De G., M. & G. 439.

[2] Webb *v.* Shaftesbury, 7 Ves. 480; Hutchinson *v.* Morritt, 3 Y. & C. 47.

[3] Sugden *v.* Crossland, 3 Sim. & Gif. 192.

[4] Robinson *v.* Pett, 3 P. Wms. 251, n. (a); Pooley *v.* Quilter, 4 Drew. 184; 2 De G. & Jon. 327; Marrett *v.* Paske, 2 Atk. 54; Dunch *v.* Kent, 1 Vern. 241; Darcy *v.* Hall, 1 Vern. 49; *Ex parte* Lacey, 6 Ves. 268; Anon., 1 Salk. 155; Fosbrooke *v.* Balguy, 1 M. & K. 226; Carter *v.* Horne, 1 Eq. Ca. Ab. 7; Schoonmaker *v.* Van Wyke, 31 Barb. 457; Matter of Oakley, 2 Edw. 478;

benefit of the *cestuis que trust*, and they refuse to take it or to pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves.[1] Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust*.[2] The better opinion, however, is, that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity.[3] So if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside, or to claim all the benefits and profits of the sale for himself.[4]

§ 429. Trustees cannot make a profit from the trust funds committed to them, by using the money in any kind of trade or speculation, nor in their own business; nor can they put the funds into the trade or business of another, under a stipulation that they shall receive a *bonus* or other profit or advantage. In all such cases, the trustees must account for every dollar received from the use of

Herr's Est., 1 Grant's Ca. 272; Quackenbush *v.* Leonard, 9 Paige, 334; Slade *v.* Van Vechten, 11 Paige, 21; Barksdale *v.* Finney, 14 Grat. 338.

[1] Barwell *v.* Barwell, 34 Beav. 371.

[2] Vaughton *v.* Noble, 30 Beav. 34; Baxter *v.* Costin, 1 Busb. Eq. 262; Andrews *v.* Hobson, 23 Ala. 219; Mason *v.* Martin, 4 Md. 124; Green *v.* Winter, 1 John. Ch. 26; Spindler *v.* Atkinson, 3 Md. 409; Wiswall *v.* Stewart, 3 Ala. 433.

[3] *Ex parte* Lacy, 6 Ves. 226; Scott *v.* Davis, 1 M. & Cr. 87; Coles *v.* Trecothick, 9 Ves. 234; Morse *v.* Royal, 12 Ves. 372; Dunlop *v.* Mitchell, 10 Ohio, 17; Harrington *v.* Brown, 5 Pick. 519; Bolton *v.* Gardner, 3 Paige, 273; Ames *v.* Downing, 1 Bradf. 321; Lyon *v.* Lyon, 8 Ired. Eq. 201; Pennock's App., 14 Penn. St. 446; Bruch *v.* Lantz, 2 Rawle, 392; Stuart *v.* Kissam, 2 Barb. 493; Jones *v.* Smith, 33 Miss. 215; Soller *v.* Chandler, 26 Miss. 124; Herne *v.* Meeres, 1 Vern. 465; Smith *v.* Isaac, 12 Mo. 106.

[4] Beeson *v.* Beeson, 9 Barr, 279; Patton *v.* Thompson, 2 Jones, Eq. 285; Mason *v.* Martin, 4 Md. 124; Spindler *v.* Atkinson, 3 Md. 409; Davoue *v.* Fanning, 2 John. Ch. 252; Iddings *v.* Bruer, 4 Sandf. Ch. 222; Hendricks *v.* Robinson, 2 John. Ch. 283; Evertson *v.* Tappan, 5 John. Ch. 497; Smith *v.* Lansing, 22 N. Y. 530; Ames *v.* Downing, 1 Bradf. 321; Andrews *v.* Hobson, 23 Ala. 219; Charles *v.* Dubois, 29 Ala. 367; Wiswall *v.* Stewart, 32 Ala. 433; Bellamy *v.* Bellamy, 6 Fla. 62; Schoonmaker *v.* Van Wyke, 31 Barb. 457.

the trust money, and they will be absolutely responsible for it if it is lost in any such transactions. By this rule, trustees may be liable to great losses while they can receive no profit; and the rule is made thus stringent, that trustees may not be tempted from selfish motives to embark the trust fund upon the chances of trade and speculation.[1]

§ 430. All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation.[2] Thus partners stand in a fiduciary relation to each other, and if a partner, instead of winding up the partnership affairs, when for any reason he ought to do so, continues to use the partnership property in business, and makes a profit thereon, he must account for it.[3] But in making up the accounts, courts will make a just allowance for time, skill, and other elements of success in conducting the business.[4] If a trader has trust funds in his hands, not in a fiduciary character, but through a breach of trust by a trustee, he is liable only for interest.[5] Agents, guardians, directors of corporations, officers of municipal corporations, and all other persons clothed with a fiduciary character, are subject to this rule.[6]

431. So if persons, standing in such a relation to an estate, obtain advantages in respect to it, those who succeed to the estate

[1] Docker *v.* Somes, 2 M. & K. 664; Willett *v.* Blanford, 1 Hare, 253; Cummins *v.* Cummins, 8 Ir. Eq. 723; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84; Townend *v.* Townend, 1 Gif. 201; Parker *v.* Bloxam, 20 Beav. 295; Manning *v.* Manning, 1 John. Ch. 527; *In re* Thorp, Davies, 290; Brown *v.* Ricketts, 4 John. Ch. 303.

[2] Hawley *v.* Cramer, 4 Cow. 717; Richardson *v.* Spencer, 18 B. Mon. 450; Thorp *v.* McCullum, 1 Gil. Ill. 615; Van Epps *v.* Van Epps, 9 Paige, 237; Ackerman *v.* Emot, 4 Barb. 626.

[3] Bentley *v.* Craven, 18 Beav. 75; Parsons *v.* Hayward, 31 Beav. 199; Crawshay *v.* Collins, 15 Ves. 226; Brown *v.* De Tastet, Jac. 284; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84.

[4] Docker *v.* Somes, 2 M. & K. 662; Willett *v.* Blanford, 1 Hare, 253; Brown *v.* De Tastet, Jac. 284.

[5] Strand *v.* Gwyer, 28 Beav. 130; Townend *v.* Townend, 1 Gif. 210; Simpson *v.* Chapman, 4 De G., M. & G. 154; Macdonald *v.* Richardson, 1 Gif. 81; Brown *v.* De Tastet, Jac. 284; Chambers *v.* Howell, 11 Beav. 6; *Ex parte* Watson, 2 V. & B. 414.

[6] Morret *v.* Paske, 2 Atk. 52; Powell *v.* Glover, 3 P. Wms. 251; Great Luxembourg Railway Co. *v.* Magnay, 25 Beav. 586; Chaplin *v.* Young, 33 Beav. 414; Bowes *v.* Toronto, 11 Moore, P. C. C. 463; Docker *v.* Somes, 2 M. & K. 665.

shall have the advantages which are thus obtained.[1] As where a mortgagee had purchased the right of dower of the widow of a deceased mortgagor, the heir of the mortgagor, upon a bill to redeem, was held to have the right to take the purchase of the dower at the price which the mortgagee had paid.[1] So an heir cannot hold an incumbrance for more than he gave for it, against the creditors of the ancestor's estate,[2] and it is conceived that the same rule applies to a devisee.[3] But if the heir or devisee is himself an incumbrancer at the death of the ancestor, he may buy in a prior, but not a subsequent, incumbrance, and hold it for the whole amount due. The court considers him, in buying such a prior incumbrance, not as heir or devisee, but as an incumbrancer or stranger; and so if, as such prior incumbrancer, he obtains a prior incumbrance by the bounty or gift of another, he shall hold such bounty or gift for the benefit of his own incumbrance, and there is no reason why he should hold it for the benefit of the creditors of the ancestor.[4] So the heir or devisee may hold a prior incumbrance for full value, though bought for less, against a subsequent incumbrancer.[5] So if one of several joint purchasers of an estate, buy in an incumbrance for less than its face, he shall hold it for his copurchasers at the same price he paid.[6] And the opinion has been expressed, that a tenant for life holds the same relation toward the remainder-man; and if such tenant buy in an incumbrance upon the estate for less than its face, he cannot claim from the remainder-man more than he gave.[7]

§ 432. The rule that trustees can make no profit out of the estate is carried so far in England that they can receive no compensation for their services. In the United States, trustees are entitled to reasonable compensation. But both in England and the United States, a trustee can receive no indirect profit from the estate by reason of his connection with it. Thus a trustee cannot be ap-

[1] Baldwin *v.* Bannister, cited 3 P. Wms. 251; Dobson *v.* Land, 8 Hare, 220; Arnold *v.* Garner, 2 Phil. 231; Mathison *v.* Clarke, 3 Drew. 3.

[2] Lancaster *v.* Cross, 10 Beav. 154; 1 Phil. 354; Morret *v.* Paske, 2 Atk. 54; Long *v.* Clopton, 1 Vern. 464; Brathwaite *v.* Brathwaite, 1 Vern. 334; Darcy *v.* Hall, 1 Vern. 49.

[3] Long *v.* Clopton, 1 Vern. 464; Davis *v.* Barrett, 14 Beav. 542.

[4] Davis *v.* Barrett, 14 Beav. 542; Darcy *v.* Hall, 1 Vern. 49; Anon., 1 Salk. 155.

[5] Davis *v.* Barrett, 14 Beav. 542.

[6] Carter *v.* Horne, 1 Eq. Ca. Ab. 7.

[7] Hill *v.* Brown, Dr. 433.

pointed *receiver* with a salary,[1] nor would he be appointed without compensation except under peculiar circumstances; for it is his duty to superintend and watch over the receiver.[2] The same reasons do not apply for excluding a dry trustee.[3] If trustees are factors,[4] or brokers,[5] or commission agents,[6] or auctioneers,[7] or bankers,[8] or attorneys, or solicitors,[9] they can make no charges against the trust estate for services rendered by them in their professional capacity to the estate of which they are trustees. They may employ the services of such agents, if necessary, and pay for them from the estate; but if they undertake to act in such capacities themselves for the estate, they can receive no compensation. This rule is so strict, that if the trustee has a partner, and employs such partner, no charge can be made by the firm;[10] but if the trustee is excluded from all participation in the compensation, the partner of the trustee may be paid like any other person for similar services.[11] In one case where several trustees were made defendants, one of them, being a solicitor, conducted the defence, and was allowed his full costs, it not appearing that the costs were increased by such conduct.[12] This case is put upon the ground that the services were rendered under the eye of the court, and there could be no danger of collusion; but the case is not approved in England, and has not been followed.[13] In the United States a

[1] Sutton *v.* Jones, 15 Ves. 584; Morison *v.* Morison, 4 M. & C. 215; Sykes *v.* Hastings, 11 Ves. 363; ——— *v.* Jolland, 8 Ves. 72; Anon., 3 Ves. 515.

[2] Sykes *v.* Hastings, 11 Ves. 363.

[3] Sutton *v.* Jones, 15 Ves. 587.

[4] Scattergood *v.* Harrison, Mos. 128.

[5] Arnold *v.* Garner, 2 Phil. 231.

[6] Sheriff *v.* Aske, 4 Russ. 33.

[7] Mathison *v.* Clarke, 3 Drew. 3; Kirkman *v.* Booth, 11 Beav. 273.

[8] Crosskill *v.* Bower, 1 Dr. & Sm. 319.

[9] Pollard *v.* Doyle, 1 Dr. & Sm. 319; Moore *v.* Frowd, 3 M. & Cr. 46; Frazer *v.* Palmer, 4 Y. & C. 515; York *v.* Brown, 1 Coll. 260; Broughton *v.* Broughton, 5 De G., M. & G. 160; *In re* Sherwood, 3 Beav. 338; Douglass *v.* Archbutt, 2 De G. & J. 148; Harkin *v.* Darby, 28 Beav. 325.

[10] Collin *v.* Carey, 2 Beav. 128; Lincoln *v.* Winsor, 9 Hare, 158; Christophers *v.* White, 10 Beav. 523; Lyon *v.* Baker, 5 De G. & Sm. 622; Manson *v.* Baillie, 2 Macq. H. L. Ca. 80.

[11] Clack *v.* Carlon, 7 Jur. (N. S.) 441; Burge *v.* Burton, 2 Hare, 373.

[12] Cradock *v.* Piper, 1 McN. & G. 664; 1 Hall & T. 617, overruling Brainbrigge *v.* Blair, 8 Beav. 588.

[13] Lyon *v.* Baker, 5 De G. & Sm. 622.

trustee has been refused compensation as solicitor, for professional services rendered by himself for himself as trustee, on the ground that no man can make a contract with himself.[1]

§ 433. Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the *cestui que trust.*[2] If a trustee desires to set up a title to the trust property in himself, he should refuse to accept the trust. But if a claim is made upon him by a third person, adverse to the *cestui que trust*, he may decline to deliver over the property to his *cestui que trust* until the title is determined, or he is indemnified or secured against the consequences.[3] A trustee must assume the validity of the trust under which he acts, until it is actually impeached, although he may have some suspicion that there may have been fraud or collusion in the appointment and settlement.[4] So if a trustee obtains a knowledge of facts that would defeat the title of his *cestui que trust*, and give the property over to another, he is not justified in morals in communicating such facts to such other person. His duty is to manage the property for his *cestui que trust*, and not to keep his conscience, or betray his title or interests.[5]

§ 434. In England a trustee, being in possession of real estate in trust, may profit from his trust if the *cestui que trust* dies without heirs; for, as the trustee is tenant in possession, there is no such failure of a tenant as to cause an escheat; and the trustee thenceforth holds the lands for his own use, there being no *cestui que trust* to call him to an account.[6] This is a benefit to the trustee; but it arises rather from an absence of right in others, than from an affirmative right in himself. But if he is not in possession,

[1] Mayer *v.* Galluchet, 6 Rich. Eq. 2; Jenkins *v.* Fickling, 4 Des. 470; Edmonds *v.* Crenshaw, Harp. 232.

[2] Att'y.-Gen. *v.* Monro, 2 De G. & Sm. 163; Stone *v.* Godfrey, 5 De G., M. & G. 76; Frith *v.* Curtland, 2 Hen. & Mil. 417; Pomfret *v.* Winsor, 2 Ves. 476; Kennedy *v.* Daley, 1 Sch. & Lef. 381; *Ex parte* Andrews, 2 Rose, 412; Conry *v.* Caulfield, 2 B. & B. 272; Newsome *v.* Flowers, 30 Beav. 461; Shields *v.* Atkins, 3 Atk. 560; Langley *v.* Fisher, 9 Beav. 90; Reece *v.* Frye, 1 De G. & Sm. 279.

[3] Neale *v.* Davies, 5 De G., M. & G. 258.

[4] Beddoes *v.* Pugh, 26 Beav. 407.

[5] Lewin, 234.

[6] Burgess *v.* Wheate, 1 Ed. 177, 186, 216, 256; Taylor *v.* Haygarth, 14 Sim. 8; Davall *v.* New River Co., 3 De G. & Sm. 394; Cox *v.* Parker, 22 Beav. 168; Barrow *v.* Wadkin, 24 Beav. 9; Att'y-Gen. *v.* Sands, Hard. 496.

or if he has need of the assistance of a court of equity to enforce his rights, the court will not act;[1] though it is said, that having the legal title, which a court of law must recognize, he can obtain all the rights which a court of law must give.[2] But if the *cestui que trust* devise the estate to another upon trusts that fail, the trustee must pass over the estate to the devisee, for the reason that the trustee can have no advantage from trusts that so fail, and he has no equity against the devisee to keep the estate.[3]

§ 435. Upon this rule of law in England, several questions were started in the case of Burgess *v.* Wheate,[4] which are rather curious than practical in this country; as, for instance, if a purchaser should pay the money in full for land, and die without heirs, before he obtained a conveyance, could the vendor keep both land and purchase-money?[5] Again, if a mortgagor in fee should die without heirs, could a mortgagee in fee keep the whole estate, for the reason that there was no person having a right to redeem?[6] Of course the equity of redemption would be assets for the payment of the debts of the mortgagor.[7] But if there were no debts, could the mortgagee keep a large estate for a small debt?[8] Another question was raised, whether a trust in such cases might not result to the grantor.[9] No answers have been given to these questions by decided cases, and as they were put more than a century ago, it is not probable that a case will arise requiring their judicial determination.

§ 436. In the United States, if a *cestui que trust* should die without heirs, the trustee could not hold for his own beneficial use; but he would hold for the State as *ultima hæres* where all other heirs fail.[10]

§ 437. Where a *cestui que trust* of chattels dies without heirs,

[1] Burgess *v.* Wheate, 1 Ed. 212; Onslow *v.* Wallis, 1 McN. & G. 506; Williams *v.* Lonsdale, 3 Ves. 752.

[2] King *v.* Coggan, 6 East, 431; 2 Smith, 417; King *v.* Wilson, 10 B. & C. 80.

[3] Onslow *v.* Wallis, 1 McN. & G. 506; Jones *v.* Goodchild, 3 P. Wms. 33.

[4] 1 Ed. 177.

[5] Ibid. 212.

[6] Ibid. 210.

[7] Beal *v.* Symonds, 16 Beav. 406; Downe *v.* Morris, 3 Hare, 394.

[8] 1 Ed. 236, 256.

[9] 1 Ed. 185.

[10] McCaw *v.* Galbraith, 7 Rich. L. 75; Matthews *v.* Ward, 10 G. & J. 443; Darrah *v.* McNair, 1 Ashm. 236; Ringgold *v.* Malott, 1 Harr. & John. 299; 4 Kent, 425; 1 Cruise, Dig. 448.

the trustee can take no benefit; for the beneficial use in such chattels will go as *bona vacantia* to the crown or State. So if the *cestui que trust* makes a will and appoints an executor, but makes no further disposition of his personalty, the executor will take for the State; for the executor can take no beneficial interest unless the will expressly gives it to him.[1]

[1] Middleton *v.* Spicer, 1 Bro. Ch. 201; Taylor *v.* Haygarth, 14 Sim. 8; Russell *v.* Clowes, 2 Coll. 648; Powell *v.* Merritt, 1 Sim. & Gif. 381; Crodock *v.* Owen, 2 Sim. & Gif. 241; Read *v.* Steadman, 26 Beav. 495; Cane *v.* Roberts, 8 Sim. 214.

CHAPTER XV.

POSSESSION — CUSTODY — CONVERSION — INVESTMENT OF TRUST PROPERTY, AND INTEREST THAT TRUSTEES MAY BE MADE TO PAY.

§ 438. The first duty of a trustee, after his appointment and qualification to act, is to secure the possession of the trust property and to protect it from loss and injury. If the trust property is an equitable interest or estate, he must give notice to the holder

of the legal title; and if he cannot have the legal title transferred to himself, he must take such steps that no incumbrances can be put upon it by the settlor or assignor. If the trust fund consists in part of notes, bonds, policies of insurance, and other similar *choses in action*, notice should be given to the promisors, obligors, or makers of the instruments. This is the general rule in England and in many of the United States.[1] In some States, however, it is held that an assignment of a *chose in action* is complete in itself when the assignor and assignee have completed the transfer, and that notice to the debtor is not necessary in order to make the assignment valid as against third persons, or attaching creditors, or subsequent assignees without notice.[2] But it seems to be agreed in all the cases, that, if the debtor without notice and in *good faith* pays the debt to the assignor, it will be a good payment, and dis-

[1] Jacob *v.* Lucas, 1 Beav. 436; Wright *v.* Dorchester, 3 Russ. 49 n.; Timson *v.* Ramsbottom, 2 Keen, 35; Forster *v.* Blackstone, 1 M. & K. 297; Roofer *v.* Harrison, 2 K. & J. 86; Loveredge *v.* Cooper, 3 Russ. 30; Dearle *v.* Hall, 3 Russ. 1; Meux *v.* Bell, 1 Hare, 73; Stocks *v.* Dobson, 4 De G., M. & G. 11; Voyle *v.* Hughes, 2 Sm. & Gif. 18; Ryall *v.* Rowles, 1 Ves. 348; 1 Atk. 165; Dow *v.* Dawson, 1 Ves. 331; 3 Lead. Ca. Eq. 612; Jones *v.* Gibbons, 9 Ves. 410; Thompson *v.* Spiers, 13 Sim. 469; Waldron *v.* Sloper, 1 Drew. 193; *Ex parte* Boulton, 1 De G. & J. 163; Pierce *v.* Brady, 23 Beav. 64; Martin *v.* Sedgwick, 9 Beav. 333; Evans *v.* Bicknell, 6 Ves. 174; Dunster *v.* Glengall, 3 Ir. Eq. 47; Forster *v.* Cockerell, 9 Bligh (N. S.), 332; 3 Cl. & Fin. 456; Feltham *v.* Clark, 1 De G. & Sm. 307. *In Re* Atkinson, 2 De G., M. & G. 140; Mangles *v.* Dixon, 18 Eng. L. & Eq. 82; Brashear *v.* West, 7 Pet. 608; Stewart *v.* Kirkland, 19 Ala. 162; Cummings *v.* Fullam, 13 Vt. 134; Northampton Bank *v.* Balliet, 8 W. & S. 311; Bean *v.* Simpson, 4 Shep. 49; Phillips *v.* Bank of Lewistown, 6 Harris, 394; Laughlin *v.* Fairbanks, 8 Mo. 367; Campbell *v.* Day, 16 Vt. 358; Barney *v.* Douglass, 19 Vt. 98; Ward *v.* Morrison, 25 Vt. 593; Loomis *v.* Loomis, 2 Vt. 201; Adams *v.* Leavens, 20 Conn. 73; Van Buskirk *v.* Ins. Co., 14 Conn. 145; Foster *v.* Mix, 20 Conn. 395; Bishop *v.* Halcomb, 10 Conn. 444; Woodbridge *v.* Perkins, 3 Day, 364; Judah *v.* Judd, 5 Day, 534; Murdock *v.* Finney, 21 Mo. 138; Cladfield *v.* Cox, 1 Sneed, 330; Fisher *v.* Knox, 13 Penn. St. 622; Judson *v.* Corcoran, 17 How. 614; but see Beavan *v.* Oxford, 6 De G., M. & G. 507; Kekewich *v.* Manning, 1 De G., M. & G. 176; Clack *v.* Holland, 24 L. J. 19; Barr's Trusts, 4 K. & J. 219; Scott *v.* Hastings, 4 K. & J. 633.

[2] Sharpless *v.* Welch, 4 Dall. 279; Bholen *v.* Cleveland, 1 Mason, 174; Dix *v.* Cobb, 4 Mass. 508; Wood *v.* Partridge, 11 Mass. 488; Warren *v.* Copelin, 4 Met. 594; Littlefield *v.* Smith, 17 Me. 327; Corser *v.* Craig, 1 Wash. C. C. 24; United States *v.* Vaughn, 3 Binn. 394; Muir *v.* Schenk, 3 Hill, 228; Talbot *v.* Cook, 7 Mon. 438; Maybin *v.* Kirby, 4 Rich. Eq. 105; Stevens *v.* Stevens, 1 Ashm. 590; Beckwith *v.* Union Bank, 5 Seld. 211.

charge him from further liability;[1] but if he should pay after notice he would still be liable to the assignee.[2] Under all circumstances, it is safer to give notice to the debtor, whether the courts of a State hold notice necessary or not. If the assignor receive the money of the debtor after the assignment, he will hold the money in trust for the assignee.[3] These general rules concerning notice do not apply to equities in real estate.[4] Trustees should also insist upon possession of all the notes, bonds, policies, and other obligations for the payment of money being delivered to them; for, if negligent in this respect, and suits and costs arise, they might be made responsible personally.[5] So if there are debts or securities already due and payable to the trust estate, the trustees must proceed to collect them. If any loss happens to the estate from any delay, they would be responsible,[6] and they may accept payment even before the debts are due.[7] Where it is important for the trustees to give notice of an assignment to them, notice to one of several obligors is notice to all: so notice to one of several of a society of underwriters is sufficient; and if the obligors compose a corporation, there must be notice to the directors or trustees of the corporation.[8]

[1] Reed v. Marble, 10 Paige, 509; Mangles v. Dixon, 18 Eng. L. & Eq. 82, and cases before cited, Stocks v. Dobson, 4 De G., M. & G. 11.

[2] Brashear v. West, 7 Pet. 608, and cases before cited; Judson v. Corcoran, 17 How. 614.

[3] Ellis v. Amason, 2 Dev. Eq. 273; Fortescue v. Barnett, 3 M. & K. 36.

[4] Wilmot v. Pike, 5 Hare, 14; Etty v. Bridges, 2 Y. & Col. 486; *Ex parte* Boulton, 1 De G. & J. 163; Webster v. Webster, 31 Beav. 393; Stephens v. Venables, 30 Beav. 625; Barr's Trusts, 4 K. & J. 219; Van Rensalaer v. Stafford, Hopk. Ch. 569; 9 Cow. 316; Poillon v. Martin, 1 Sand. Ch. 569.

[5] Fortescue v. Barnett, 3 M. & K. 36; Meux v. Bell, 1 Hare, 82; Evans v. Bicknell, 6 Ves. 174; Knye v. Moore, 1 S. & S. 65.

[6] Caffrey v. Darbey, 6 Ves. 488; McGachen v. Dew, 15 Beav. 84; Tebbs v. Carpenter, 1 Mad. 298; Waring v. Waring, 3 Ir. Eq. 335; Platel v. Craddock, C. P. Coop. 481; Wiles v. Gresham, 2 Drew. 258; Grove v. Price, 26 Beav. 103; Rowley v. Adams, 2 H. L. Ca. 725; Macken v. Hogan, 14 Ir. Eq. 220; Mucklow v. Fuller, Jac. 198; Powell v. Evans, 5 Ves. 839; Lowson v. Copeland, 2 Bro. Ch. 156; Caney v. Bond, 6 Beav. 486; Cross v. Petree, 10 B. Mon. 413; Wolfe v. Washburn, 6 Cow. 261; Waring v. Darnall, 10 G. & J. 127; Hester v. Wilkinson, 6 Humph. 215; Garner v. Moore, 3 Drew. 277.

[7] Mills v. Osborne, 7 Sim. 30.

[8] Timson v. Ramsbottom, 2 Keen, 35; Meux v. Bell, 1 Hare, 88; *Re* Styan, 1 Phil. 155; Smith v. Smith, 2 Cr. & Mee. 31; Duncan v. Chamberlayne, 11 Sim. 123.

§ 439. There is no fixed time within which *executors* are to get in the *choses in action* of the testator. They must use due diligence; and what is due diligence depends upon the existing facts in every case, and a large discretion must necessarily be vested in the executor.[1] If there is property that cannot be kept without great expense, it should be sold forthwith. If the testator's establishment is expensive, it should be broken up within a reasonable time; and, under special circumstances, two months were held to be reasonable.[2] If there are shares or stocks in corporations, the executors must exercise a sound discretion to sell in the most advantageous manner, and at the most advantageous time. In the case of some Crystal Palace shares owned by a testator, a sale within a year was held to be the exercise of a reasonable discretion, although it was claimed that they ought to have been sold within two months.[3] So where a large part of an estate consisted of Mexican bonds, which the testator directed to be converted "with all convenient speed," it was held that these words added nothing to the implied duty of every executor to convert such property with all reasonable speed; that a conversion in the course of the second year was proper and reasonable; that if executors were bound to sell at once without reference to the circumstances, there would often be a great sacrifice of property, and therefore that executors were bound to exercise a *reasonable discretion*, according to the circumstances of each case.[4]

§ 440. Personal securities change from day to day; and as the death of the testator puts an end to his discretion in regard to them, unless he has exercised it in his will, the executor or trustee will become personally liable, if he does not get in the money within a reasonable time.[5] He must not allow the assets to remain out on personal security,[6] though it was a loan or investment by the tes-

[1] Waring *v.* Darnall, 10 G. & J. 127; Hughes *v.* Empson, 22 Beav. 138.

[2] Field *v.* Pickett, 29 Beav. 576.

[3] Hughes *v.* Empson, 22 Beav. 138; Bate *v.* Hooper, 5 De G., M. & G. 338; Wilkinson *v.* Duncan, 26 L. J. (N. S.) Ch. 495.

[4] Buxton *v.* Buxton, 1 M. & C. 80; Prendergast *v.* Lushington, 5 Hare, 171; Hester *v.* Wilkinson, 6 Humph. 215; Waring *v.* Darnall, 10 G. & J. 127.

[5] Bailey *v.* Young, 4 Y. & Col. Ch. 226; Will's App., 22 Penn. St. 330; Mucklow *v.* Fuller, Jac. 198; Tebbs *v.* Carpenter, 1 Mad. 297.

[6] Lowson *v.* Copeland, 2 Bro. Ch. 156; Caney *v.* Bond, 6 Beav. 486; Att'y.-Gen. *v.* Higham, 2 Y. & Col. Ch. 634; Hemphill's App., 18 Penn. St. 303.

tator himself.[1] It is not enough for the executor to apply for payment through an attorney: he must follow the collection actively by legal proceedings,[2] unless he can show that such proceedings would have been futile and vain.[3] An executor must take the same steps when his *coexecutor* is a debtor to the estate, even if the testator has been in the habit of depositing or lending money to the coexecutor as to a banker.[4] Executors are not justified in dealing with a testator's money as he dealt with it himself, nor may they trust all the persons that he trusted. Nor will a direction in the will "to call in securities not approved by them" excuse executors from not calling in personal securities; for such direction refers to the different kinds of securities sanctioned by law and the court, and not to all investments outside the sanctions of the law.[5] If the executors are to get in the money "whenever they think proper and expedient," they will be liable for the fund if they allow it to remain uncollected out of kindness or regard for the tenant for life, and not upon an impartial judgment for the best interest of all the parties.[6] If the outstanding debt is secured by a real mortgage, it ought not to be called in, if it is safe, until it is wanted in the course of the administration.[7] But pains should be taken to ascertain whether the security is safe.[8] If the mortgage security is not adequate, the executor or trustee must insist

[1] Powell *v.* Evans, 5 Ves. 839; Bullock *v.* Wheatley, 1 Coll. 130; Tebbs *v.* Carpenter, 1 Mad. 298; Clough *v.* Bond, 3 M. & Cr. 496; Hemphill's App., 18 Penn. St. 303; Pray's App., 34 Penn. St. 100; Barton's App., 1 Pars. Eq. 24 is overruled; Kimball *v.* Reading, 11 Foster, 352. In England, bank stock must be converted. Mills *v.* Mills, 7 Sim. 509; Howe *v.* Dartmouth, 7 Ves. 150; Price *v.* Anderson, 15 Sim. 473.

[2] Lowson *v.* Copeland, 2 Bro. Ch. 156; Horton *v.* Brocklehurst, 29 Beav. 511; Paddon *v.* Richardson, 7 De G., M. & G. 563; Wolfe *v.* Washburn, 6 Cow. 261.

[3] Clack *v.* Holland, 19 Beav. 262; Hobday *v.* Peters, 28 Beav. 603; Alexander *v.* Alexander, 12 Ir. Eq. 1; Maitland *v.* Bateman, 16 Sim. 233 and note; Walker *v.* Symonds; 3 Swans. 71; East *v.* East, 5 Hare, 343; Ratcliff *v.* Wynch, 17 Beav. 217; Ball *v.* Ball, 11 Ir. Eq. 370; Styles *v.* Guy, 16 Sim. 232.

[4] Styles *v.* Guy, 1 Mac. & G. 428; 1 Hall & Tw. 523; Egbert *v.* Butter, 21 Beav. 560; Candler *v.* Tillett, 22 Beav. 257; Mucklow *v.* Fuller, Jac. 198.

[5] Styles *v.* Guy, 1 Mac. & G. 428; Scully *v.* Delany, 2 Ir. Eq. 165.

[6] Luther *v.* Bianconi, 10 Ir. Ch. 194.

[7] Orr *v.* Newton, 2 Cox, 274; Howe *v.* Dartmouth, 7 Ves. 150; Robinson *v.* Robinson, 1 De G., M. &. G. 252.

[8] Ames *v.* Parkinson, 7 Beav. 384.

upon payment, even where the *cestui que trust* is to consent to every change of investment, and he refuses to consent; for nothing will justify conduct that endangers the fund.[1] But if the fund is safe on a security sanctioned by the court and selected by the testator, it might be a breach of trust to call it in, and allow it to remain unproductive, or to invest it anew.[2] But if trustees are ordered by the court to call in securities, and they neglect to do so, they will be liable for any loss that occurs.[3] So if trustees compromise a debt due from a bankrupt estate, they must show that the bankrupt would have obtained his discharge, and that it was impossible to get the whole debt, or they will be liable for the loss.[4] If the trustee himself owes the estate and becomes bankrupt, he must prove the debt against himself, or he will be liable, even if he gets his discharge.[5] But in the United States, bankrupts are not discharged from any liabilities which they are under in a fiduciary capacity.

§ 441. It was observed in Harden *v.* Parsons,[6] that no man can require, or with reason expect, that a trustee should manage another's property with the same care and discretion as his own. But this is neither sound morality nor good law. A trustee must use the same care for the safety of the trust fund, and for the interests of the *cestui que trust*, that he uses for his own property and interests.[7] Thus where a trustee had £200 of his own money, and £40 of trust money in his house, and he was robbed by his servant, he was not held responsible.[8] And where a trustee deposited articles with his solicitor, to be passed over to a party entitled to them, and the articles were stolen, the trustee was not held responsible.[9] But if a trustee employs an agent, and the agent steals or appropriates the property intrusted to him, the trustee will be

[1] Harrison *v.* Thexton, 4 Jur. (N. S.) 550.

[2] Orr *v.* Newton, 2 Cox, 276.

[3] Davenport *v.* Stafford, 14 Beav. 338.

[4] Wiles *v.* Gresham, 2 Dr. 258; 5 De G., M. & G. 770. Lord Justice Turner expressed a doubt, whether the trustees should have been charged, without further inquiry.

[5] Orrett *v.* Corser, 21 Beav. 52.

[6] 1 Eden, 148.

[7] Morley *v.* Morley, 2 Ch. Ca. 2; Jones *v.* Lewis, 2 Ves. 241; Massy *v.* Banner, 1 J. & W. 247; Att'y-Gen. *v.* Dixon, 13 Ves. 534; *Ex parte* Belchier, Amb. 220; *Ex parte* Griffin, 2 Gl. & J. 114; Taylor *v.* Benham, 5 How. 233.

[8] Morley *v.* Morley, 2 Ch. Ca. 2.

[9] Jones *v.* Lewis, 2 Ves. 240.

held responsible; that is, the trustee is not responsible for the crimes of strangers, but he is responsible for the criminal acts of agents employed by himself about the trust fund.[1]

§ 442. Several trustees, residing in different places, cannot all have the custody of the same articles; therefore it is said that articles of plate, which passes by delivery, and stocks and bonds, payable to the bearer, with coupons to be cut off for the interest, should be deposited at a responsible banker's.[2]

§ 443. A trustee may deposit money temporarily in some responsible bank or banking-house;[3] but he will be liable for the money in case of a failure of the bank, if he deposits it to his *own credit*, and not to the separate account of the trust estate.[4] So if he allows another person to draw upon the fund and misapply the money;[5] so if he deposits the money in such manner that it is not under his own exclusive control, as where money is deposited in bank so that it cannot be drawn without the concurrence of other persons, the trustee will be liable for the failure of the bank, on the principle that it is the duty of the trustee to withdraw the money from the bank upon the slightest indication of danger or loss, and he cannot perform this duty promptly if he is clogged by the necessity of procuring the concurrent action of other persons.[6] So he will be liable if he keeps money in bank an unreasonable length of time, or where it is his duty to invest the fund in safe securities,[7] or to pay it over to newly appointed trustees,[8] or

[1] Bostock *v.* Floyer, L. R. 1 Eq. 28.

[2] Mendes *v.* Guedalla, 2 John. & H. 259.

[3] Routh *v.* Howell, 3 Ves. 565; Jones *v.* Lewis, 2 Ves. 241; Adams *v.* Claxton, 6 Ves. 226; *Ex parte* Belchier, Amb. 219; Att'y-Gen. *v.* Randall, 21 Vin. Ab. 534; Massey *v.* Banner, 1 J. & W. 248; Horsley *v.* Chaloner, 2 Ves. 85; France *v.* Woods, Taml. 172; Dorchester *v.* Effingham, Taml. 279; Freme *v.* Woods, Taml. 172; Wilks *v.* Groome, 3 Dr. 584; Johnson *v.* Newton, 11 Hare, 160; Swinfen *v.* Swinfen, 29 Beav. 211.

[4] Wren *v.* Kirton, 11 Ves. 377; Fletcher *v.* Walker, 3 Mad. 73; Macdonnell *v.* Harding, 7 Sim. 178; Mathews *v.* Brice, 6 Beav. 239; Massey *v.* Banner, 1 J. & W. 241; see remarks on this case in Pennell *v.* Deffell, 4 De G., M. & G. 386, 392.

[5] Ingle *v.* Partridge, 32 Beav. 661; 34 Beav. 411.

[6] Salway *v.* Salway, *alias* White *v.* Baugh, 2 R. & M. 215; 9 Bligh, 181; 3 Cl. & Fin. 44; overruling same case, 4 Russ. 60.

[7] Moyle *v.* Moyle, 2 R. & M. 710; Johnston *v.* Newton, 11 Hare, 169.

[8] Lunham *v.* Blundell, 4 Jur. (N. S.) 3.

into court;[1] or, if having no occasion to keep a balance on hand for the purposes of the trust, he lends the money to the bank on interest upon personal security, that being a security not sanctioned by the court.[2]

§ 444. Trustees may leave money in the custody of third persons when it is necessary in the course of business, as where money is left in the hands of an auctioneer as agent of both parties on a sale or purchase;[3] and during the negotiation of an investment, the trustees may buy exchequer bills;[4] but if they leave the exchequer bills undistinguished in the hands of a banker or broker, they will be liable for the loss of the money.[5] But if trustees deposit money in bank to their own credit;[6] or if they leave it for an unreasonable time, as a year after the testator's death and after all debts and legacies are paid;[7] or if they place their papers and receipts in the hands of their solicitor, so that he can receive their money and misapply it;[8] or if the money is so paid into bank that it may be drawn out upon the check of one trustee and misapplied;[9] or if they neglect to sell property when it ought to have been sold,[10] or suffer money to remain upon personal security,[11] or upon an unauthorized security;[12] or if the money is left improperly or unadvisedly in the hands of a coexecutor or cotrustee, so that he has an opportunity to misapply it, — all the trustees will be responsible for any loss that may occur to the trust fund.[13]

§ 445. In one case it was said, that an executor would not be liable if he had placed money in bank under the control of a coexecutor. The money was entered on joint account, but the individual checks of the coexecutors could draw it out. This was held to be the ordinary and reasonable course of business.[14] If,

[1] Wilkinson *v.* Bewick, 4 Jur. (N. S.) 1010.

[2] Darke *v.* Martyn, 1 Beav. 525.

[3] Edmonds *v.* Peake, 7 Beav. 239.

[4] Mathews *v.* Brice, 6 Beav. 239.

[5] Ibid.

[6] Massey *v.* Banner, 1 J. & W. 241; Wren *v.* Kirton, 11 Ves. 377.

[7] Ibid.

[8] Ghost *v.* Waller, 9 Beav. 497; Rowland *v.* Witherden, 3 Mac. & G. 568.

[9] Clough *v.* Bond, 3 M. & Cr. 490; Clough *v.* Dixon, 8 Sim. 594.

[10] Phillips *v.* Phillips, Freem. Ch. 11.

[11] Powell *v.* Evans, 5 Ves. 839; Tebbs *v.* Carpenter, 1 Mad. 290.

[12] Hancom *v.* Allen, 2 Dick. 498 and n.; Howe *v.* Dartmouth, 7 Ves. 137.

[13] Langford *v.* Gascoyne, 11 Ves. 333; Shipbrook *v.* Hinchinbrook, 11 Ves. 252; 16 Ves. 477; Underwood *v.* Stevens, 2 Mer. 712.

[14] Kilbee *v.* Sneyd, 2 Moll. 186.

however, there is any fraud, collusion, or wilful default, or gross neglect, or if the executor has any reason to interfere, and does not put a stop to the mismanagement of his coexecutor, he will be held liable.[1] The case of Kilbee *v.* Sneyd, however, is so doubtful on this point, and contrary to authority, that it would be unsafe to act upon it.[2]

§ 446. Trustees and executors have a reasonable time to wind up a testator's estate, and make investments; and they may, without responsibility, keep the money in a reliable bank for one year after the death of the testator;[3] but if they draw the money out of bank, and make any irregular investment, or lend it to another bank on interest, they will be responsible for the loss of the money, even if the will directs that the trustees shall not be responsible for losses by a banker; the construction of such direction being that the trustees shall not be liable for loss of money deposited with a banker in the ordinary manner.[4]

§ 447. The trustee must not mingle the trust fund with his own. If he does, the *cestui que trust* may follow the trust property, and claim every part of the blended property which the trustee cannot identify as his own.[5]

§ 448. There may be express trusts for conversion; that is, to sell the trust fund, as it exists at the time of the testator's decease, and convert the same into some other kind of property or investment; and there may be an express trust to allow the *cestuis que trust* the use and enjoyment of the *specific* property devised. Both of these forms of trust must be strictly executed, and generally no question arises upon them. But a question sometimes arises from the situation and character of the property, and the relations of the *cestuis que trust* to it, whether the trustee is to convert the property into another form, or allow the *cestuis que trust* to enjoy it *in specie:* that is, the court is left to infer or imply, from the

[1] Ibid. 203, 213.

[2] Clough *v.* Dixon, 8 Sim. 594; 3 M. &. C. 490; Gibbons *v.* Taylor, 22 Beav. 344; Ingle *v.* Partridge, 32 Beav. 661; 34 Beav. 411.

[3] Johnson *v.* Newton, 11 Hare, 160; Swinfen *v.* Swinfen, 29 Beav. 211; Wilkes *v.* Groom, 3 Dr. 584.

[4] Rehden *v.* Wesley, 29 Beav. 213.

[5] Lupton *v.* White, 15 Ves. 432, 440; Chedworth *v.* Edwards, 8 Ves. 46; White *v.* Lincoln, 8 Ves. 363; Fellowes *v.* Mitchell, 1 P. Wms. 83; Gray *v.* Haig, 20 Beav. 219; Leeds *v.* Amherst, 20 Beav. 239; Mason *v.* Morly, 34 Beav. 471, 475.

construction of the instrument, the character of the property and the relations of the *cestuis que trust*, whether it was the intention of the testator that the property should be converted, or whether the beneficiaries should take the use of it specifically, according to the terms in which it is given.

§ 449. The general rule is, that where the testator gives his personal property, or the residue of his personal property, or the interest of his personal property,[1] in trust, or directly to several persons in succession;[2] and the property is of such a nature that it grows less valuable by time, as where it is leaseholds or annuities; or where the property is wasted or consumed in the use of it,— the court implies an intention that such property shall be converted into a fixed and permanent form, so that the beneficiaries may take the use and income of it in succession. Accordingly, in England, such property is converted into the investments allowed by law; and in the United States it must be converted into safe investments, according to the rules in force in the State where the trust is to be administered; and if the trustees fail to do so in a reasonable time, they will be guilty of a breach of trust.[3]

§ 450. The court presumes an intention that perishable property shall be converted, where several persons are to enjoy it in succession; not so much from the actual fact of such an intention, as from its being a convenient means of adjusting the rights of those who are to enjoy the property in succession.[4] This presumption is made, unless a contrary intention is indicated upon the face of the will. The later authorities give effect to slighter indications than the older cases.[5] The object of the rule is to secure a fair adjustment of the rights of all the *cestuis que trust* in succession;

[1] Howe *v.* Dartmouth, 7 Ves. 137; Cranch *v.* Cranch (cited 7 Ves. 142, 147); Litchfield *v.* Baker, 2 Beav. 481; Crowley *v.* Crowley, 7 Sim. 427; Sutherland *v.* Cook, 1 Coll. 498; Johnson *v.* Johnson, 2 Coll. 441; Fearns *v.* Young, 9 Ves. 549; Benn *v.* Dixon, 10 Sim. 636; Oakes *v.* Strachey, 13 Sim. 414.

[2] House *v.* Way, 12 Jur. 959.

[3] Bate *v.* Hooper, 5 De G., M. & G. 338; see *post*, Chap. XVIII.

[4] Cape *v.* Bent, 5 Hare, 35; Pickering *v.* Pickering, 4 M. & Cr. 303; Hinves *v.* Hinves, 2 Hare, 611; Prendergast *v.* Prendergast, 3 H. L. Ca. 195; see Cotton *v.* Cotton, 14 Jur. 950.

[5] Morgan *v.* Morgan, 14 Beav. 82; Craig *v.* Wheeler, 29 L. J. Ch. 374; Mackie *v.* Mackie, 5 Hare, 77; Wightwick *v.* Lord, 6 H. L. Ca. 217; Blann *v.* Bell, 5 De G. & Sm. 658; 2 De G., M. & G. 775; Burton *v.* Mount, 2 De G. & Sm. 383; Howe *v.* Howe, 14 Jur. 359; 2 Spence, Eq. Jur. 42, 554.

for if the property would greatly depreciate in value in the hands of the first taker, the remainder-man might fail to receive the benefit intended to be given to him; the court, therefore, orders the perishable property to be converted into a permanent fund, unless a contrary intention is indicated in the will. So if property, not liable to waste, but bearing a high rate of interest, and subject to great risks, is given to one person for life, and to another in remainder, the beneficiary in remainder may call for a conversion of the stocks or bonds into a less hazardous and more permanent investment, that their interests may be better protected;[1] but the court will not call in real securities without directing an inquiry whether it is necessary for the safety or benefit of all parties.[2] On the other hand, the court applies the same principles to the protection of the first taker or tenant for life; and so if there are reversionary interests that may not fall in and become beneficial to the tenant for life, but may come into the possession of the remainder-man, the court may order the reversions to be sold, and the purchase-money to be invested, so that the tenant for life may have the income for life.[3] And if the trustees have a discretion as to the time of sale, which the court cannot control, and they sell when the reversion falls in, the court will give the tenant for life the difference between the actual price for which the reversion sold, and its estimated value one year after the testator's death.[4]

§ 451. On the other hand, an intention may be implied from the form or terms of the gift, that the property is to be enjoyed by the *cestuis que trust in specie;* as, if there is a *specific gift* of leaseholds or of stocks, the specific legatee will take the rents and dividends of the specified property.[5] A general direction to pay rents to the tenant for life, after the mention of leaseholds, is a specific de-

[1] Thornton *v.* Ellis, 15 Beav. 193; Blann *v.* Bell, 5 De G. & Sm. 658; 2 De G., M. & G. 775; Wightwick *v.* Lord, 6 H. L. Ca. 217.

[2] Howe *v.* Dartmouth, 7 Ves. 150.

[3] Ibid.; Fearns *v.* Young, 9 Ves. 549; Dimes *v.* Scott, 4 Russ. 200.

[4] Wilkinson *v.* Duncan, 23 Beav. 469.

[5] Vincent *v.* Newcombe, Younge, 599; Lord *v.* Godfrey, 4 Mad. 455; Pickering *v.* Pickering, 4 M. & Cr. 299; Hubbard *v.* Young, 10 Beav. 205; Harris *v.* Poyner, 1 Dr. 181; Mills *v.* Mills, 7 Sim. 501; Dunbar *v.* Woodcock, 10 Leigh, 628; Harrison *v.* Foster, 9 Ala. 955; Hale *v.* Burrodale, 1 Eq. Ca. Ab. 461; Bracken *v.* Beatty, 1 Rep. in Ch. 110; Evans *v.* Iglehart, 6 G. & J. 171; Alcock *v.* Sloper, 2 M. & K. 702; Pickering *v.* Pickering, 2 Beav. 57.

vise;[1] but it is still a matter of doubt upon the authorities, whether such a direction, unconnected with any mention of the leaseholds, is a specific devise or not.[2] A mere direction to pay dividends is not a specific devise of the stocks.[3] But a bequest of the "interest, dividends, or income of all moneys or stock, and of all other property yielding income at the testator's death," has been held to be specific, and the trustees could not convert.[4] If the devise is specific, the direction to vary the securities will not affect the rights of a specific legatee, for such direction is only for the protection of the trust fund.[5] A debt due to a testator is not devised specifically, although it is embraced in the residue of an estate specifically devised, as it is in no sense in the nature of an investment, and is therefore to be converted.[6] And if a testator use any expression implying that leaseholds or stocks or other property are not to be converted, as if he names a time for the sale of them, as at or after the death of the tenant for life, the trustees will have no power to convert the property until the time arrives.[7] But where a testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, and at her decease to be disposed of as therein directed,

[1] Blann v. Bell, 2 De G., M. & G. 775; Crowe v. Crisford, 17 Beav. 507; Hood v. Clapham, 19 Beav. 90; Marshall v. Brenner, 2 Sm. & Gif. 237; Elmore's Trusts, 6 Jur. (N. S.) 1325.

[2] Goodenough v. Tremamondo, 2 Beav. 512; Hunt v. Scott, 1 De G. & Sm. 219; Wearing v. Wearing, 23 Beav. 99; Pickup v. Atkinson, 4 Hare, 624; Craig v. Wheeler, 29 L. J. Ch. 374; Vachell v. Roberts, 32 Beav. 140; Harvey v. Harvey, 5 Beav. 134; Att'y-Gen. v. Pitter, 5 Beav. 164.

[3] Neville v. Fortescue, 16 Sim. 333; Blann v. Bell, 2 De G., M. & G. 775; Sutherland v. Cooke, 1 Coll. 503; Hood v. Clapham, 19 Beav. 90.

[4] Boys v. Boys, 28 Beav. 436.

[5] Lord v. Godfrey, 4 Mad. 455; Llewellyn's Trusts, 29 Beav. 171; Morgan v. Morgan, 14 Beav. 72.

[6] Holgate v. Jennings, 24 Beav. 630. There is some doubt upon the principles of this case.

[7] Collins v. Collins, 2 M. & K. 703; Vaughan v. Buck, 1 Phil. 78; Litchfield v. Baker, 13 Beav. 451; Harris v. Poyner, 1 Dr. 180; Chambers v. Chambers, 15 Sim. 190; Daniel v. Warren, 2 Y. & Col. Ch. 290; Rowe v. Rowe, 29 Beav. 276; Alcock v. Sloper, 2 M. & K. 699; Hind v. Selby, 22 Beav. 273; Bowden v. Bowden, 17 Sim. 65; Burton v. Mount, 2 De G. & Sm. 383; Skirving v. Williams, 24 Beav. 24; Hinves v. Hinves, 3 Hare, 609; Harvey v. Harvey, 5 Beav. 134; Bethune v. Kennedy, 1 M. & C. 114; Hunt v. Scott, 1 De G. & Sm. 219; Pickering v. Pickering, 2 Beav. 31; 4 M. & Cr. 289; Prendergast v. Prendergast, 3 H. L. Ca. 195; Hood v. Clapham, 19 Beav. 90; Neville v. Fortescue, 16 Sim. 333; Howe v. Howe, 14 Jur. 359.

it was held that the trustees must convert, as there was no indication that she should enjoy any of the property *in specie*.[1]

§ 452. After a trustee has reduced the trust fund to possession, and has secured the proper custody, and after he has converted so much of the property as was necessary to sell for money, his next duty is to invest the proceeds. It is one of the most important of the duties of trustees to invest the trust fund in such manner that it shall be safe, and yield a reasonable rate of income to the *cestuis que trust*. If there are directions in the instrument of trust as to the time, manner, and kind of investment, the trustees must follow the direction and power so given them. In the absence of such directions and powers, the trustees must be governed by the general rules of the court, or by the statutes and laws of the State in which the trust is to be executed. If there are no directions in the instrument, nor rules of court, nor statutory provisions in relation to investments, they must be governed by a sound discretion and *good faith*.

§ 453. There is one rule that is universally applicable to investments by trustees, and that rule is, that trustees cannot invest trust moneys in personal securities. If trustees have a discretion as to the kind of investments, it is not a sound discretion to invest in personal securities.[2] Lord Hardwicke said, that "a promissory note is evidence of a debt, but no security for it." [3] Baron Hothman observed that "lending on personal credit for the purpose of a larger interest was a species of gaming." [4] Lord Kenyon said,

[1] Benn *v.* Dixon, 1 Phil. 76; Thornton *v.* Ellis, 193; Morgan *v.* Morgan, 14 Beav. 92; Blann *v.* Bell, 2 De G., M. & G. 775; Hood *v.* Clapham, 19 Beav. 90; Litchfield *v.* Baker, 13 Beav. 481.

[2] Walker *v.* Symonds, 3 Swans. 62; Darke *v.* Martyn, 1 Beav. 525; Terry *v.* Terry, Pr. Ch. 273; Adye *v.* Feuilleteau, 1 Cox, 24; Vigrass *v.* Binfield, 3 Mad. 62; Harden *v.* Parsons, 1 Ed. 149, note (a); Anon., Lofft, 492; Keble *v.* Thompson, 3 Bro. Ch. 112; Wilkes *v.* Steward, G. Coop. 6; Clough *v.* Bond, 3 M. & Cr. 496; Pocock *v.* Reddington, 5 Ves. 799; Collis *v.* Collis, 2 Sim. 365; Blackwood *v.* Borrowes, 2 Conn. & Laws. 477; Watts *v.* Girdleston, 6 Beav. 188; Graves *v.* Strahan, 8 De G., M. & G. 291; Fowler *v.* Reynal, 3 Mac. & G. 500; Smith *v.* Smith, 4 John. Ch. 281; Nyce's Est., 5 W. & S. 254; Swoyer's App., 5 Barr, 377; Willes's App., 22 Penn. St. 330; Gray *v.* Fox, Saxton, Ch. 259; Harding *v.* Larned, 4 Allen, 426; Clark *v.* Garfield, 8 Allen, 427; Moore *v.* Hamilton, 4 Flor. 112; Spear *v.* Spear, 9 Rich. Eq. 184; Barney *v.* Saunders, 16 How. 545, 546.

[3] Walker *v.* Symonds, 3 Swans. 81, note (a), citing Ryder *v.* Bickerton.

[4] Adye *v.* Feuilleteau, 1 Cox, 25.

that "no rule was better established than that a trustee could not lend on mere personal security, and it *ought to be rung in the ears* of every one who acted in the character of trustee."[1] It makes no difference that there are several joint promisors;[2] nor that the loan is to a person to whom the testator loaned money on his personal promise;[3] nor will personal sureties justify the loan.[4] There must be express authority in the instrument of trust to authorize a loan on personal promises.[5] Loose, general expressions, leaving the nature of the investments to the trustees, will not justify such loans.[6] All the terms and conditions of a loan, to be made on personal security, must be strictly complied with; as, if a loan is authorized to a husband, upon the written consent of the wife, such consent must be had in the required form;[7] and a subsequent assent will not save the trustees from responsibility.[8] An authority to loan on personal security will not justify the trustees in lending to one of themselves;[9] nor will it justify them in lending to a relation for the purpose of accommodating him.[10]

§ 454. So, in the absence of express authority, the employment of trust funds in trade or speculation, or in a manufacturing establishment, will be a gross breach of trust.[11] However advantageous such an investment may appear, the trustee investing the funds in such undertakings will be compelled to make good all losses, and to account for and pay over all profits.[12] The law discourages

[1] Holmes *v.* Dring, 2 Cox, 1.

[2] Ibid.; Clark *v.* Garfield, 8 Allen, 427.

[3] Styles *v.* Guy, 1 Mac. & G. 423.

[4] Watts *v.* Girdleston, 6 Beav. 188.

[5] Forbes *v.* Ross, 2 Bro. Ch. 430; 2 Cox, 113; Child *v.* Child, 20 Beav. 50.

[6] Pocock *v.* Redington, 5 Ves. 799; Wilkes *v.* Steward, G. Coop. 6; Mills *v.* Osborne, 7 Sim. 30.

[7] Cocker *v.* Quayle, 1 R. & M. 535.

[8] Bateman *v.* Davis, 3 Mad. 98.

[9] Forbes *v.* Ross, 2 Bro. Ch. 430; 2 Cox, 113; ——— *v.* Walker, 5 Russ. 7; Stickney *v.* Sewell, 1 M. & Cr. 814; Francis *v.* Francis, 5 De G., M. & G. 108.

[10] Ibid.; Langston *v.* Ollivant, G. Coop. 33; Cock *v.* Goodfellow, 10 Mod. 489; Fitzgerald *v.* Pringle, 2 Moll. 534.

[11] Munch *v.* Cockerell, 5 M. & Cr. 178; Kyle *v.* Barnett, 17 Ala. 306.

[12] French *v.* Hobson, 9 Ves. 103; Brown *v.* De Tastet, Jac. 284; Cook *v.* Collingridge, Jac. 607; Crawshay *v.* Collins, 15 Ves. 218; 2 Russ. 325; Featherstonhaw *v.* Fenwick, 17 Ves. 298; Docker *v.* Somes, 2 M. & K. 655; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41.

all such use of trust funds, by rendering it certain that the trustee shall make no profit from such investments, and that he shall be responsible for all losses. And if a trustee stands by, and sees his cotrustee employ the funds in that manner, he will be equally liable.[1] The same rule applies if the trustees simply continue the trade or business of the testator.[2] It is their duty to close up the trade, withdraw the fund, and invest it in proper securities at the earliest convenient moment; and the same rule applies, although the trustees may have been the business agents or partners of the testator.[3] Nor will a power "to place out at interest, or other way of improvement," authorize the employment of the money in a trading concern.[4] In one case, the direction was to "employ" the money, and it was thought that it savored of trade, and might be employed in that manner;[5] but it would not be safe for trustees to rely upon that case as an authority, even if their trust instrument contains a similar direction. If the settlor authorize his trustees to continue the fund in a trading firm, it will be a breach of trust, if the trustees allow the fund to remain after a change in the firm, as by the death or withdrawal of one of the partners.[6] If the trustees are directed to continue the testator's trade, they can invest none of his general assets in the business. They are confined to the fund already embarked in the trade.[7] If the trustees act in good faith in continuing the testator's business under such directions in a will, they will not be liable for any loss;[8] but they must act in good faith and without collusion or interested motives. So trustees are not bound to continue the capital in such trade, and they ought not to do so against their judgment.[9] But if all the *cestuis que trust* are *sui juris*, and capable of acting for themselves, and they desire an executor, administrator, or trustee to continue the business of the testator a

[1] Booth *v.* Booth, 1 Beav. 125; *Ex parte* Heaton, Buck. 386.

[2] Ibid.; Kirkman *v.* Booth, 11 Beav. 273. In some cases, an executor is bound to complete the contracts of the testator. Collinson *v.* Lister, 20 Beav. 356.

[3] Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41.

[4] Cock *v.* Goodfellow, 10 Mod. 489.

[5] Dickinson *v.* Player, C. P. Coop. 178 (1837, 1838).

[6] Cummins *v.* Cummins, 3 Jo. & Lat. 64.

[7] McNeille *v.* Acton, 4 De G., M. & G. 563; 17 Jur. 104.

[8] Paddon *v.* Richardson, 7 De G., M. & G. 563.

[9] Murray *v.* Glasse, 23 L. J. Ch. 124.

few months in order to preserve it for his son, and the executor acts in accordance with their request, and uses his best skill and judgment in the conduct of the trade, he will be allowed for the loss in his accounts.[1]

§ 455. In England, trustees cannot invest the trust fund in the stock or shares of any bank or private or trading corporation; for the capital depends upon the management of the directors, and is subject to losses.[2] It is apparent, that a manufacturing or trading corporation may lose its whole capital in the prosecution of its business strictly within the terms of its charter.[3] Lord Eldon said of bank stock, that "it is as safe, I trust and believe, as any government security; but it is not government security, and therefore this court does not lay out or leave property in bank stock, and what this court will decree it expects from trustees and executors."[4] By Lord St. Leonard's act, 22 & 23 Vict. c. 35, trustees, not forbidden by the instrument of trust, are authorized to invest in bank of England or Ireland or East India stock. This act was held not to authorize an investment in these stocks of trust funds settled before the passage of the act.[5] By 23 & 24 Vict. c. 38, the original act was made retrospective, and the courts of chancery were authorized to issue general orders, from time to time, as to the investment of funds subject to its jurisdiction, either in three per cent consolidated or reduced, or new bank annuities, or in such other stocks, funds, or securities as the court shall think fit; and trustees, having power to invest trust funds in government securities, or upon railway stocks, funds, or securities, may invest in the stocks, funds, or securities which may be designated by the general order of the court. In pursuance of the statute, a general order was issued in 1861, as follows: "Cash under the control of the court may be invested in bank stock, East India stock, exchequer bills, and £2 10*s*. annuities,

[1] Poole *v*. Munday, 103 Mass.

[2] Haynes *v*. Redington, 1 Jo. & Lat. 589; 7 Ir. Eq. 405; Clough *v*. Bond, 3 M. & Cr. 496; Powell *v*. Cleaver, 7 Ves. 142, n.

[3] Trafford *v*. Boehm, 3 Atk. 440; Mills *v*. Mills, 7 Sim. 501; Hancom *v*. Allen, 2 Dick. 499, n., 7 Bro. P. C. 375; Emelie *v*. Emelie, 7 Bro. P. C. 259; Peat *v*. Crane, 2 Dick. 499, n.; Clough *v*. Bond, 3 My. & Cr. 496.

[4] Howe *v*. Dartmouth, 7 Ves. 150.

[5] *Re* Miles's Will, 5 Jur. (N. S.) 1266; Dodson *v*. Sammell, 6 Jur. (N. S.) 137; 1 Dr. & Sm. 575. The Vice-Chancellor held the other way in Page *v*. Bennett, 2 Gif. 117; Simson's Trusts, 1 John. & H. 89.

and upon freehold and copyhold estates, respectively in England and Wales, as well as in consolidated £3 per cent annuities reduced £3 per cent annuities, and new £3 per cent annuities." There are also provisions in the act by which trustees may apply, to the court for leave to change their investments into those now allowed by the act and the court; but the act does not apply where the fund is settled specifically and there is no power of varying the securities.[1]

§ 456. The English rule, in relation to investments of trust funds in bank stock, and shares in trading and manufacturing corporations, prevails in New York and Pennsylvania.[2] It is agreed, that trustees cannot invest trust funds in trade, nor directly in manufacturing, nor in business generally, nor in personal securities, unless there is an authority contained in the instrument of trust. The reasoning is, that trustees cannot use the trust fund in carrying on a private manufacturing establishment, nor in the business of private bankers, nor in underwriting, nor in trade and commerce, and that there is no difference in principle between carrying on such enterprises themselves with the trust fund, or lending it to other individuals to do so on their personal security, and buying shares or stocks in such business corporations carried on by other private individuals, or by the trustees themselves, as officers or agents. Perhaps these are the only States in which the strict English rule is holden. In Massachusetts, it is held that trustees may invest in bank stocks, and in the shares of manufacturing and insurance corporations,[3] or in the notes of individuals secured by such stocks and shares as collateral security.[4] The court justifies this rule in an elaborate opinion, affirming that such stocks are subject to no greater fluctuations than government securities; that they are as safe as real securities, which may depreciate in value, or the title fail; that claims against such corporations can be enforced at law,[5] while government funds can only be en-

[1] Ward's Settlement, 2 John. & H. 191.

[2] Ackerman v. Emott, 4 Barb. 626; Hemphill's App., 18 Penn. St. 303; Worrall's App., 22 Penn. St. 44; Morris v. Wallace, 3 Barr, 319; Nyce's Est., 5 W. & S. 254.

[3] Harvard Coll. v. Amory, 9 Pick. 446.

[4] Lovell v. Minot, 20 Pick. 116.

[5] It is said that loans by the city of Boston always command a higher premium in the market than the loans of the commonwealth. The difference in part is

forced by supplicating the sovereign power; and that government securities have hitherto been so limited in amount that it was impossible for the trust funds of the country to be invested in that manner. The last reason no longer exists. There are now national, state, county, town, and city bonds in sufficient amounts to absorb all trust funds seeking investment, and it is not to be denied that such investments are more permanent and safe. It may be admitted, that great public emergencies and national dangers have an unfavorable effect upon the value of public securities; but such emergencies and dangers have the same effect upon the stocks of private corporations. In addition to these depressing influences, the capital of such companies runs the risks and chances of trade, business, and speculation. Calamities that depress public credit seldom occur, while the risks of trade are constant. It would seem to be the wiser course to withdraw the funds, settled for the support of women, children, and other parties who cannot exercise an active discretion in the protection of their interests, as much as possible from the chances of business. It may be said, that settlors may always do this by directing in what manner the funds settled by them shall be invested. But it would seem to be wiser for the court to establish the safest rule in the absence of special directions, and leave it to the settlor, if he prefers, to direct a less safe investment.

§ 457. The power to lend on mortgage was doubted or denied, until Lord St. Leonard's Act, unless there was an express power in the instrument of trust, or a decree of the court. Lord Harcourt, Lord Hardwicke, and Lord Alvanley appear to have thought that a trustee or executor might invest the money in *well secured real estates*.[1] But Lord Thurlow said, that in *latter* times the court had considered it improper to invest any part of a lunatic's estate upon private security.[2] Sir John Leach refused to allow an infant's money to be invested in that manner, and expressed surprise that

said to be that the city of Boston can be sued upon its contracts, and a judgment against it can be satisfied by seizing upon an execution any property of any citizen within the municipal limits, while no suit can be maintained against the State, but every thing depends upon the good faith and honor of the legislature in supplying the means of payment.

[1] Brown *v.* Litton, 1 P. Wms. 141; Lyse *v.* Kingdon, 1 Coll. 188; Knight *v.* Plymouth, 1 Dick. 126; Pocock *v.* Redington, 5 Ves. 800.

[2] *Ex parte* Cathorpe, 1 Cox, 182; *Ex parte* Ellice, Jac. 234.

any precedent could be found to the contrary.[1] In a late case, the trustees invested in mortgages at the request of the tenant for life, and to procure a higher rate of interest, and they were held liable for the loss; but the case did not go to the full extent of deciding that trustees could not invest on *real securities*, for the reason that they had consulted the interests of the tenant for life, at the expense of those of the remainder-man, but the court did not favor mortgages.[2] If trustees are directed to invest in public funds, of course they cannot invest in mortgages.[3] Previous to the acts before mentioned,[4] courts did not sanction mortgages;[5] but the practice is now relaxed, and a loan upon freeholds of inheritance to the extent of two-thirds of their value may be allowed.[6] But the rule of two-thirds is not inflexible. It may be improper to loan even two-thirds of the present value; as, where the value depends upon the chances of trade or business, and where the property consists of houses liable to deterioration.[7] So it may not be a breach of trust under certain circumstances to loan more than two-thirds.[8] Trustees ought not to lend on a second mortgage, though it might not be a breach of trust in all cases to do so;[9] and so they ought to have a power of sale inserted in the deed, although it might not be a breach of trust to neglect it.[10]

§ 458. There can be no doubt that mortgages on real estate

[1] Norbury *v.* Norbury, 4 Mad. 191; Widdowson *v.* Duck, 2 Mer. 494; *Ex parte* Fust, 1 C. P. Coop. (t. Cott.) 157 n. (e); *Ex parte* Franklyn, 1 De G. & Sm. 531; *Ex parte* Johnson, 1 Moll. 128; *Ex parte* Ridgway, 1 Hog. 309.

[2] Raby *v.* Ridehalgh, 7 De G., M. & G. 108.

[3] Pride *v.* Fookes, 2 Beav. 430; Waring *v.* Waring, 3 Ir. Ch. 331.

[4] Ante, § 455.

[5] Barry *v.* Marriott, 2 De G. & Sm. 491; *Ex parte* Franklyn, 1 De G. & M. 531.

[6] Stickney *v.* Sewell, 1 M. & C. 8; Norris *v.* Wright, 14 Beav. 307; Macleod *v.* Annesly, 16 Beav. 600.

[7] Ibid.; Phillipson *v.* Gatty, 7 Hare, 16; Drosier *v.* Brereton, 15 Beav. 221; Stretton *v.* Ashmall, 16 Beav. 600; 3 De G. 26; L. J. Ch. 277; Farrar *v.* Barraclough, 2 Sm. & Gif. 231.

[8] Jones *v.* Lewis, 3 De G. & Sm. 471. This case was reversed on appeal. See Lewis on Trusts, 263 (5th ed.).

[9] Norris *v.* Wright, 14 Beav. 291; Drosier *v.* Brereton, 15 Beav. 221; Robinson *v.* Robinson, 11 Beav. 371; 1 De G., M. & G. 247; Waring *v.* Waring, 3 Ir. Eq. 337; Lockhart *v.* Reilly, 1 De G. & J. 476.

[10] Farrar *v.* Barraclough, 2 Sm. & Gif. 231.

are considered proper investments in the United States, and perhaps they are the only investments which are not objectionable in some one of the States. In the absence of public funds to an amount hitherto sufficient to absorb the money to be invested by trustees, different rules have been established in the several States, but mortgages upon estates of inheritance, taken with proper caution as to the amount and the title, have been named in all the States as proper and safe investments; so that the question in the United States is whether the security is in fact, what it is called, security upon real estate. A loan to a company owning coal lands and a canal, to a much greater value than its debts, the interest on the loan being a preferred claim upon the income, was held to be substantially on real estate;[1] but an investment in the stock of a similar company, which stock was not preferred, was held to be a breach of trust.[2] An investment in railway bonds, secured by a mortgage of the road-bed, franchise, and other property, is not real security, though real estate is covered by the mortgage; for the method of enforcing such a bond is very different from the ordinary manner of foreclosing a mortgage, and whether such a bond can be enforced at all depends upon the concurrent will of so many bondholders, that at best it is only nominal real estate.[3] London Dock stock and sewer bonds are not real security.[4] It is not a breach of trust to leave funds in turnpike bonds, secured by a mortgage of the tolls and real estate of the company, as they had been invested by the testator.[5] Under the right of the trustees to invest trust funds in real securities, they cannot convert the funds into real estate by taking the legal title absolutely to themselves in trust; and if they do so the *cestui que trust* may elect to take the land, or the trust money and interest;[6] though a direction to invest in

[1] Twaddell's App., 5 Barr, 15.

[2] Worrell's App., 9 Barr, 508.

[3] Mant *v.* Leith, 15 Beav. 524. It is not sufficient for a trustee to say, in defence of an investment, that it is on real security. There are other things to be considered, the nature of the property and other matters. The property, though sufficient, may be involved in litigation. *Per* Master of Rolls in same case.

[4] Robinson *v.* Robinson, 11 Beav. 371.

[5] Robinson *v.* Robinson, 21 L. J. Ch. 111; 1 De G., M. & G. 247.

[6] Ouseley *v.* Anstruther, 10 Beav. 456; Royer's App., 11 Penn. St. 36; Kaufman *v.* Crawford, 9 W. & S. 131; Bonsall's App., 1 Rawle, 273; Bellington's App., 3 Rawle, 55; Ringgold *v.* Ringgold, 1 H. & G. 11; Morton *v.* Adams,

productive real estate was held to justify the purchase of dwelling-houses, or the purchase of a right of dower in order to render the property more productive.[1] If a testator has already invested in mortgages, an executor may make such further advances of money as is necessary to secure the first investment. No general rule can be stated; but the executor in such case must make a careful investigation and exercise a sound discretion, or his advances will not be allowed in case of a loss.[2] And so a guardian, in case of a grave emergency, may buy in land for the minor to save a certain loss;[3] so an administrator may buy in the land of a debtor to his estate to save the debt.[4] Such an investment is a mere temporary expedient, and is to be treated as personal estate.[5] The court may order an investment of accumulations, or of the principal fund temporarily in real estate, with a declaration that it shall continue personalty;[6] and so a court may order an investment in real estate generally, where no other way is pointed out in the trust instrument.[7] Where a trustee or guardian is obliged to take land subject to a mortgage, the trustee becomes personally liable to pay off the mortgage, to protect the interest of the *cestui que trust*. In such case, the guardian or trustee may have the possession of the estate or the management of the trust fund, in order to secure himself for the advancement so made.[8] But there must be an urgent necessity to justify such a proceeding.

§ 459. In a few States, there are statutes authorizing trustees to invest in a particular manner, and excusing them from responsibility if their investments are made in good faith in the prescribed securities. Thus, in Pennsylvania,[9] an executor, guardian, or trustee, may apply to the Orphans' Court, and the court may direct an investment in the stocks or public debt of the United States, of the State, or of the city of Philadelphia, or in real securities, or in

1 Strob. Eq. 72; Heth *v.* Richmond, &c., Co., 4 Grat. 482; Eckford *v.* De Kay, 8 Paige, 89; Winchelsea *v.* Nordcliffe, 1 Vern. 434.

[1] Parsons *v.* Winslow, 16 Mass. 368.

[2] Collinson *v.* Lister, 20 Beav. 356.

[3] Bonsall's App., 1 Rawle, 273; Royer's App., 11 Penn. St. 36.

[4] Bellington's App., 3 Rawle, 55.

[5] Oeslager *v.* Fisher, 2 Penn. St. 467.

[6] Webb *v.* Shaftesbury, 6 Mad. 100.

[7] *Ex parte* Calmes, 1 Hill, Eq. 112.

[8] Woodward's App., 38 Penn. St. 322.

[9] Acts 1832, 1838, 1850, 1852.

the stock of the incorporated districts of Philadelphia County, of Pittsburg and Alleghany, and the water-works of Kensington, Philadelphia County. But it has been held that trustees are not confined to these funds; that the acts are for their benefit; that they can elect other kinds of investment, but will be responsible for losses.[1] In New York, there does not appear to be any legislation on the subject, but trustees are bound by the rules of the court to invest in real securities, or government bonds, or in the State loan, or in loans of the New York Life Insurance and Trust Company.[2] In New Jersey, a statute authorized an investment to be made upon an application to the court, but does not establish any particular funds. In Gray *v.* Fox, the court lay down the rule that investments must be made in government stocks or in real security.[3] In Maryland, there is neither statute nor rule of court to guide the trustees. The courts do not approve of changes in investments, unless express power is given in the instrument of trust, as where a testator gave certain stocks in trust without direction to vary the security, and the trustee disposed of the stocks and invested the money in other securities, he was ordered to replace the entire sum in the same stocks, although the number of shares were increased by the change.[4] In Maine, New Hampshire, Vermont, Michigan, and Missouri, the courts may, upon application, direct trustees as to the manner of investment, but no special investments are pointed out.[5] If trustees invest according to the direction of the courts, they are not responsible for any loss. In Georgia, if trustees invest in the stocks, bonds, or other securities, issued by their own State, they will be exempt from loss. In Mississippi, an investment in bank stocks is allowed.[6] In States where there are no statutes nor rules of court regulating investments, trustees are bound to act in good faith and with a sound discretion in investing trust money; and if they so act they are not responsible for any

[1] Barton's Est., 1 Pars. Eq. 24; Worrell's App., 9 Barr, 108; Twaddell's App., 5 Barr, 15.

[2] Ackerman *v.* Emott, 4 Barb. 626; and see Smith *v.* Smith, 4 John. Ch. 281, 445.

[3] Gray *v.* Fox, Saxton, 259.

[4] Murray *v.* Feinour, 2 Md. Ch. 418; Evans *v.* Iglehart, 6 Gill & J. 192; Gray *v.* Lynch, 8 Gill, 405; Hammond *v.* Hammond, 2 Bland, 306.

[5] It is impossible to cite the statutes of all the States. Practising attorneys will of course know the legislation of their own States.

[6] Smyth *v.* Burns, 25 Miss. 422.

loss that may happen,[1] but to invest in mere personal securities is not a sound discretion anywhere.[2] Nor is it a sound discretion for trustees to subscribe trust funds to new enterprises, as for the stock of new manufacturing, insurance, or railroad corporations, when the undertaking must, in the nature of things, be experimental; and it will not excuse the trustee that he subscribes his own money to such enterprises, as it is permitted to him to speculate with his own money if he sees fit.[3]

§ 460. The instrument of trust frequently contains directions respecting the investment of the trust funds. If the directions are so general that they do not point to any particular class or classes of investments, the trustees must invest in those securities that are sanctioned by the court; as, if the trust is to invest in "good and sufficient security," the court will sanction no security not allowed by its rules and orders.[4] If the trustee is to invest at his "discretion" he cannot invest in personal securities.[5] The powers and directions given in the instrument must be strictly followed;[6] thus a power to invest in bank stocks or lots of land, will not authorize an investment in the loan of the United States.[7] A power to loan on *real securities* does not justify a loan upon railroad bonds secured by mortgage of the road;[8] nor does a power to loan upon mortgage authorize an investment in railroad mortgage bonds.[9] A power to invest in "good and sufficient securities in Virginia and Maryland," authorizes a loan upon town securities.[10] A direction to invest in "any public stocks or securities bearing an interest," embraces a coal and navigation company, that being within the popular meaning of the testator.[11] If there is a direction to

[1] Clark *v.* Garfield, 8 Allen, 427.

[2] *Ante* § 453.

[3] Kimball *v.* Reading, 31 N. H. 352.

[4] Booth *v.* Booth, 1 Beav. 125; Trafford *v.* Boehm, 3 Atk. 440; De Manneville *v.* Crompton, 1 V. & B. 259; Wilkes *v.* Steward, Coop. 6; Ryder *v.* Bickerton, 3 Swans. 80 n.

[5] Pocock *v.* Reddington, 5 Ves. 794; Wormley *v.* Wormley, 8 Wheat. 421; 1 Brock. 339; Langston *v.* Ollivant, Coop. 33.

[6] Wood *v.* Wood, 5 Paige, 596; Burrill *v.* Sheil, 2 Barb. 457.

[7] Banister *v.* McKenzie, 6 Munf. 447.

[8] Mortimore *v.* Mortimore, 4 De G. & J. 472; Mant *v.* Leith, 15 Beav. 525; Harris *v.* Harris, 29 Beav. 107.

[9] Ibid.

[10] McCall *v.* Peachy, 3 Munf. 288; but if such securities are greatly depreciated, it would be a breach of trust to invest in them. Trustees, &c., *v.* Clay, 2 B. Mon. 386.

[11] Rush's Est., 12 Penn. St. 375; see Hemphill's App., 18 Penn. St. 303.

invest trust funds in real securities in a foreign jurisdiction, the court will allow the investment;[1] but if no such power is given, such investment will not be allowed.[2] As before stated, all these powers are strictly construed, as if the trustees are authorized to loan £3000 on personal securities, and they lend £5000, it is a breach of trust;[3] and if the power is to loan on a bond, they cannot loan on a promissory note.[4] If the trustees may loan the trust fund to the husband with the consent of the wife, they cannot allow the loan to continue if the husband becomes bankrupt; and they will be guilty of a breach of trust, if they do not use due diligence in calling in the loan, or in collecting such dividends as may be coming. An entire change of circumstances may change their duty, although the wife may still desire that her husband should have the use of the money.[5] Generally, where the trustees are required to invest the fund in a particular manner with the approbation of any person, such requirement becomes imperative upon the request of such person.[6] So if any formalities are prescribed as to the investment, they must be strictly complied with; as where the written consent of a wife is a prerequisite to a loan to her husband, a verbal consent will not relieve the trustees from the consequences of a breach of trust, if they act on such verbal consent.[7] A subsequent consent is not sufficient where a previous consent was contemplated;[8] nor is it enough for a wife to join the husband in a petition for an order that a loan be made to him.[9] If the trustees go beyond the prescribed limits, neither good faith nor care nor diligence, if they can accompany a departure from the direction of the instrument of trust, will protect them if a loss occurs.[10]

§ 461. A direction to invest in good freehold security must be

[1] Burrill *v.* Sheil, 2 Barb. S. C. 457.

[2] Rush's App., 12 Penn. St. 375.

[3] Payne *v.* Collier, 1 Ves. Jr. 170.

[4] Greenwood *v.* Wakeford, 1 Beav. 576.

[5] Wiles *v.* Gresham, 2 Drew. 258; 24 L. J. Ch. 264; Langston *v.* Ollivant, Coop. 33; and see Boss *v.* Goodsall, 1 N. C. C. 617; Burt *v.* Ingram, Lewin on Trusts, 339 (4th ed.).

[6] Cadogan *v.* Essex, 2 Dr. 227.

[7] Cocker *v.* Quayle, 1 R. & M. 535; Hopkins *v.* Myall, 2 R. & M. 86; Kellaway *v.* Johnson, 5 Beav. 319.

[8] Bateman *v.* Davis, 3 Mad. 98; Adams *v.* Broke, 1 N. C. C. 627.

[9] Norris *v.* Norris, 14 Beav. 291; Fitzgerald *v.* Pringle, 2 Moll. 534.

[10] Ackerman *v.* Emott, 4 Barb. 626.

strictly complied with;[1] an authority to invest in ground rents authorizes an investment in redeemable ground rents, that being the kind of ground rent in the place where the investment is to be made;[2] a power to invest in good private security does not authorize the trustees to use the funds themselves.[3] Where stock is settled on a husband and wife for life with remainder to the children, with a power to vary the securities for greater interest, the trustees cannot purchase an annuity for one of the tenants for life.[4] If, however, the existing securities are unsafe, and it is proper to call in the money and reinvest it, trustees may make a temporary investment in safe funds until an investment can be advantageously made in the securities directed by the testator.[5] If the direction is to invest in land or any other security, it will be implied that the settlor intended the investment to be made in land if it could be done advantageously, and the alternative part of the direction is to be followed only in case an investment cannot be made in land; and this construction will be followed unless there is some other controlling consideration in the instrument.[6] And if trustees are authorized to lend on mortgage to *three persons*, they cannot lend to *two* of them, although they get the entire interest in the estate; nor can they lend to the *three* without the mortgage at the time, although they get the security in two years after. It is no excuse to say that the delay did not occasion the loss. The conclusive answer is, that they committed a breach of trust in not obeying the power, and they must make good the loss.[6] And so trustees cannot let money on a mortgage to one of themselves.[7] Under a power to loan on mortgage they may continue existing mortgages, if safe.[8]

[1] Wyatt v. Wallace, 8 Jur. 117; 1 Coop. 155 n.

[2] *Ex parte* Huff, 2 Barr, 227.

[3] Westover v. Chapman, 1 Coll. 177; Forbes v. Ross, 2 Bro. Ch. 430; 2 Cox, 113; *ante*, § 453.

[4] Fitzgerald v. Pringle, 2 Moll. 534.

[5] Sowerby v. Clayton, 3 Hare, 430; 8 Jur. 597; Mathews v. Brice, 6 Beav. 329; *Ex parte* Chaplin, 3 Y. & C. 397; Knott v. Cottee, 6 Beav. 77.

[6] Earlom v. Saunders, Amb. 340; Cookson v. Reay, 5 Beav. 32; Cowley v. Hartstonge, 1 Dow, 361; Hereford v. Ravenhill, 5 Beav. 51; Fowler v. Reynal, 3 Mac. & G. 500; 2 De G. & Sm. 749.

[7] Stickney v. Sewell, 1 M. & Cr. 8; ——— v. Walker, 5 Russ. 7; Fletcher v. Green, 33 Beav. 426; Francis v. Francis, 5 De G., M. & G. 108; Crosskill v. Bower, 32 Beav. 86.

[8] Angerstein v. Martin, T. & R. 239; Ames v. Parkinson, 7 Beav. 379.

§ 462. A trustee must invest the trust funds in his hands, in the manner directed, within a *reasonable time*, although no direction is given in the deed or will as to the time or manner of investment. If he neglects for an unreasonable time to make the investment, he may be charged with interest; and if any loss or damage occurs to the *cestui que trust* from the delay, the trustee must make it up.[1] What is a reasonable time depends upon circumstances. When the trustees were directed to invest in the purchase of land with *all convenient speed*, a year was held to be a reasonable time.[2] But where the trustees are directed to invest in *freehold securities*, they will not be charged with interest until it has been shown that they could have invested according to the direction; for it is not always practicable to procure such securities.[3] So a year from the testator's death was considered a reasonable time within which to make an investment in United States stock.[4] On the other hand, the Supreme Court of the United States allowed three months as a reasonable time within which to invest capital sums of a trust fund paid in to a banker, and charged the trustee for the sum lost by the failure of the banker after that time.[5] In other cases, six months have been allowed as a reasonable time within which to invest trust funds; and trustees have been charged with interest when they kept the money uninvested for a longer time.[6] But where the trustees make no effort to invest the money, they may be charged with interest from a period earlier than six months.[7] Where a trustee or executor is directed to invest a legacy *imme-*

[1] Lyse *v.* Kingdom, 1 Coll. 184; Bates *v.* Scales, 12 Ves. 402; Ryder *v.* Bickerton, 3 Swans. 80; Trafford *v.* Boehm, 3 Atk. 440; Lomax *v.* Pendleton, 3 Call, 538; Garniss *v.* Gardner, 1 Edw. Ch. 128; Schieffelin *v.* Stewart, 1 John. Ch. 620; Chase *v.* Lockerman, 11 G. & J. 185; Armstrong *v.* Miller, 6 Ham. 118; Handly *v.* Snodgrass, 9 Leigh, 484; Aston's Est., 5 Whart. 228; *In re* Thorp, Davies, 290.

[2] Parry *v.* Warrington, 6 Mad. 155; Johnson *v.* Newton, 11 Hare, 160.

[3] Wyatt *v.* Wallis, 1 Coop. 154 n.; 8 Jur. 117.

[4] Cogswell *v.* Cogswell, 2 Edw. Ch. 231. This was in analogy to the payment of legacies, which may be done in one year; a trustee with ready money ought to invest with more promptness.

[5] Barney *v.* Saunders, 16 How. 543.

[6] Dunscomb *v.* Dunscomb, 1 John. Ch. 508; Manning *v.* Manning, 1 John. Ch. 527; Merrick's Est., 2 Ash. 485; Warrell's App., 23 Penn. St. 44; Armstrong *v.* Walkup, 12 Grat. 608; Hooper *v.* Savage, 1 Munf. 119; Frey *v.* Frey, 2 C. E. Green, 72.

[7] Ringgold *v.* Ringgold, 1 H. & G. 11.

diately in stock, and he retains the sum for the period of one year or more, or for an unreasonable time, and the price of the stock rises, he will be ordered to purchase as much stock as could have been purchased at the time the fund ought to have been invested.[1] Where trustees were directed to invest in the funds, and they paid the money into a banker's with directions to invest in bank annuities, which the bankers neglected to do, and the trustees made no inquiry for five months, they were held, after the failure of the bankers, for the money or the stock at the option of the *cestui que trust*.[2] Trustees and guardians are held to a stricter rule in relation to investments than executors acting as trustees, for trustees and guardians generally take an estate ready to be invested; and trustees will be held to a stricter rule in relation to capital sums, than in relation to current income from interest, dividends, rents, and other smaller sums; thus in Barney *v.* Saunders,[3] before cited, three months were held a reasonable time within which trustees ought to have invested capital sums paid into the banker's, and they were held responsible for the loss of capital after that time by the failure of the bankers, while they were not held liable to replace small sums paid into the same banker's from the rents, interest, and dividends upon the same estate. An executor will not in general be charged with interest for not investing before the expiration of a year from the testator's death. A year is a reasonable time within which an executor may call in the testator's estate and pay off his liabilities; and it is necessary, during that time, that the executor should keep the money on hand. In most States, an executor is allowed that time by statute; and he is exempt from suit by creditors during that year. After that time, if an executor keeps money in his hands without any apparent reason, except for the purpose of using it, it becomes a breach of trust or negligence; and the court may charge him with interest, or with the principal sum if lost.[4] So an executor will be charged with interest

[1] Byrchall *v.* Bradford, 6 Mad. 235; Pride *v.* Fooks, 2 Beav. 430; Wates *v.* Girdlestone, 6 Beav. 188; Clough *v.* Bond, 3 M. & Cr. 496; Robinson *v.* Robinson, 1 De G., M. & G. 256; Phillipson *v.* Gatty, 7 Hare, 516.

[2] Challen *v.* Shippam, 4 Hare, 555.

[3] Barney *v.* Saunders, 16 How. 545; Lomax *v.* Pendleton, 3 Call, 538.

[4] Forbes *v.* Ross, 2 Cox, 115; Flanagan *v.* Nolan, 1 Moll. 85; Moyle *v.* Moyle, 2 R. & M. 710; Johnston *v.* Newton, 11 Hare, 160; Hughes *v.* Empson, 22 Beav. 181; Johnston *v.* Prendergast, 28 Beav. 480· Williamson *v.* Williamson,

during the year, if he receives interest by loaning or using the money.[1]

§ 463. Trustees ought not to mix trust money with other moneys, and take a joint mortgage for the whole, for this would be to complicate the trust with the rights of strangers; nor should a mortgage in such case be taken in the name of a common trustee, for that would be a delegation of the rights of the trustee;[2] but where the trust fund was very small, it was held to be proper for a trustee to put some of his own money with it in order to loan it to the best advantage on a mortgage.[3] Trustees must personally see to it, that the security is forthcoming upon parting with the money; as, where they allowed their solicitors to receive the money upon representations that the mortgage was ready, and there was no mortgage, and the solicitors misapplied the money, the trustees were held to make up the loss.[4] When the money is paid in to a banker or broker for investment, the trustees must see that the investment is made at once, and the securities taken in the proper form, or they will be liable for any loss that may happen;[5] or where money is suffered to remain in the hands of third persons unnecessarily and a loss happens, the trustees must make it up.[6] So if the trustee pays the money into a bank in his own name, and not in the name of the trust, he will be responsible for the money in case of the failure of the bank.[7] But as between the trustee,

6 Paige, 300; Dillard *v.* Tomlinson, 1 Munf. 183; Carter *v.* Cutting, 5 Munf. 224; Minuse *v.* Cox, 5 John. Ch. 441; Cogswell *v.* Cogswell, 2 Edw. Ch. 231.

[1] Lund *v.* Lund, 41 N. H. 359; Stearns *v.* Brown, 1 Pick. 530; Wyman *v.* Hubbard, 13 Mass. 232; Griswold *v.* Chandler, 5 N. H. 499; Mathes *v.* Bennett, 21 N. H. 199; Wendell *v.* French, 19 N. H. 205.

[2] Lewin on Trusts, 268.

[3] Graves's App., 50 Penn. St. 189.

[4] Rowland *v.* Witherden, 3 Mac. & G. 568; Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Ghost *v.* Waller, 13 Beav. 336.

[5] Challen *v.* Shippman, 4 Hare, 555; Byrne *v.* Norcott, 13 Beav. 336.

[6] Barney *v.* Saunders, 16 How. 543; Anon., Lofft, 492; Fletcher *v.* Walker, 3 Mad. 73; Moyle *v.* Moyle, 2 R. & M. 701; Macdonnell *v.* Harding, 7 Sim. 178; Massey *v.* Banner, 4 Mad. 419; 1 J. & W. 241; Lowry *v.* Fulton, 9 Sim. 115; Mathews *v.* Brice, 6 Beav. 239; Munch *v.* Cockerell, 9 Sim. 115; Johnson *v.* Newton, 11 Hare, 160.

[7] Ibid.; Wren *v.* Kirton, 11 Ves. 377; Pennell *v.* Deffell, 4 De G., M. & G.. 392; *Ex parte* Hilliard, 1 Ves. Jr. 89; Roche *v.* Hart, 11 Ves. 61; Freeman *v.* Fairlee, 3 Mer. 39; Jenkins *v.* Walter, 8 G. & J. 218; Luken's App., 7 W. & S. 48; Stanley's App., 8 Penn. St. 131, Royer's App., 11 Penn. St. 36.

his representatives, and the *cestui que trust*, the *cestui que trust* may follow the money into the hands of the banker. If it is a simple account, not complicated by mixture with deposits of the trustee's own moneys and withdrawals, it is a simple debt which the *cestui que trust* may claim to be held and applied to the trust; but the deposit of the trustee's own money, and the withdrawal of part by checks, will not defeat the right of the *cestui que trust.* The rule to be applied in such case is stated in Rennell *v.* Deffell as follows: the checks are to be applied to the earliest items of deposit, whether of the trust fund or of the trustee's own money, and such earliest items will be reduced *pro tanto.* If any thing of the trust fund remains in the hands of the banker under this rule, it will be applied to the purposes of the trust.[1] This is a rule for the protection of the *cestui que trust* in case of the failure or bankruptcy of the trustee. But it does not affect the general rule before stated, that where a trustee deposits the trust money in his own name, or mixes the money with his own, he must pay interest for it, and be responsible for the principal, in case of the failure of the banker or of any other loss.[2]

§ 464. Trustees cannot use trust moneys in their business, nor embark it in any trade or speculation;[3] nor can they disguise the

[1] Pennell *v.* Deffell, 4 De G., M. & G. 392; Frith *v.* Cortland, 2 Hem. & Mill. 417; 34 L. J. Ch. 301; Kip *v.* Bank of N. Y., 10 John. 65; Kennedy *v.* Strong, 10 John. 289; School, &c., *v.* Kirwin, 25 Ill. 73; McAllister *v.* Commonwealth, 4 Casey, 536; 30 Penn. St. 536.

[2] Munford *v.* Murray, 6 John. Ch. 1; Kellett *v.* Rathbun, 4 Paige, 102; Jacot *v.* Emmett, 11 Paige, 142; De Peyster *v.* Clarkson, 2 Wend. 77; Garniss *v.* Gardner, 1 Edw. Ch. 128; Spear *v.* Tinkham, 2 Barb. Ch. 211; Merrick's Est., 2 Ash. 485; Dyott's Est., 2 W. & S. 565; Beverleys *v.* Miller, 6 Munf. 99; Deffenderffer *v.* Winder, 3 G. & J. 341; Peyton *v.* Smith, 2 Dev. & Bat. Eq. 325; Jameson *v.* Shelly, 2 Humph. 198; Kerr *v.* Laird, 27 Miss. 544; *In re* Thorp, Davies, 290.

[3] Tebbs *v.* Carpenter, 1 Mad. 304; Lee *v.* Lee, 2 Vern. 548; Adye *v.* Feuilleteau, 1 Cox, 24; Piety *v.* Stace, 4 Ves. 622; Docker *v* Somes, 2 M. & K. 655; Palmer *v.* Mitchel, 2 M. & K. 672 n.; Miller *v.* Beverleys, 4 Hen. & M. 415; *In re* Thorp, Daveis, 290; Manning *v.* Manning, 1 John. Ch. 527; Brown *v.* Ricketts, 4 John. Ch. 303. At one time, it was held that executors might employ money in their trade, especially if they were solvent, and if the assets were generally, and not specifically bequeathed. Grovesnor *v.* Cartright, 2 Ch. Ca. 212; Linch *v.* Cappey, 2 Ch. Ca. 35; Brown *v.* Litton, 1 P. Wms. 140; Ratcliffe *v.* Graves, 2 Ch. Ca. 152; Bromfield *v.* Wytherley, Pr. Ch. 505; Adams *v.* Gale, 2 Atk. 106; Child *v.* Gibson, 2 Atk. 603; but Mr. Lewin says, that Lord North overruled above forty cases, and a twenty years' practice in Ratcliffe *v.* Graves, 1 Vern. 196; Newton *v.* Bennett, 1 Bro. Ch. 361; Adye *v.* Feuilleteau, 1 Cox, 25; Lewin on Trusts, 255, 276.

employment of the money in their business, under the pretence of a loan to one of themselves,[1] nor to a partnership of which they are members;[2] nor can the money be loaned on security to be reloaned back to the trustee, or by the trustee at a profit.[3] If a trustee makes such use of the money, he will be responsible for all loss, and he may be compelled to pay the highest rate of interest; or the *cestui que trust* may follow the money, and insist upon all the profits made by such use; and if the trustee is a trader or business man, he will be presumed to use and employ the money in his business if he deposits it in bank in his own name, for such business men must generally keep some money in bank for the purposes of their credit, and such trust money answers the purpose as if it was their own.[4]

§ 465. There is said to be a distinction between an original investment improperly made by trustees, and an investment made by the testator himself, and simply continued by a trustee;[5] but it is a distinction that cannot be safely acted upon. If a testator gives any directions in his will to continue his investments already made, trustees must of course follow such directions; and if they follow them in good faith, they will not be liable for any losses, unless they are negligent in failing to change an investment, when it ought to be changed to save it; for it cannot be supposed that the direction of a testator to continue a certain investment, relieves the trustees from the ordinary duty of watching such investment, and of calling it in, when there is imminent danger of its loss by a change of circumstances. If no directions are given in a will as to the conversion and investment of the trust property, trustees to be safe should take care to invest the property in the securities pointed out by the law. It is true that a testator during his life

[1] Townend *v.* Townend, 1 Gif. 201.

[2] Kyle *v.* Barnett, 17 Ala. 306.

[3] Ratcliffe *v.* Graves, 2 Ch. Ca. 152; 1 Vern. 196.

[4] Treves *v.* Townshend, 1 Bro. Ch. 284; Moons *v.* De Bernales, 1 Russ. 301; *In re* Hilliard, 1 Ves. Jr. 90; Sutton *v.* Sharp, 1 Russ. 146; Roche *v.* Hart, 11 Ves. 61; Brown *v.* Southhouse, 3 Bro. Ch. 107.

[5] Powell *v.* Evans, 5 Ves. 841; Clough *v.* Bond, 3 M. & Cr. 496; Harvard Coll. *v.* Amory, 9 Pick. 446; Thompson *v.* Brown, 4 John. Ch. 628; Knight *v.* Plymouth, 3 Atk. 480; 1 Dick. 120; Routh *v.* Howell, 3 Ves. 565; Wilkinson *v.* Stafford, 1 Ves. Jr. 41; Vez *v.* Emery, 5 Ves. 144; Barton's Est., 1 Pars. Eq. 24; Murray *v.* Feinour, 2 Md. Ch. 418; Brown *v.* Campbell, Hopkins, 233; Smith *v.* Smith, 4 John. Ch. 283.

may deal with his property according to his pleasure, and investments made by him are some evidence that he had confidence in that class of investments; but, in the absence of directions in the will, it is more reasonable to suppose that a testator intended that his trustees should act according to law. Consequently, in States where the investments which trustees may make are pointed out by law, the fact that the testator has invested his property in certain stocks, or loaned it on personal security, will not authorize trustees to continue such investments, beyond a reasonable time for conversion and investment in regular securities.[1] But in States where there are no fixed funds or securities in which trustees shall invest, the fact that a testator has invested his property in particular stocks, shares of corporations, mortgages, or other securities, thus indicating his confidence in such investments, will go far to justify the trustees in continuing them.[2] So trustees, in the usual course of dealing, may take notes on short time for small sums of rent due their estate, that having been the usual course of dealing with the tenants by the testator.[3] Taking all the cases together, it would appear to be a settled principle that trustees are not justified, in the absence of express or implied directions in the will, in continuing an investment permanently, made by the testator, which they would not be justified themselves in making. The principle probably has this qualification, that if a trustee continues such investment, in good faith, and a loss happens, he would be held to replace the original sum only, without interest.[4]

§ 466. Where trust moneys are left by the testator, properly invested in the funds, or are once so invested by the trustees, they cannot, without express authority, sell out the stock and invest in other securities; and if they do so, they will be ordered to replace the stock, and to invest all the proceeds and profits of the sale in the same stocks;[5] or the *cestui que trust* may elect to take the

[1] Hemphill's App., 18 Penn. St. 303; Pray's App., 34 Penn. St. 100, overrules the case of Barton's Est., 1 Pars. Eq. 24; Kimball *v.* Reading, 11 Foster, 352.

[2] Harvard Coll. *v.* Amory, 9 Pick. 446.

[3] Smith *v.* Smith, 4 John. Ch. 283.

[4] Lowson *v.* Copeland, 2 Bro. Ch. 157; Tebbs *v.* Carpenter, 1 Mad. 298.

[5] Williams *v.* Nixon, 2 Beav. 672; Fyler *v.* Fyler, 3 Beav. 550; Adams *v.* Clifton, 1 Russ. 297; Hanbury *v.* Kirkland, 3 Sim. 265; Pawlett *v.* Herbert, 1 Ves. Jr. 297; Underwood *v.* Stevens, 1 Mer. 712; Crackelt *v.* Bethune, 1 J. & W. 586; Witter *v.* Witter, 3 P. Wms. 100.

money with interest upon it.[1] And even if trustees have express power to vary the securities, they will not be allowed to do so capriciously, or without some apparent object;[2] and they ought not to sell out an investment without having in view an immediate reinvestment: if they do so, they may be held to pay the loss that may occur.[3] If an investment in a particular fund or stock is directed by a testator, it cannot be varied except by the consent of all the parties interested; and if there are parties not *sui juris*, or not in being, the court itself will not order a change.[4] In those States where there are no stocks, funds, or securities, prescribed by law, or by the order of court, in which trustees must invest in order to be safe, and investments are once made by trustees in safe and proper securities, or where investments are left by the testator in such securities, the courts will be very adverse to a change, and will not allow one, except for some very controlling motive. The reason is, that where there is no rule governing investments by trustees, except that they shall act in good faith and upon a sound discretion, courts are very averse to change proper investments once made, and select others by so very indefinite a rule.[5]

§ 467. If trustees make an improper investment with the knowledge, assent, and acquiescence, or at the request of the *cestui que trust*, they cannot be held to make good the loss, if one happens;[6] but the *cestuis que trust*, to be affected by such consent or acquiescence, must be *sui juris*, and capable of acting for themselves; if therefore, they are married women, or minor children, or other persons incapacitated, or under disability, they cannot be bound by

[1] Forrest *v.* Elwes, 4 Ves. 497; Fowler *v.* Reynall, 2 De G. & Sm. 749; 3 Mac. & G. 500.

[2] Brice *v.* Stokes, 11 Ves. 324; De Manneville *v.* Crompton, 1 V. & B. 359; Fowler *v.* Reynall, 3 Mac. & G. 500.

[3] Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 N. C. C. 16; Watts *v.* Girdlestone, 6 Beav. 190.

[4] Wood *v.* Wood, 5 Paige, 596; Trans. University *v.* Clay, 2 B. Mon. 386; Contee *v.* Dawson, 2 Bland, 264; Deaderick *v.* Cantrell, 10 Yerg. 263; Burrill *v.* Sheil, 2 Barb. 457; Personeau *v.* Personeau, 1 Des. 521.

[5] Murray *v.* Feinour, 2 Md. Ch. 418.

[6] Booth *v.* Booth, 1 Beav. 125; Langford *v.* Gascoyne, 11 Ves. 333; Nail *v.* Punter, 5 Sim. 555; Farrar *v.* Barraclough, 2 Sim. & Gif. 231; Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Raby *v.* Ridehalgh, 7 De G., M. & G. 104; Walker *v.* Symonds, 3 Swans. 64; Munch *v.* Cockerell, 5 M. & Cr. 178; Poole *v.* Munday, 103 Mass. —; Brice *v.* Stokes, 11 Ves. 319.

any alleged acquiescence, nor by their urgent requests,[1] although a married woman may acquiesce in the investment of trust property, given to her sole and separate use, in such manner that she cannot afterwards complain of the investment as improper.[2] But in order that the *cestuis que trust* may be bound by their acquiescence in an improper investment, there must be, on their part, full knowledge of all the facts and circumstances;[3] and the trustee must be free from all suspicion of misrepresentation or concealment.[4] The remainder-man cannot acquiesce in an investment, until his interest falls into possession, so as to be bound.[5] If the improper investment has been made, at the request of the tenant for life, and such tenant has received an increased income by reason of the improper investment, such increased income can be recovered back from the tenant for life.[6] But if the tenant for life protested against the illegal investment, and desired the trustees to make a proper investment, the increased income from the illegal investment cannot be recovered back.[7] In all cases the assent to an illegal investment must be so formal that the trustees are justified in acting upon it. If it is a mere expression that a certain investment would be safe, without any intention that the trustees should act upon it, the *cestui que trust* will not be bound.[8] So an assent to a particular investment cannot justify a subsequent mismanagement of the investment.[9] And acquiescence by the *cestui que trust* will not be

[1] Walker *v.* Symonds, 3 Swans. 69; Hopkins *v.* Myall, 2 R. & M. 86; Ryder *v.* Bickerton, 3 Swans. 80 n.; March *v.* Russell, 3 M. & Cr. 31; Nail *v.* Punter, 5 Sim. 556; Kellaway *v.* Johnson, 5 Beav. 319; Bateman *v.* Davis, 3 Mad. 98; Cocker *v.* Quayle, 1 R. & M. 535; Murray *v.* Feinour, 2 Md. Ch. 422; Barton's Est., 1 Pars. Eq. 47.

[2] Mant *v.* Leith, 15 Beav. 524; Brewer *v.* Swirles, 2 Sm. & Gif. 219.

[3] Munch *v.* Cockerell, 5 M. & Cr. 178; Montfort *v.* Cadogan, 17 Ves. 489.

[4] Burrows *v.* Walls, 5 De G., M. & G. 233; Underwood *v.* Stevens, 1 Mer. 712; Walker *v.* Symonds, 3 Swans. 1.

[5] Bennett *v.* Colley, 5 Sim. 181; 2 My. & K. 225; Brown *v.* Cross, 14 Beav. 105.

[6] Dimes *v.* Scott, 4 Russ. 195; Mehrtens *v.* Andrews, 3 Beav. 72; Howe *v.* Dartmouth, 7 Ves. 150; Mills *v.* Mills, 7 Sim. 101; Pickering *v.* Pickering, 4 M. & Cr. 289; Holland *v.* Hughes, 16 Ves. 114; Hood *v.* Clapham, 19 Beav. 90; M'Gachen *v.* Dew, 15 Beav. 84; Raby *v.* Ridehalgh, 7 De G., M. & G. 104; Band *v.* Tardell, 7 De G., M. & G. 628.

[7] Bate *v.* Hooper, 5 De G., M. & G. 358; and see Turquand *v.* Marshall, L. R. 6 Eq. 112; Hood *v.* Clapham, 19 Beav. 90.

[8] Nyce's App., 5 W. & S. 254.

[9] Lockhart *v.* Reilly, 39 Eng. L. & Eq. 135.

presumed from mere lapse of time, if he has done nothing to acknowledge it, or has received no benefit.[1]

§ 468. It is difficult to lay down any general rule that is equitable and applicable to all cases, as to the interest that trustees shall pay upon trust funds in their hands. In England, if trustees suffer money to remain in their own hands, or in the hands of third persons, or in bank for an unreasonable time, in addition to their liability for its loss during such delay, they will be charged with interest at the rate of four per cent; but if the trustees are grossly negligent or corrupt, or improperly call in the money from a proper investment, and suffer it to lie idle, or if they use it in trade or speculation, or invest it in improper places, the court will charge them with interest at the rate of five per cent; and, in certain special cases of misconduct, the court will order annual or semiannual rests, for the purpose of charging them with compound interest. In the United States, there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is, whether simple or compound interest shall be imposed. The general rules, so far as they can be drawn from all the cases, are as follows: (1.) If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements.[2] This rule is subject to the qualification that trustees

[1] Phillipson *v.* Gatty, 7 Hare, 516.

[2] Burdick *v.* Garrick, L. R. 5 Ch. 241; Blogg *v.* Johnson, L. R. 2 Ch. 225; Berwick *v.* Murray, 7 De G., M. & G. 843; Treves *v.* Townshend, 1 Bro. Ch. 384; Forbes *v.* Ross, 2 Bro. Ch. 430; Piety *v.* Stacy, 4 Ves. 620; Ashburnham *v.* Thompson, 13 Ves. 402; Bates *v.* Scales, 12 Ves. 402; Pocock *v.* Reddington, 5 Ves. 794; Sutton *v.* Sharp, 1 Russ. 146; Crackelt *v.* Bethune, 1 J. & W. 122; Attorney-General *v.* Solly, 2 Sim. 515; Heathcote *v.* Hulme, 1 J. & W. 122; Brown *v.* Sansome, 1 McC. & Y. 427; Westover *v.* Chapman, 1 Coll. 177; Robinson *v.* Robinson, 1 De G., M. & G. 247; Jones *v.* Foxall, 15 Beav. 392; Saltmarsh *v.* Barrett, 21 Beav. 349; Knott *v.* Cottee, 16 Beav. 77; Roche *v.* Hart, 11 Ves. 58; Lincoln *v.* Allen, 4 Bro. P. C. 553; Young *v.* Comb, 4 Ves. 101; Dawson *v.* Massey, 1 Ball & B. 231; Hicks *v.* Hicks, 3 Atk. 274; Perkins *v.* Boynton, 1 Bro. Ch. 375; Newton *v.* Bennett, 1 Bro. Ch. 359; Littlehales *v.* Gas-

cannot make any advantage to themselves out of the trust fund; and if they make more than legal interest, they shall pay more, as, if they make usurious loans, they shall be charged with all their gains from the use of the money.[1] If the trustee cannot show what amount of interest he has received, he shall be charged with legal interest from the time when the regular investment ought to have been made.[2] There may be an exception to the rule, that a deposit of the trust money in bank in the name of the trustee, or a mixing of the trust fund with his own, will impose a liability to legal interest. There must be some element of a breach of trust in the transaction, or a breach of duty. If therefore the sums are small, and the trustee receives no credit or profit from the act, or if the act was accidental, or beneficial to the *cestui que trust*, legal interest will not be imposed upon the trustee.[3] The proper mode of taking the account of trustees is to treat all the income of the trust received during the current year as unproductive, and to charge against the income of the current year all the disbursements, including the compensation or commissions of the trustees for the same year,

coigne, 3 Bro. Ch. 73; Franklin *v.* Firth, 3 Bro. Ch. 433; Longmore *v.* Broom, 7 Ves. 124; Trimleston *v.* Hammil, 1 Ball & B. 385; Tebbs *v.* Carpenter, 1 Mad. 290; Mousley *v.* Carr, 4 Beav. 49; Hoskins *v.* Nichols, 1 N. C. C. 478; Beverleys *v.* Miller, 6 Munf. 99; Diffenderffer *v.* Winder, 3 G. & J. 341; Mumford *v.* Murray, 6 John. Ch. 1; Jacot *v.* Emmett, 11 Paige, 142; Kellet *v.* Rathburn, 4 Paige, 102; De Peyster *v.* Clarkson, 2 Wend. 77; Garniss *v.* Gardner, 1 Edw. Ch. 128; Spear *v.* Tinkham, 2 Barb. Ch. 211; Manning *v.* Manning, 1 John. Ch. 527; Brown *v.* Rickett, 4 John. Ch. 303; Williamson *v.* Williamson, 6 Paige, 298; Dunscomb *v.* Dunscomb, 1 John. Ch. 508; Minuse *v.* Cox, 5 John. Ch. 448; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Gray *v.* Thompson, 1 John. Ch. 82; Armstrong *v.* Miller, 6 Hamm. 118; Astor's Est., 5 Whar. 228; Merrick's Est., 2 Ash. 285; Worrell's App., 23 Penn. St. 44; Graves's App., 50 Penn. St. 189; Peyton *v.* Smith, 2 Dev. & Bat. Eq. 325; Jameson *v.* Shelly, 2 Humph. 198; Dyott's Est., 2 W. & S. 655; *In re* Thorp, Davies, 290; Carr *v.* Laird, 27 Miss. 544; Lomax *v.* Pendleton, 3 Call, 538; Handy *v.* Snodgrass, 9 Leigh, 484; Dillard *v.* Tomlinson, 1 Munf. 183; Carter *v.* Cutting, 5 Munf. 223; Wood *v.* Garnett, 6 Leigh, 271; Miller *v.* Beverleys, 4 Hemm. & M. 415; Chase *v.* Lockerman, 11 G. & J. 185; Ringgold *v.* Ringgold, 1 H. & G. 11; Arthur *v.* Marster, 1 Harp. Eq. 47; Roland *v.* Best, 2 McCord, Ch. 317; Lyles *v.* Hattan, 6 G. & J. 122; Griswold *v.* Chandler, 5 N. H. 497; Lund *v.* Lund, 41 N. H. 355; Turney *v.* Williams, 7 Yerg. 172; Williams *v.* Powell, 16 Jur. 393; Dornford *v.* Dornford, 12 Ves. 127; Wright *v.* Wright, 2 McCord, Ch. 185.

[1] Barney *v.* Saunders, 16 How. 543.

[2] Bentley *v.* Shreve, 2 Md. Ch. 219; Rapalje *v.* Hall, 1 Sand. Ch. 339.

[3] Rapalje *v.* Hall, 1 Sand. Ch. 399; Graves's App., 50 Penn. St. 189.

and to strike a balance, upon which, as a general rule, interest is to be allowed,[1] but in such a way as not to compound it.[2] If, however, these balances are too small to invest, or for any reason the trustees might equitably keep them on hand, interest will not be allowed upon them until the balances so accumulate as to be properly invested, or until the trustees ought to invest them.[3] Of course as soon as a trustee properly pays the fund into court, his liability for interest ceases.[4] But so long as any litigation is pending over the fund, and the money is not brought into court, the trustee is bound to keep it invested, and he is liable for legal interest.[5]

§ 469. (2.) If a trustee is directed and bound to invest in a particular stock or fund within a certain time, or within a reasonable time, and he neglects to make the investment as directed, the *cestui que trust* has his election to take the money and legal interest thereon, or so much stock as the money would have purchased at the time when the investment ought to have been made, and the dividends thereon.[6] It has been held in some cases, that if trustees were directed to invest in *stocks, or in real estate*, and they neglected to do either, the *cestui que trust* might have the amount of stocks that could have been purchased, and the dividends thereon.[7] On the other hand, it has been held, and is now established in such case, that, as the trustees might have invested in real securities, and

[1] Boynton *v.* Dyer, 18 Pick. 1; Pettus *v.* Clawson, 4 Rich. Eq. 92; Jones *v.* Morrall, 2 Sim. (N. S.) 241; Clarkson *v.* De Peyster, 2 Wend. 78; Vanderheyden *v.* Vanderheyden, 2 Paige, 288.

[2] Rowland *v.* Best, 2 McCord, Ch. 317; Jordon *v.* Hunt, 2 Hill, Eq. 145; Walker *v.* Bynum, 4 Des. 555; Powell *v.* Powell, 10 Ala. 900; Shephard *v.* Stark, 3 Munf. 29; Burwell *v.* Anderson, 3 Leigh, 348; Garrett *v.* Carr, 3 Leigh, 407; Campbell *v.* Williams, 3 Mon. 122; Jones *v.* Ward, 10 Yerg. 160.

[3] Rapalje *v.* Hall, 1 Sand. Ch. 399; Graves's App., 50 Penn. St. 189; Woods *v.* Garnett, 6 Leigh, 271.

[4] January *v.* Poyntz, 2 B. Mon. 404; Yundt's App., 13 Penn. St. 575; Lane's App., 24 Penn. St. 487; Younge *v.* Brush, 38 Barb. 294; Brandon *v.* Hoggatt, 32 Miss. 335.

[5] Ibid.

[6] Shepherd *v.* Mauls, 4 Hare, 504; Robinson *v.* Robinson, 1 De G., M. & G. 256; Byrchall *v.* Bradford, 6 Mad. 235.

[7] Hockley *v.* Bantock, 1 Russ. 141; Watts *v.* Girdlestone, 6 Beav. 188; Ames *v.* Parkinson, 7 Beav. 379; Ouseley *v.* Anstruther, 10 Beav. 456.

such real securities might have been of less value than the original fund, the *cestui que trust* can have only the money and legal interest thereon, and cannot claim the amount of stocks that might have been purchased.[1]

§ 470. (3.) If the trust fund was properly invested, according to the direction of the trust instrument, or according to law, and the trustee improperly converts the fund into money, and neglects to invest it, or invests it improperly, or uses it in trade, business, or speculation, the *cestui que trust* may, at his election, take the dividends or interest which the fund would have produced if the investment had been suffered to remain where it was properly made; or he may take legal interest on the fund; or he may take all the profits that have been made upon the fund.[2] If the *cestui que trust* elects to take the profits, he must take them during the whole period, subject to all the losses of the business: he cannot take profits for one period and interest for another.[3]

§ 471. (4.) If the trustee improperly changes an investment, and refuses to reinvest the money in a legal manner; or if he refuses to invest the fund in the first instance; or if he uses the fund in trade, business, or speculation; or makes an improper or illegal investment, — the *cestui que trust* may have the income that would have accrued from the proper investment; or he may have simple interest at the legal rate; or he may take all the profits of the trade or business, or other investment or employment of the money, and if the trustee refuse to account for the profits arising from his use of the money, or if he has so mingled the money and the profits with his own money and profits that he cannot separate and account for the profits that belong to the *cestui que trust*, the *cestui que trust* may have legal interest computed with annual rests in order to compound it.[4] There has been considerable

[1] Marsh *v.* Hunter, 6 Mad. 295; Shepherd *v.* Mauls, 4 Hare, 500; Robinson *v.* Robinson, 1 De G., M. & G. 256; Phillipson *v.* Gatty, 7 Hare, 516; Rees *v.* Williams, 1 De G. & Sm. 314.

[2] Jones *v.* Foxall, 15 Beav. 392; Robinett's App., 36 Penn. St. 174; Saltmarsh *v.* Barrett, 31 Beav. 349; Kyle *v.* Barnett, 17 Ala. 306; Barney *v.* Saunders, 16 How. 543; Brown *v.* De Tastet, Jac. 284; Cook *v.* Collingridge, Jac. 607; Crawshay *v.* Collins, 15 Ves. 218; 2 Russ. 325; Featherstonhaw *v.* Fenwick, 17 Ves. 298; Docker *v.* Somes, 2 M. & K. 655; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41.

[3] Heathcote *v.* Hulme, 1 J. & W. 122.

[4] Jones *v.* Foxall, 15 Beav. 392; Raphael *v.* Boehem, 11 Ves. 92; 13 Ves.

conflict of opinion and authority upon the matter of compounding interest against a trustee. Lord Cranworth said, that a trustee might as well be charged with more principal than he had received as to be charged with more interest.[1] In another case, it was said in England that a trustee would be charged with more than four per cent interest:[2] (1) when he *ought* to have received more; (2) when he *did* receive more; (3) when he is *presumed* to receive more; and (4) when he is estopped to say he did not receive more.[3] The burden is on the trustee to show, that he made no profits, or received no benefit from the money;[4] and if he refuses to account or to show the amount of profits received, the court will give compound interest, in order that it may be certain that the *cestui que trust* gets the profits of the trade or business in which the trustee has employed the money.[4] To justify the compounding of interest, there must be a wilful breach of duty, and not simple neglect; there must be some special and peculiar circumstances.[5] If the money is simply used in business, and it appears that the profits were not equal to the interest, annual rests will not be made.[6] It appears now to be the settled doctrine, that compound interest will not be given as a penalty for a breach of trust, nor will it be given for an

407; 1 Mad. 167; Saltmarsh *v.* Barrett, 31 Beav. 349; Walker *v.* Woodward, 1 Russ. 107; Heighington *v.* Grant, 5 M. & Cr. 258, 2 Phil. 600; Williams *v.* Powell, 15 Beav. 561; Walrond *v.* Walrond, 29 Beav. 586; Stackpole *v.* Stackpole, 4 Dow P. C. 209; Williams *v.* Powell, 15 Beav. 461.

[1] Attorney-General *v.* Alford, 4 De G., M. & G. 851.

[2] Penney *v.* Avison, 3 Jur. (N. S.) 62.

[3] Attorney-General *v.* Alford, 4 De G., M. & G. 851.

[4] Knott *v.* Cottee, 16 Beav. 77; 16 Jur. 752; Swindall *v.* Swindall, 8 Ired. Eq. 286; Ringgold *v.* Ringgold, 1 H. & G. 11; Diffenderffer *v.* Winder, 3 G. & J. 311; Schieffelin *v.* Stewart, 1 John. Ch. 620; Bryant *v.* Craige, 12 Ala. 354; Hodge *v.* Hawkins, 1 Dev. & Bat. Eq. 566; Hugh *v.* Smith, 2 Dana, 253; Karr *v.* Karr, 6 Dana, 3. Annual rests were allowed in Harland's Acct., 5 Rawle, 329; the question was left open, Dietterich *v.* Heft, 3 Barr, 91; McCall's Est., 1 Ash. 357; Pennypacker's App., 41 Penn. St. 44, and rests were wholly rejected in Graves's App., 50 Penn. St. 189.

[5] Garniss *v.* Gardner, 1 Edw. Ch. 128; Ackerman *v.* Emott, 4 Barb. 626; Tebbs *v.* Carpenter, 1 Mad. 290; Fay *v.* Howe, 1 Pick. 528 and n.; Clemens *v.* Caldwell, 7 B. Mon. 171; Fall *v.* Simmons, 6 Ga. 272; Kenan *v.* Hall, 8 Ga. 417; Cartledge *v.* Cutliff, 21 Ga. 1.

[6] Utica Ins. Co. *v.* Lynch, 11 Paige, 521; Kyle *v.* Barnett, 17 Ala. 306; Ringgold *v.* Ringgold, 1 H. & G. 11; Myers *v.* Myers, 2 McCord, Ch. 214; Wright *v.* Wright, 2 McCord, Ch. 185; Johnson *v.* Miller, 33 Miss. 553.

employment of the money in the course of trade, if the profits, made in the trade, can be clearly ascertained, and are less than legal interest, or less than five per cent; but if nothing appears, as to the profits, the courts will presume that the ordinary profits of trade are made, or five per cent in England, and the legal interest in the United States. And if the interest or profits of the fund are retained in the trade, instead of being paid out, it will be presumed that the trustees made a similar rate of interest or profit upon the sum retained in trade, and therefore annual rests will be made, and compound interest given; not as punishment or penalty, but because the fund and the income employed in trade are presumed to produce that amount of income, interest, or profit.[1]

§ 472. If a trustee is directed to make a certain investment, and to accumulate the income, and he neglects or refuses so to do, the *cestui que trust* is entitled to compound interest, upon all the authorities. If, by the instrument of trust, interest is to be added to principal semiannually, semiannual rests will be made; otherwise annual rests will be made,[2] or an inquiry will be directed to ascertain what would have been the amount of the accumulation if the directions had been followed, in order to charge the trustee with the amount.[3] And where a trustee was ordered by the court to invest a sum in controversy, and he neglected to do so, he was ordered to bring the whole sum into court with compound interest.[4]

[1] Jones *v.* Foxall, 15 Beav. 388; Burdick *v.* Garrick, L. R. 5 Ch. 233. See the matter of compound interest elaborately discussed by Mr. Justice Scarburgh in Ker *v.* Snead, 11 Law Rep. 217, Boston, Sept. 1848; and Wright *v.* Wright, 2 McCord, Eq. 200–204.

[2] Raphael *v.* Boehm, 11 Ves. 92; 13 Ves. 407, 590; Dornford *v.* Dornford, 12 Ves. 127; Knott *v.* Cottee, 16 Beav. 77; Pride *v.* Fooks, 2 Beav. 430; Byrne *v.* Norcott, 13 Beav. 336; Stackpoole *v.* Stackpoole, 4 Dow, 209; Brown *v.* Southhouse, 3 Bro. Ch. 107; Karr *v.* Karr, 6 Dana, 3; Bowles *v.* Drayton, 1 Des. 489; Hodge *v.* Hawkins, 1 Dev. & Bat. 564; Wilson *v.* Peake, 3 Jur. (N. S.) 155; Brown *v.* Sansome, 1 McCl. & Y. 427.

[3] Brown *v.* Sansome, 1 McCl. & Y. 427.

[4] Latimer *v.* Hanson, 1 Bland, 51; Winder *v.* Diffenderffer, 2 Bland, 166.

CHAPTER XVI.

POWERS OF TRUSTEES.

§ 473. Division of powers.
§ 474. Powers where the trust is before the court.
§ 475. Powers in law and in equity.
§ 476. General power of trustees.
§ 477. General power of repairing.
§ 478. Powers of superintendents of public works.
§ 479. Of executors to close up testator's establishment.
§ 480. Power of executor to appropriate a legacy.
§ 481. Power to waive the statute of limitations.
§ 482. Power to release or compromise a debt.
§ 483. Power as to equity of redemptions.
§ 484. General power of leasing.
§ 485. Power of trustee to reimburse himself.
§ 486. Powers of trustees of trading companies.
§ 487. Power of insuring.
§ 488. Special powers.
§§ 489, 490. Division and definition of special powers.
§§ 491, 492. Difference between the gift of a power and of an estate.
§ 493. Where power may be executed by survivors.
§ 494. Where by heirs or devisees or assigns.
§ 495. Where by assigns, and where not.
§ 496. Where the power is matter of personal confidence.
§ 497. Where a power may be executed by *last* survivor.
§ 498. When a power must be executed.
§ 499. By what persons powers may be executed.
§ 500. Whether by administrators with the will annexed.
§ 501. By whom to be executed when no person is named.
§ 502. By whom where a trustee refuses to accept.
§ 503. Whether the power goes with the estate.
§ 504. Who can execute where an estate is assigned.
§ 505. Powers annexed to an estate survive with the estate.
§ 506. Where a power may be contrary to the rule against perpetuities.
§ 507. Discretionary powers, where and where not.
§ 508. Division of discretionary powers and their execution.
§ 509. Power of varying securities.
§§ 510, 511. Control of courts over the exercise of discretionary powers.
§ 512. Powers of trustees to consent to a marriage.
§ 513. If the property once vests in *cestui que trust*, the power is gone.
§ 514. Where consent is a condition to the vesting of the estate.
§ 515. Power in general restraint of marriage, void.
§ 516. A limitation until marriage with consent, good.
§§ 517, 518. When and how the power may be exercised.
§ 519. Courts will control the exercise of such a power.

§ 473. WHERE an express trust is created, certain powers are conferred upon the trustees to be executed by them. These powers are divided in the first instance into *general* and *special* powers. General powers are those, which by construction of law are incident to the *office* of trustee. Every trustee must have them, whether they are named or not in the instrument creating the trust, in order that he may perform the duties imposed upon him. Special powers are such special directions and authority as the settlor gives to his trustees in order to carry out his special purposes in instituting the trust. Special powers are again divided into mere naked powers, — to be exercised by trustees at their sole discretion, and according to their own judgment, and to be for ever discharged and obsolete, if the trustees do not see fit to execute them, — and powers in the nature of a trust. These latter powers are sometimes coupled with an interest, and sometimes not. But if they are in the nature of a trust, they are imperative on the trustees and must be executed. If the trustees neglect or refuse to execute them, or die without performing them, courts of equity will execute them, or compel them to be executed. In considering this subject, the rules governing mere naked powers, and powers in the nature of a trust, will first be stated. The nature of general powers, and the rules that regulate their performance, will next be noticed. Special powers, and the rules applicable to them, will then be discussed, and the time when, and the persons by whom, they may be executed.

§ 474. It must be observed, in the first instance, that whatever powers may be possessed by trustees, whether general or special, if the trust is before the court and a *decree* has been made, the powers of the trustees are thenceforth so far changed that they must have the sanction of the court for all their acts.[1] They cannot begin nor defend any suit without leave of the court;[2] they cannot sell,[3] nor make repairs,[4] nor make investments,[5] nor pay debts without consulting the court.[6] But there must be a *decree* in the

[1] Mitchelson *v.* Piper, 8 Sim. 64; Shewen *v.* Vanderhorst, 2 R. & M. 75; 1 R. & M. 347.

[2] Jones *v.* Powell, 4 Beav. 96; Lewin on Trusts, 425.

[3] Walker *v.* Smallwood, Amb. 676; Annesley *v.* Ashurst, 3 P. Wms. 282.

[4] Anon., 10 Ves. 104. [5] Widdowson *v.* Duck, 3 Mer. 494.

[6] Mitchelson *v.* Piper, 8 Sim. 64; King *v.* Roe, L. J. May, 1858; Irby *v.* Irby, 24 Beav. 525; Jackson *v.* Woolly, 12 Sim. 18.

case; for if there is nothing before the court but a bill, it may be dismissed at any time, and the authority of the trustees left as it was before the bill was filed.[1] Even in the case of a mere bill, the trustees ought to consult the court in important matters, and before incurring large expenses.[2] But even after a decree, which brings all the matters of the trust into the jurisdiction of the court, the trustees must not neglect the duties imposed upon their office; for if they should allow a policy of insurance to expire for want of care, they would be responsible.[3] And they should still collect the personal assets, and prevent them from wasting, and they may give receipts for moneys paid them.[4]

§ 475. In a court of *law*, the trustee is the absolute owner of the estate, and he can exercise all the powers of ownership; he can sue and be sued,[5] and must act in many respects as the owner; and so he must be treated by others as the sole proprietor; but in equity the *cestui que trust* is the owner, and the question in equity is, how far the trustee can act without exceeding his powers, and rendering himself responsible to the *cestui que trust*. If the trust is a simple or passive one to allow the beneficiary to occupy and enjoy the estate, the trustee has no power or duty to perform, except at the instance of the *cestui que trust*. In trusts of a more particular and active kind, the general power of the trustee is limited to the exact performance of the duty imposed upon him. The duty and power given in such trusts must be strictly performed. There is no room for discretion or divergence from the particular directions contained in the instrument, as where money was left to a trustee to be laid out in lands, he had no discretion to purchase land with a part of the moneys, and to expend the remainder in repairs and improvements.[6]

§ 476. But there are *circumstances* where a trustee *must* exercise the discretionary powers of an absolute owner, otherwise great loss might happen to the estate. The exigencies of the moment

[1] Cafe *v.* Bent, 3 Hare, 249; Neeves *v.* Burrage, 14 Q. B. 504.

[2] Attorney-General *v.* Clark, 1 Beav. 467; Cafe *v.* Bent, 3 Hare, 249.

[3] Garner *v.* Moore, 3 Drew. 277.

[4] Lewin on Trusts, 426.

[5] Harrison *v.* Rowan, 4 Wash. C. C. 202.

[6] Bostock *v.* Blakeney, 2 Bro. Ch. 653; Caldecott *v.* Brown, 2 Hare, 145; Wormley *v.* Wormley, 8 Wheat. 421; Coonrod *v.* Coonrod, 6 Ohio, 114; Locke *v.* Lomas, 5 De G. & Sm. 326; Pinnell *v.* Hallett, 2 Ves. 276; Lewis *v.* Hill, 1 Ves. 275; Supp. Ves. Sr. 344; Ringgold *v.* Ringgold, 1 Har. & Gil. 11; Booth *v.* Purser, 1 Ir. Eq. 37.

may demand immediate action. The *cestuis que trust* may be numerous and scattered, or under disability or not in existence, so that their sanction cannot be obtained, or cannot be obtained without great inconvenience. The alternative of applying to the court may be attended with considerable or disproportionate expense, and perhaps delay, so that the opportunity is gone and lost for ever. It is therefore evident that it is for the interest of the *cestuis que trust* that the trustee should have a reasonable discretionary power to be exercised in emergencies, though no such power is given in the instrument of trust.[1] And so it is a rule of equity that a trustee may safely do that without a decree of the court, which the court, on a case made, would order or decree him to do.[2] But there is always danger that courts may not view the matter in the same light as the trustee, and so fail to sanction by decree what he has taken the responsibility of doing under a supposed necessity.[3] It is said in some cases, that, if it is doubtful what ought to be done under the circumstances and the terms of the trust, the trustee may give notice to the beneficiary that he intends to act in a certain manner, and unless the *cestui que trust* interferes to prevent it, the court will not hold the trustee responsible if the act turns out disadvantageous.[4] Trustees may waive all matters of mere form which saves circuity, trouble and expense.[5]

§ 477. A trustee with power to manage real estate for a person absolutely entitled, but incapable from infancy or otherwise of giving any directions, may make repairs; but he cannot go beyond the necessity of the case at the peril of having his expenses disallowed.[6] If there is a legal tenant for life and remainder over, the tenant for life cannot commit waste, and must not suffer the

[1] Ward *v.* Ward, 2 H. L. Ca. 784, note to Rowley *v.* Adams; Angell *v.* Dawson, 3 Y. & Col. Ch. 317; Forshaw *v.* Higginson, 8 De G., M. & G. 827; Darke *v.* Williamson, 25 Beav. 622; Harrison *v.* Randall, 9 Hare, 407.

[2] Hutton *v.* Weems, 12 Gill & J. 83; Co. Lit. 171 a; Bath *v.* Bradford, 2 Ves. 590; Hutcheson *v.* Hammond, 3 Bro. Ch. 145; Lee *v.* Brown, 4 Ves. 369; Cook *v.* Parsons, Pr. Ch. 185; Inwood *v.* Twyne, 2 Ed. 153; Terry *v.* Terry, Gilb. 11; Shaw *v.* Borrer, 1 Keen, 576.

[3] Forshaw *v.* Higginson, 3 Jur. (N. S.) 476.

[4] Life Association *v.* Siddal, 3 De G., F. & J. 74.

[5] Pell *v.* De Winton, 2 De G. & Jo. 20.

[6] Bridge *v.* Brown, 2 Y. & Col. Ch. Ca. 181; Attorney-General *v.* Geary, 3 Mer. 513.

buildings to fall into decay;[1] but whatever may be the rights or liabilities of a legal tenant for life, the trustee of an equitable tenant for life cannot interfere with the possession of the equitable tenant for not repairing, unless he is clothed with the special power of managing the life-estate.[2] In other respects, the equitable and legal rights of tenants for life and remainder-men, and trustees for tenants for life and remainder-men, are the same. Thus trustees of the life-estate may cut timber for repairs as against the remainder-man, if the tenant for life will consent that income shall be applied for the purpose of using the timber for repairing; for timber cannot be cut to be sold, nor to pay for the labor of repairing.[3] The repairs by a tenant for life are his own act, however beneficial to the remainder-man, and he cannot charge any thing upon the inheritance for them;[4] nor will a court direct any improvements to be made.[5] The court said in one case, that there might be an exception to this rule, as where a fund was directed to be laid out in lands, and there was already a settled estate to the same uses, it might be more beneficial to apply part of the fund to prevent buildings on the settled estate from going to destruction, than to apply the whole fund to the purchase of new lands;[6] but it would be an extraordinary case which would move the court to create the exception.[7]

§ 478. Superintendents of public works and similar *quasi* trustees may apply the funds under their control in opposing legislation which would operate injuriously to the interests confided to them. Lord Cottenham said that, "every trustee is to be allowed the reasonable and proper expenses incurred in protecting the property committed to his care." So they have a right to protect it from indirect and probable injuries;[8] but these *quasi* trustees

[1] Powys *v.* Blagrave, 4 De G., M. & G. 458; Harnett *v.* Maitland, 16 M. & W. 257.

[2] Powys *v.* Blagrave, Kay, 495; 4 De G., M. & G. 458; *Re* Skingley, 3 M. & G. 221; Gregg *v.* Coates, 23 Beav. 33.

[3] Co. Lit. 53 b, 54 b; Gower *v.* Eyre, Coop. 156; Marlborough *v.* St. John, 5 De G. & Sm. 181.

[4] Hibbert *v.* Cooke, 1 S. & S. 552; Caldecott *v.* Brown, 2 Hare, 144; Bostock *v.* Blakeney, 2 Bro. Ch. 653; Hamer *v.* Tilsley, Johns. 486; Dent *v.* Dent, 3 Beav. 363.

[5] Nain *v.* Majoribanks, 3 Russ. 582.

[6] Caldecott *v.* Brown, 2 Hare, 145; *Re* Barrington's Estate, 1 Johns. & Hem. 142.

[7] Dunne *v.* Dunne, 3 Sm. & Gif. 22; Dent *v.* Dent, 30 Beav. 363.

[8] Bright *v.* North, 2 Phil. 220; Queen *v.* Norfolk Comm'rs, 15 Q. B. 549;

cannot apply the funds of an existing undertaking for the purpose of obtaining larger powers from the legislature, at least without the consent of all parties interested.[1]

§ 479. An executor is allowed a reasonable time to close up the testator's establishment. In one case a period of two months was not considered too long.[2] In most States, the time that the testator's family may remain in his house, and use the provisions and other materials on hand, is fixed by statute.

§ 480. An executor or trustee may appropriate a legacy without suit where the appropriation is such as the court would have directed;[3] and the trustee may expend money for the protection, safety, and support of a *cestui que trust* who is incapable from any cause of taking care of himself, but the better way is to apply to the court.[4]

§ 481. An executor may waive the statute of limitations, by which a debt due from his testator before his death is barred, and if he pays such debt it will be allowed in his accounts.[5] But in most States there are statutes which limit the time of bringing actions against executors and administrators for debts due from the deceased person. In England there is a decree of administration. After the action is barred against the executor by statute, or by decree of administration, he must plead the statute bar at his peril; and if he should pay after all actions were barred against him by statute, decree of administration, or otherwise, he would pay upon his own responsibility.[6]

Attorney-General *v.* Andrews, 2 McN. & G. 225; Attorney-General *v.* Eastlake, 11 Hare, 205.

[1] Attorney-General *v.* Andrews, 2 McN. & G. 225; Vance *v.* East Lancashire R. Co., 3 K. & J. 50; Attorney-General *v.* Guardians of Poor, &c., 17 Sim. 6; Attorney-General *v.* Norwich, 16 Sim. 225; Stevens *v.* South Devon R. Co., 13 Beav. 48.

[2] Field *v.* Pickett, 29 Beav. 576.

[3] Hutcheson *v.* Hammond, 3 Bro. Ch. 145, 148; Cooper *v.* Douglas, 2 Bro. Ch. 231; Green *v.* Pigot, 1 Bro. Ch. 103; Sitwell *v.* Barnard, 6 Ves. 543; Attorney-General *v.* Manners, 1 Price, 411; Hill *v.* Atkinson, 2 Mer. 45; Webber *v.* Webber, 1 S. & S. 311; 2 Wms. Ex'rs, pp. 861–864.

[4] Duncombe *v.* Alson, 9 Beav. 211; Chester *v.* Rolfe, 4 De G., M. & G. 798; *Ex parte* Price, 2 Ves. 407; Williams *v.* Wentworth, 5 Beav. 235; Wentworth *v.* Tubb, 1 Y. & Col. Ch. 171; Barnsley *v.* Powell, Amb. 102.

[5] Stahlschmidt *v.* Lett, 1 Sim. & Gif. 415; Hill *v.* Walker, 4 K. & J. 166; Hunter *v.* Baxter, 3 Gif. 214; Dring *v.* Greetham, 1 Eq. R. 442.

[6] Alston *v.* Trollope, L. R. 2 Eq. 205; Dring *v.* Greetham, 1 Eq. R. 442;

§ 482. A trustee may generally, acting in *good faith*, release or compound a debt due to his trust estate.[1] But if he releases or compromises a debt without sufficient reason or justification, or if he sells a debt for a grossly inadequate consideration, when by proper diligence more could have been realized, he will be answerable for it in his accounts.[2] In many States there are now statutes authorizing executors, administrators, guardians, and trustees to refer or compromise all claims due to and from the estates which they represent.

§ 483. Trustees who hold an equity of redemption in lands mortgaged for more than their value may release the equity of redemption to avoid the costs of a foreclosure suit, where such suit will lie, and where costs would be imposed upon them as defendants.[3] If a trustee is a mortgagee, he would not be justified in releasing part of his security for the convenience of the mortgagor merely, nor unless there was some advantage to be gained to the *cestui que trust* or the trust estate.[4]

§ 484. Trustees of lands must of course have a general power to lease them, otherwise they could obtain no income; but they must make reasonable leases. In one case a lease for ten years was allowed.[5] In the case of farming lands, husbandry leases only can be made: in England such leases never exceed ten years.[6] Probably there is no such general custom in this country. But if it is a simple trust, and the *cestui que trust* is in possession, the trustee can do nothing without the consent of the beneficiary.

§ 485. A trustee may reimburse himself for money advanced in good faith for the benefit of the *cestui que trust*, or for the protection of the property, or for his own protection in the management of the trust. It is a rule, that the *cestui que trust* ought to save the trustee harmless where the trustee has honestly, fairly, and

Fuller *v.* Redman, 26 Beav. 614; Shewen *v.* Vanderhorst, 1 R. & M. 347; 2 R. & M. 75; Briggs *v.* Wilson, 5 De G., M. & G. 12; 2 Eq. R. 153; *Ex parte* Dewdney, 15 Ves. 496.

[1] Blue *v.* Marshall, 3 P. Wms. 381; Ratcliffe *v.* Winch, 17 Beav. 216; Forshaw *v.* Higginson, 8 De G., M. & G. 827.

[2] Jevon *v.* Bush, 1 Vern. 342; Gorge *v.* Chansey, 1 Ch. R. 125; Wiles *v.* Gresham, 5 De G., M. & G. 770; *Re* Alexander, 13 Ir. Ch. 137.

[3] Lewin on Trusts, 423 (5th ed.).

[4] Ibid.

[5] Naylor *v.* Arnitt, 1 R. & M. 501; Bowes *v.* East London, &c., Jac. 324; Drohan *v.* Drohan, 1 B. & B. 185; Middleton *v.* Dodswell, 13 Ves. 268.

[6] Attorney-General *v.* Owen, 10 Ves. 560.

without possibility of gain to himself, paid out money for the benefit of the *cestui que trust.*[1]

§ 486. The trustees or managers of a trading company or partnership have no power in *any case* to borrow money beyond the capital prescribed in the deed of settlement, and bind the company or its members.[2] And where the trustees borrow money, without special authority conferred by the deed, for launching and enlarging the business, and make themselves personally liable, they have no remedy against the other members of the company.[3] But if the trustees incur expenses and debts, within the scope of their authority, and in the ordinary business of the company, or borrow money to pay for such expenses or debts, the company are in equity liable to pay or contribute to the payment of such debts.[4]

§ 487. A trustee would probably be justified in insuring the property, but where there is tenant for life, entitled to the income, it would be safer to have such tenant's consent.[5] A mortgagee cannot insure at the expense of the mortgagor without a special stipulation to that effect; and if he insures without such stipulation he cannot charge the premiums to the mortgagor in his accounts.[6] If a lessor and a lessee insure on their own accounts, neither can claim any thing under the policy of the other.[7] So if a tenant for life insures out of the income, the remainder-man can claim no benefit from the policy.

§ 488. As there are legal estates and equitable estates, so there are legal powers and equitable powers. Legal powers operate upon the legal estate, and are cognizable in courts of law; equitable

[1] Balsh *v.* Hyham, 2 P. Wms. 453.

[2] Burmester *v.* Norris, 6 Exch. 796; Ricketts *v.* Bennett, 4 C. B. 688; Hawtayne *v.* Bourne, 7 M. & W. 595; Hawken *v.* Bourne, 8 M. & W. 703.

[3] Worcester Corn Exch. Co., 3 De G., M. & G. 180; *Ex parte* Chippendale, 4 De G., M. & G. 43; Australian, &c. Co. *v.* Mounsey, 4 K. & J. 733.

[4] Ibid.; Tramp's Case, 29 Beav. 353; Hoare's Case, 30 Beav. 225.

[5] *Ex parte* Andrews, 2 Rose, 412; Frye *v.* Frye, 27 Beav. 146. If an annuity and a policy on the life of *cestui que vie* are made the subject of a settlement, it is implied that the trustees shall pay the premiums out of the income. Darcy *v.* Croft, 9 Ir. Ch. 19.

[6] Dobson *v.* Land, 8 Hare, 216; Phillips *v.* Eastwood, Lloyd & Goold, t. Sugd. 289; *Ex parte* Andrews, 2 Rose, 412.

[7] Duncombe *v.* Nelson, 9 Beav. 211; Chester *v.* Rolfe, 4 De G., M. & G. 798.

powers affect the equitable estate alone, and are exclusively cognizable in courts of equity. Thus if land is given to A. for life, remainder to B. and his heirs, and a power is given to C. in such manner as to operate under the statutes of uses, the execution of the power conveys the legal estate, and the common law will notice it. But if lands are limited to the use of A. and his heirs, in trust for B. for life, remainder in trust for C. and his heirs, and a power not operating under the statute of uses is given, either to the trustee or the *cestui que trust*, the execution of the power will have no effect at law. It will only convey an equitable or beneficial interest, and can be recognized only in equity.[1]

§ 489. An equitable power, like a legal power, may be appendant to an interest in the estate, and grow out of it, or it may be simply a collateral power given to some person who has no interest whatever in the estate, legal or equitable. Thus a testator gave an estate to his sister and her heirs in trust, to settle it upon such descendants of the donor's mother as she should think fit. The sister married, and it became a question whether she could execute the power under coverture. But Lord Hardwicke held, "that it was a naked equitable power, not coupled with any beneficial interest, and that a *feme covert* can execute such naked power."[2] But where a donor gave a legal estate to trustees in trust for an *infant feme covert* for life, and to permit her by deed or writing to dispose of the estate as she should think fit, and the donor died leaving the *infant feme covert* his heir-at-law; and she, during her infancy and coverture executed the power, — Lord Hardwicke held this to be bad, as she had the trust in equity for life, and the trust of the inheritance, as the heir-at-law of the donor, therefore the whole equitable inheritance was in her, and this was a power over her own inheritance, and neither infants nor married women can execute a power coupled with an interest.[3]

§ 490. Courts have treated powers as either *strict* or simply *directory*. *Strict* powers are such as are to be executed only under the exact circumstances prescribed in the instrument of trust. *Directory* powers are monitory only, and may be executed with some degree of latitude; as where an advowson was vested in trus-

[1] Lewin on Trusts, 427.

[2] Godolphin *v.* Godolphin, 1 Ves. 21; *ante*, § 49.

[3] Hearle *v.* Greenbank, 1 Ves. 298; Blithe's Case, Freem. 91; Penne *v.* Peacock, For. 43.

tees, to present a fit person within *six months* of the incumbent's decease, the direction was held to be monitory, and that the power might be executed after that time had elapsed.[1] So when *six* trustees were empowered, when reduced to *three* to appoint others, and all died but one, this power was held to be simply directory, and that one might fill the vacancies.[2] Where a power was given to sell with all convenient speed, and within *five years* after the testator's decease, these words were held to be directory only, and that a sale and a good title could be made after that time.[3] And when twenty-five trustees were appointed, with a direction that when reduced to fifteen the vacancies should be filled, the court held that the trustees were at *liberty* to fill the vacancies when reduced to only seventeen, and that they would be compelled to exercise the power when reduced to fifteen.[4]

§ 491. Although powers may be given to trustees in the same words which are used in giving them an estate, yet different rules of construction will apply to the gift. Thus if an estate is given to A. and B., and their heirs, A. and B. may convey it to strangers, and the survivor, where joint-tenancy is not abolished, may devise it; but if a power is given to A. and B., and their heirs, it can neither be assigned by both, nor devised by the survivor.[5] Thus where a *mere naked* power was given to A. and B. and their heirs, Lord Chief-Justice Wilmot said: "It was equivalent to saying, the power is to be executed by consent of both while they live; but when one dies, that consent shall devolve on the heir; the heir of the dead trustee shall consent, as well as the surviving trustee. One may abuse the power. I will supply the loss of one by his heir, and the loss of both by the heirs of both."[6] But where the estate itself is given to A. and B. and their heirs in trust, with certain powers appendant, the power is an essential part of the trust, and passes to the survivor.

§ 492. In one case, a naked power of sale was given to *three trustees and their heirs*, to preserve contingent remainders. The

[1] Attorney-General *v.* Scott, 1 Ves. 413.

[2] Attorney-General *v.* Floyer, 2 Vern. 748; Attorney-General *v.* Bishop of Litchfield, 5 Ves. 825; Attorney-General *v.* Cuming, 2 Y. & Col. Ch. 139; Foley *v.* Wontner, 2 J. & W. 245.

[3] Pearce *v.* Gardner, 10 Hare, 287; Cuff *v.* Hall, 1 Jur. (N. S.) 973.

[4] Doe *v.* Roe, Anst. 86.

[5] Cole *v.* Wade, 16 Ves. 46.

[6] Mansell *v.* Vaughn, Wilmot, 50.

money was to be paid into the hands of the trustees, the survivors or survivor of them, and the executors, administrators, or assigns of such survivor. New trustees were to be appointed as often as one or more of the trustees died. One trustee died, and the Court of Queen's Bench determined that the survivors could not execute the power.[1] Lord Eldon was dissatisfied with the judgment, and said, "Did the court consider that the two surviving trustees and the heir of the deceased trustee were to act together? for it was one thing to say that the survivors could not act until another was appointed, and a different thing to say that the heir of the deceased trustee could act in the mean time.[2] But his Lordship felt himself bound by the authority, and refused to compel a purchaser to take a title under similar circumstances.[3] It will be noticed, that, in this case, the estate itself was not in the trustees; if it had been the survivors would have had an interest and could have executed the power: for it has been held, that where an estate was devised to three trustees and their respective heirs, upon the trust that they and their respective heirs should sell, the word "respective" was surplusage, and that the survivors could make a title.[4]

§ 493. A power, limited to "executors" or "sons-in-law," may be exercised by the survivors, so long as the plural number remains;[5] and if the power is limited to a number of trustees, it may reasonably be concluded, that whether they have any estate or not,[6] *i. e.*, whether the power is an adjunct to the trust, or collateral to it, it may be exercised by the surviving trustees. A power given to "executors" will, if annexed to the office of executor, be continued to the single survivor.[6] So a power given to "trustees" will, as annexed to the estate and office, be exercisable by a single survivor;[7] but it cannot be exercised by one trustee in the lifetime of the other who has not effectually renounced the trust.[8] If a power is communicated to the *trustees* for the time being, it

[1] Townsend *v.* Wilson, 1 B. & A. 608; 3 Mad. 261; Cooke *v.* Crawford, 13 Sim. 91.

[2] Hall *v.* Dewes, Jac. 193; Jones *v.* Price, 11 Sim. 557.

[3] Hall *v.* Dewes, Jac. 189.

[4] Jones *v.* Price, 11 Sim. 557; Hewett *v.* Hewett, 2 Eden, 332; Amb. 508.

[5] 1 Sugd. Pow. 128 (8th ed.).

[6] 1 Sugd. Pow. 128; Howell *v.* Barnes, Cro. Car. 382; Brassey *v.* Chalmers, 4 De G., M. &. G. 528, reversing same case in 16 Beav. 231.

[7] Lane *v.* Debenham, 11 Hare, 188.

[8] Lancashire *v.* Lancashire, 2 Phil. 664; 1 De G. & Sm. 288.

cannot be exercised by a *single* trustee.[1] Where there was a trust for sale, but no sale was to be made without the consent of the testator's sons and daughters, and there were seven sons and daughters, and one died, it was held that a sale with the consent of the survivors was too doubtful a title to be specifically enforced.[2] But where trustees had power to sell, with the consent of a majority of the testator's children then living, and all the children were dead, it was held that the trustees could execute the power by a sale, and make a good title.[3]

§ 494. Where powers are confided to trustees "and their heirs," and not "assigns," it cannot be exercised by persons claiming by assignment under the trustees or their heirs.[4] So it cannot be exercised by a "devisee" of the original trustee, for a devise is an assignment;[5] if the word "assigns" is added to the limitation to the trustees, the devisees can execute such part of the trusts as may be delegated to third persons.[6]

§ 495. When a discretionary legal power is expressly given to A. and his assigns, the assignee or devisee of A., or any one claiming under him by operation of law as heir or executor, may execute the power.[7] As where a power in a mortgage is limited to the mortgagee, his heirs, executors, administrators, and assigns, the power goes along with and is annexed to the security, and the power can be executed by all those to whom any interest in the estate may come, whether heir, executor, administrator, or assignee.[8] When a mortgage is made to A. and B., their heirs and assigns, to secure a joint advance, the power and security are coupled together and go to the survivor, who may execute the

[1] Ibid.

[2] Sykes *v.* Sheard, 2 De G., Jo. & Sm. 6; Alley *v.* Lawrence, 12 Gray, 374.

[3] Leeds *v.* Wakefield, 10 Gray, 514; Williams *v.* Williams, 1 Duvall, 221.

[4] Bradford *v.* Belfield, 2 Sim. 264.

[5] Cooke *v.* Crawford, 13 Sim. 91. See Midland Counties Railway Co. *v.* Westcombe, 11 Sim. 57; Titley *v.* Walstenholme, 7 Beav. 425; Mortimer *v.* Ireland, 6 Hare, 196; Ockleston *v.* Heap, 1 De G. & Sm. 640; Beasley *v.* Wilkinson, 13 Jur. 649; Wilson *v.* Bennett, 20 L. J. Ch. 279; Macdonald *v.* Walker, 14 Beav. 556; 2 Jarm. on Wills, 716; 1 Green. Cruise, 407; *Re* Burtt's Est., 1 Drew. 319.

[6] Lane *v.* Debenham, 11 Hare, 188; Saloway *v.* Strawbridge, 1 K. & J. 371; 7 De G., M. & G. 594.

[7] How *v.* Whitfield, 1 Vent. 338; 1 Freem. 476.

[8] Saloway *v.* Strawbridge, 1 K. & J. 371; 7 De G., M. & G. 594.

power by sale or otherwise.[1] But if an estate is vested in a trustee upon trust, that he, his heirs, executors, administrators, or "assigns," shall sell, &c., the word "assigns" will not authorize the trustee to assign the estate to a stranger;[2] nor, if assigned, can the stranger execute the power.[3]

§ 496. Where the power is matter of personal confidence in the trustee, it cannot be extended beyond the express words and clear intention of the donor; so if a power, indicating personal confidence is given to a trustee and his *executors*, and the executor of the trustee dies, his executor, or the executor of the executor, who by law in England is executor both of the trustee and his executor, cannot execute the power.[4] Still less could the executor of the executor of the trustee execute such power in this country; for if an executor dies before completing his trust, an executor *de bonis non* must be appointed.

§ 497. A discretionary power to four trustees and the *survivors* of them cannot be executed by the last survivor; for, though the power may generally be held to survive, an intention to the contrary, if it can fairly be inferred, will control. The settlor may be supposed to have said, "I repose confidence in any two of the trustees jointly, but in neither one of them individually."[5] But if the power is to four trustees, and the *survivor* of them, it may well be urged that on the death of one, the power may still be exercised by the survivors; for the settlor has said that he reposes confidence in the four jointly, and in each one of them individually.[6]

§ 498. If a power is given to trustees, to be exercised during the *continuance* of the trust, it cannot be exercised after the time when the trust ought to have ceased, though, from the delay of the trustees, it happens that the trust has not in fact been executed.[7] If

[1] Hind *v.* Poole, 1 K. & J. 383.

[2] Lewin on Trusts, 431; Cooke *v.* Crawford, 13 Sim. 98.

[3] Ibid.; Mortimer *v.* Ireland, 11 Jur. 721; 6 Hare, 196; Wilson *v.* Bennett, 5 De G. & Sm. 495; Stevens *v.* Austen, 7 Jur. (N. S.) 873; Burtt's Est., 1 Drew. 319; Titley *v.* Wolstenholme, 7 Beav. 425; Ockleston *v.* Heap, 1 De G. & Sm. 542; Ashton *v.* Wood, 3 Sm. & Gif. 436; Hall *v.* May, 3 K. & J. 585; Hardwick *v.* Mynd, 1 Anst. 109, is not law.

[4] Cole *v.* Wade, 16 Ves. 44; Stile *v.* Thompson, Dyer, 210 a; Sugd. Pow. 129 (8th ed.).

[5] Hibbard *v.* Lamb, Amb. 309; Eaton *v.* Smith, 2 Beav. 236.

[6] Crewe *v.* Dicken, 4 Ves. 97.

[7] Wood *v.* White, 2 Keen, 664; the matter of fact was changed in this case on appeal in 4 M. & Cr. 460.

the powers are not confined to the continuance of the trust, yet they will cease when the objects of the trust have been fully exhausted, and not before.[1] If there is no direction as to the continuance of the trust, the powers will subsist till the end of the trust, although there may be delay by the trustees in making the conveyances directed by the settlor.[2] If the trust continues as to part of the property, but has ceased as to part, the power will remain, and can be exercised over the whole,[3] unless there is a clear direction to the contrary.[4] As where an estate was vested in trustees, one-half in trust for A. for life, remainder to her children at twenty-one, and the other half in trust for B. for life, remainder to her children at twenty-one, with power to the trustees to sell during the continuance of the trust, and the children of one had arrived at twenty-one, and the trust had determined as to their share, it was held that the trustees had power to sell the whole under the terms of the settlement; it being necessary that the trustees should have the right to sell the whole, in order to preserve the trust for the full benefit of the other half.[5]

§ 499. A power of sale, whether a common-law or equitable power, or taking effect under the statute of uses, can be exercised only by the persons to whom it is expressly given.[6] If a power of sale or any other power is given to two or more persons by name, with no words of survivorship, and one dies, or refuses to act, the others cannot execute the power.[7] But where the power is given to the *trustees as a class*, or to the office of trustee, whether their names are mentioned or not, the power will continue and can be exercised as long as there are more trustees than one, although there are no words of survivorship.[8] In the United States, a power given to executors or trustees, as such, to sell real estate may be exercised so long as a single donee survives; and so if land is given to trustees to sell, the trustees are joint-tenants, and

[1] Wolley *v.* Jenkins, 23 Beav. 53; Mortlock *v.* Buller, 10 Ves. 315; Wheate *v.* Hall, 17 Ves. 86; Lantsbery *v.* Collier, 2 K. & J. 709; McWhorter *v.* Agnew, 6 Paige, 111; Moore *v.* Shultz, 13 Penn. St. 101; Salisbury *v.* Bigelow, 20 Pick. 174; Huckabee *v.* Billingsby, 16 Ala. 417.

[2] Wood *v.* White, 4 M. & Cr. 460.

[3] Trower *v.* Knightley, 6 Mad. 134; Taite *v.* Swinstead, 26 Beav. 525.

[4] Wood *v.* White, 4 M. & Cr. 460.

[5] Trower *v.* Knightley, 6 Mad. 134; Taite *v.* Swinstead, 26 Beav. 525.

[6] 1 Sugd. Pow. 141, 144 (6th ed.).

[7] Ibid.

[8] Ibid.; Co. Lit. 113 a, n. 2.

the survivor will have the freehold, and may exercise the power of sale, it being a power coupled with an interest.[1] In many States, statutes have been enacted which authorize the survivor of several executors to execute even naked powers given by will. A grave question has arisen upon these statutes, whether they extend to the execution of discretionary powers given to trustees, or whether they are confined to powers connected with the administrative functions of executors.[2] In general it would be a question as to the intention of the donor, whether the powers given should be executed by all the trustees named, or any one or more of them; or whether it was the intention, that successors or others connected with the trust should have and execute the powers conferred; in other words, the question is, whether the donor reposed a personal trust and confidence in the trustees appointed, or whether he reposed the power in whomsoever might in fact fill the office of trustee.[3]

§ 500. As a general rule, administrators with the will annexed are clothed with the ordinary duties and powers of administrators,

[1] Peter *v.* Beverley, 10 Pet. 532; 1 How. 134; Franklin *v.* Osgood, 2 John. Ch. 19; Zeback *v.* Smith, 3 Binn. 69; Davoue *v.* Fanning, 2 John. Ch. 254; Muldrow *v.* Fox, 2 Dana, 79; Hunt *v.* Rousmaniere, 2 Mason, 244; Wood *v.* Sparks, 1 Dev. & Bat. 389; Burr *v.* Sim, 1 Whart. 266; Niles *v.* Stevens, 4 Denio, 399; Coykendall *v.* Rutherford, 1 Green, Ch. 360; Putman Free School *v.* Fisher, 30 Me. 526; Jackson *v.* Burtis, 14 John. 391; Robertson *v.* Gaines, 2 Humph. 367; Miller *v.* Meetch, 8 Barr, 417; Sharp *v.* Pratt, 15 Wend. 610; Wardwell *v.* McDowell, 31 Ill. 364; Jackson *v.* Given, 16 John. 167; Jackson *v.* Bates, 14 John. 391; Jackson *v.* Ferris, 15 John. 391; Watson *v.* Pearson, 2 Exch. 594 n.; Cadogan *v.* Ewart, 7 Ad. & El. 636; Taylor *v.* Morris, 1 Comst. 341; Tainter *v.* Clark, 13 Met. 220; Warden *v.* Richards, 11 Gray, 278. This matter is regulated in several States by statutes which cannot be cited, but which the reader will consult in his own State. In some States if one of several trustees has been discharged after acceptance, the court must fill the vacancy before the trustees can execute the power. Matter of Van Wyck, 1 Barb. 565.

[2] In Kentucky, South Carolina, and Mississippi, it is held that they do not extend to discretionary powers, but are confined to the functions of the executors in settling up estates. Woodridge *v.* Watkins, 3 Bibb, 350; Clay *v.* Hart, 7 Dana, 1; Brown *v.* Hobson, 3 A. K. Marsh. 381; Mallet *v.* Smith, 6 Rich. Eq. 22; Bartlett *v.* Southerland, 2 Cush. Miss. 401. In New York, the statute was held to apply to powers to be executed by trustees generally. Taylor *v.* Morris, 1 Comst. 341. And see Chanet *v.* Villeponteaux, 3 McCord, 29; Wood *v.* Sparks, 1 Dev. & Bat. 389.

[3] Granville *v.* McNeile, 13 Jur. 252; 7 Hare, 156; Affleck *v.* James, 17 Sim. 121; Shelton *v.* Homer, 5 Met. 462; Ross *v.* Barclay, 18 Penn. St. 179; Pratt *v.* Rice, 7 Cush. 209; Cole *v.* Wade, 16 Ves. 27; Lorings *v.* Marsh, 6 Wall. 337; Fontain *v.* Ravnell, 17 How. 369; Gibbs *v.* Marsh, 2 Met. 252.

and can exercise none of the powers given to executors or trustees, in reference to the real estate, unless such powers are specially conferred upon them by the terms of the will.[1] This rule has been altered by statute in several States, but the statutes have been held not to apply to discretionary trusts or personal confidences,[2] but only to the general functions of executors in settling estates.[3] A power of sale in a mortgage given to the mortgagee, his executors, administrators, or assigns, may be executed by any of the personal representatives of the mortgagee who have the duty of settling his estate.[4] A husband cannot exercise a power given to his wife.[5]

§ 501. If a power of sale is created by a will without stating by whom it is to be exercised, but the proceeds of the sale are directed to be applied or distributed by an executor, trustee, or other person, such executor, trustee, or other person will by implication take the power of selling, unless there is some other intention to be gathered from the whole will.[6] If the will gives a power of sale to pay debts and legacies, or for distribution, without stating by whom the sale is to be made, the executor takes the power by implication.[7] But if there is a power of sale, but no person is named

[1] Tainter *v.* Clark, 13 Met. 224; Moody *v.* Vandyke, 4 Binn. 31; Conklin *v.* Egerton, 21 Wend. 430; Greenough *v.* Welles, 10 Cush. 571; Lucas *v.* Doe, 4 Ala. 679; Hall *v.* Irwin, 2 Gilm. 180; Hunt *v.* Holden, 2 Mass. 168; Knight *v.* Loomis, 30 Me. 208; Wills *v.* Cowper, 2 Ohio, 124; Jackson *v.* Potter, 4 Wend. 672; Roome *v.* Phillips, 27 N. Y. 357; McDonald *v.* King, Coxe, 432; Armstrong *v.* Park, 9 Humph. 195; Drane *v.* Bayliss, 1 Humph. 174.

[2] Commrs. *v.* Forney, 3 W. & S. 357; Hester *v.* Hester, 2 Ired. Eq. 330; Smith *v.* McCrary, 3 Ired. Eq. 204; Drayton *v.* Grimke, 1 Bail. Eq. 392; Brown *v.* Armistead, 6 Rand. 594; Owens *v.* Cowan's Heirs, 7 B. Mon. 156.

[3] Brown *v.* Hobson, 3 A. K. Marsh. 381; Wooldridge *v.* Watkins, 3 Bibb, 350; Conklin *v.* Egerton, 21 Wend. 430; 25 Wend. 224; Montgomery *v.* Milliken, 5 Sm. & M. 188; Tainter *v.* Clark, 13 Met. 220; Ross *v.* Barclay, 18 Penn. St. 179.

[4] Doolittle *v.* Lewis, 7 John. Ch. 48.

[5] May's Heirs *v.* Frazer, 4 Lit. 391.

[6] Newton *v.* Bennett, 1 Bro. Ch. 135; Benthan *v.* Wiltshire, 4 Mad. 44; Blatch *v.* Wilder, 1 Atk. 420; Elton *v.* Harrison, 2 Swans. 276 n.; Tylden *v.* Hyde, 2 S. & S. 238; Forbes *v.* Peacock, 11 Sim. 152; Ward *v.* Devon, cited 11 Sim. 160; Patton *v.* Randall, 1 J. & W. 189; Curtis *v.* Fulbrook, 8 Hare, 28; Watson *v.* Pearson, 2 Exch. 580; Gosling *v.* Carter, 1 Coll. 644; Doe *v.* Hughes, 6 Exch. 223.

[7] Bogert *v.* Hertell, 4 Hill, 492; Meakings *v.* Cromwell, 2 Sand. 512; 1 Selden, 136; Dorland *v.* Dorland, 2 Barb. S. C. 63; Davoue *v.* Fanning, 2 John. Ch. 254;

to execute the power, and there is no purpose of the sale but a mere division of the estate, the executors cannot exercise the power; and if they sell and purchase themselves, they cannot be compelled to complete the purchase.[1] A devise to three children in fee, to be divided or sold as two of the three children could agree, conferred no power of sale on any one.[2] If an estate is given to the executor for life, to be sold at his death, he can neither sell the land, nor devise the power to *his* executor.[3]

§ 502. If a power is given to several trustees, and one of them refuses to accept, the power may be exercised by the continuing trustee or trustees.[4] If the power is not given to the trustees by name, but to the office, and one disclaims, there can be no doubt that the acting trustees can execute the power.[5]

§ 503. A power, though appendant to an estate, is not so appendant that it goes with the estate in every transfer made by the trustee, or in every devolution by course of law.[6] But where the estate is transferred to trustees duly appointed under a power, the transferees take the estate and office together, and can exercise the power. But where the court appoints new trustees, it cannot communicate arbitrary or discretionary powers to them,[7] unless the instrument of trust confers such powers upon the trustees for

Houck *v.* Houck, 5 Barr, 273; Silverthorn *v.* McKinster, 12 Penn. St. 67; Lloyd *v.* Taylor, 2 Dallas, 223; Putnam Free School *v.* Fisher, 30 Me. 523; Foster *v.* Craige, 2 Dev. & Bat. Eq. 209; Robertson *v.* Gaines, 2 Humph. 378; Magruder *v.* Peter, 11 Gill & J. 217; Peter *v.* Beverly, 10 Peters, 532; 1 How. 134; Lockhart *v.* Northington, 1 Sneed, 318.

[1] Drayton *v.* Drayton, 2 Des. 250 n.; Shoolbred *v.* Drayton, 2 Des. 246.

[2] Geroe *v.* Winter, 1 Halst. Ch. 655.

[3] Walter *v.* Logan, 5 B. Mon. 516. In many of the States, there are statutes which give directions as to who shall exercise powers of sale. And see Carroll *v.* Stewart, 4 Rich. 200.

[4] Crewe *v.* Dicken, 4 Ves. 97; Granville *v.* McNeile, 7 Hare, 156; Hawkins *v.* Kemp, 3 East, 410; Cooke *v.* Crawford, 13 Sim. 96; Adams *v.* Taunton, 5 Mad. 435; Bayly *v.* Cumming, 10 Ir. Eq. 410; Sands *v.* Nugee, 8 Sim. 130.

[5] Worthington *v.* Evans, 1 S. & S. 165; Boyce *v.* Corbally, t. Plunk. 102; Clarke *v.* Parker, 19 Ves. 1.

[6] Cole *v.* Wade, 16 Ves. 47; Crewe *v.* Dicken, 4 Ves. 97; Burtt's Est., 1 Drew. 319; Wilson *v.* Bennett, 5 De G. & Sm. 475; Hardwick *v.* Mynd, Anst. 109, is not law.

[7] Doyley *v.* Att'y-Gen., 2 Eq. Ca. Ab. 194; Fordyce *v.* Bridges, 2 Phil. 497; Newman *v.* Warner, 1 Sim. (N. S.) 457; Cole *v.* Wade, 16 Ves. 44; Hibbard *v.* Lambe, Amb. 309.

the time being, or they are annexed to the office.[1] If a power is given to a trustee, his heirs and assigns, and a new trustee is appointed, and a vesting order made, the new trustee may execute the power under the word assigns. But statutes in England, and in many of the States now give new trustees the same power as the old. A release by one trustee to the others, with an intention of disclaiming, will operate as a formal disclaimer.[2]

§ 504. Though an assignment of the trust estate will not transfer a power to the assignee, neither will the power remain in the assignor; for if the settlor intended the estate and the power to be coupled together, their severance will intercept the execution of the power. As where an estate is given to A. and his heirs in trust, with a power to be executed by A. and his heirs, and A. sells the estate in his lifetime or devises it by his will, the heir of A. cannot execute the power; for the heir is *no* heir as to this estate.[3] But in charities it frequently happens that the estate or fund may vest in one set of donees, and the power of selecting the *cestuis que trust* may exist in another.[4]

§ 505. The survivorship of the estate carries with it survivorship of such powers as are annexed to the trust. But a mere personal power given to A., B., and C. cannot be exercised by the survivors, if one die. If, however, an *equitable* power is annexed to the trust, and forms an integral part of it, as if an estate is vested in three trustees upon a trust to sell, there, as the power is coupled with an interest, and the interest survives, the power also survives.[5] And this is as old as Lord Coke, who says, "If a man deviseth land to his executors to be sold, and maketh two executors, and one dieth, yet the survivor may sell the land, because as the estate, so the

[1] Bartley *v.* Bartley, 3 Drew. 384; Brassey *v.* Chalmers, 4 De G., M. & G. 528; Byam *v.* Byam, 19 Beav. 66.

[2] Nicloson *v.* Wordsworth, 2 Swans. 372; Hussey *v.* Markham, Finch, 258; Sharp *v.* Sharp, 2 B. & A. 405; Urch *v.* Walker, 3 M. & C. 702; Richardson *v.* Hulbert, 1 Anst. 65.

[3] Wilson *v.* Bennett, De G. & Sm. 475; Burtt's Est., 1 Drew. 319; Cole *v.* Wade, 16 Ves. 27.

[4] *Ex parte* Blackburne, 1 J. &. W. 297; Hibbard *v.* Lambe, Amb. 309.

[5] Lane *v.* Debenham, 11 Hare, 188; Peyton *v.* Bury, 2 P. Wms. 628; Mansell *v.* Vaughn, Wilm. 49; Eyre *v.* Shaftesbury, 2 P. Wms. 108; Butler *v.* Bray, Dyer, 189 b; Byam *v.* Byam, 19 Beav. 58; Co. Lit. 112 b, 113 a; Flanders *v.* Clarke, 1 Ves. 9; Potter *v.* Chapman, Amb. 100; Jones *v.* Price, 11 Sim. 557.

trust shall survive; and so note the diversity between a bare trust and a trust coupled with an interest." [1] At the present day, a trust, that is, a power imperative, whether a bare power or a power coupled with an interest, would equally be carried into execution in courts of equity; for the maxim now is, that "the trust or power imperative is the estate." And it is well settled that, even in trusts reposed in trustees by name, the survivor, *if he takes the estate* with a duty annexed to it, can execute the power; and the rule of survivorship now applies not only to trusts, or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are intended to form an integral part of it.[2] But powers merely arbitrary and independent of the trust, and not an integral part of it, are governed by the rules applicable to ordinary powers; as where the trustees by name have power to revoke the limitations, and change the property into a different channel, the discretion is evidently intended to be personal, and not annexed to the estate or office.[3]

§ 506. An unlimited power, to be exercised during successive estates tail, is not invalid for remoteness, for such power may be destroyed with the estate tail.[4] A power, collateral to a limitation in fee, has been supported where it was exercised by sale within the limits prescribed against perpetuities.[5] But how far the execution of such an unlimited power for an indefinite period, and beyond the limits of a perpetuity, could be supported, is not clearly settled.[6] Where a testator devised an estate to trustees in trust for his brother's first and other sons successively in fee, so that the estate and interest of each should go to his next brother on his dying without issue under the age of twenty-one, and if all died without issue under that age, then in trust for the person who should be his next heir, and the trustees had power to sell the

[1] Co. Lit. 113 a, 181 b.

[2] Lane *v.* Debenham, 11 Hare, 188; Hall *v.* May, 3 K. & J. 185; Warburton *v.* Sandys, 14 Sim. 622; Foley *v.* Wontner, 2 J. & W. 246; Doe *v.* Godwin, 1 D. R. 259; Townsend *v.* Wilson, 1 B. & Ald. 608; Jacob *v.* Lucas, 1 Beav. 436.

[3] Lane *v.* Debenham, 11 Hare, 192.

[4] Biddle *v.* Perkins, 4 Sim. 135; Powis *v.* Capron, 4 Sim. 138 n.; Waring *v.* Coventry, 3 M. & K. 249; Wallis *v.* Freestone, 10 Sim. 225.

[5] Boyce *v.* Hanning, 2 Cr. & Jer. 334.

[6] 2 Sugd. Pow. 495.

estate at their discretion at any time after his decease, it was held that a purchaser must take the estate, as the title was good, and the power did not contravene the rule against perpetuities.[1]

§ 507. Some powers are entirely discretionary, that is, it is left entirely to the judgment of the trustees whether they will execute them at all or not; as where the trustees are authorized or directed to do a certain act, or to abstain from it, "if they think fit"[2] or "proper,"[3] or "at their discretion;"[4] or the power may be imperative, and the discretion of the trustees be confined to the time, manner, and place of executing the power, or to the selection of the objects of the trust, as where the trust fund is directed to be applied, paid, or distributed, "when," or "in such manner," or "in such proportions,"[5] or to such person[6] or persons,[7] as the trustees shall determine. So the discretion may be implied, as where the execution of the power calls for judgment and discretion in the trustee, or for his approbation or consent to a settlement, or sale, or marriage;[8] or where he is called upon to decide upon the conduct of a party,[9] or upon the necessity or expediency of any payment or other act;[10] or where he is directed to pay an annuity, "unless circumstances should render it unnecessary, inexpedient, or impracticable."[11] All such matters must be mere matters of opinion and discretion.

§ 508. Discretionary powers of trustees are usually divided into four principal classes, as follows: (1.) Where it is left to the discretion of the trustees to make or withhold a gift or appointment of the trust property to a specified donee, or *cestui que trust*, or class of donees. In this class, if it is a condition precedent to the

[1] Nelson *v.* Callow, 15 Sim. 225.

[2] Maddison *v.* Andrew, 1 Ves. 53.

[3] Crossling *v.* Crossling, 2 Cox, 396; Kemp *v.* Kemp, 5 Ves. 849; Longmore *v.* Broom, 7 Ves. 124; Pink *v.* De Thuisey, 2 Mad. 157.

[4] Morice *v.* Bishop of Durham, 9 Ves. 399; Keates *v.* Burton, 14 Ves. 434; Potter *v.* Chapman, Amb. 98; Gibbs *v.* Rumsey, 2 V. & B. 294.

[5] Downer *v.* Downer, 9 Vt. 231; Marlborough *v.* Godolphin, 2 Ves. 61; Walsh *v.* Wallinger, 2 R. & M. 78.

[6] Brown *v.* Higgs, 4 Ves. 708.

[7] Grant *v.* Lyman, 4 Russ. 292.

[8] Brereton *v.* Brereton, 2 Ves. 87 n.; Clarke *v.* Parker, 19 Ves. 1; Mortlock *v.* Buller, 10 Ves. 314.

[9] Walker *v.* Walker, 5 Mad. 424; Robinson *v.* Smith, 6 Mad. 194; Eaton *v.* Smith, 2 Beav. 236.

[10] Gower *v.* Mainwaring, 2 Ves. 87.

[11] French *v.* Davidson, 3 Mad. 396.

gift, legacy, or other interest, that the trustees shall exercise their power in favor of the donee, whether of appointment or assent, no interest will vest in the donee until the power is exercised; and if the trustees refuse to exercise it, the gift cannot be enforced.[1] The court cannot decide upon the propriety or impropriety of the refusal of the trustees to give their assent,[2] unless it proceed from selfish, corrupt, or improper motives; and the burden is upon the donee to prove such motives, and not upon the trustees to show good reasons for their action.[3] The court will, however, always strive to construe this class of powers into trusts, which will give the donee a vested interest, and the trustee only the power of selection, apportionment, and distribution.[4] (2.) Where the discretionary power is confined to the selection from, or apportionment to, or distribution among, the objects of the trust. This class of powers is held to create trusts. The beneficial interest is generally vested in the whole class of objects from which the trustees have the power of selection, to be divested out of those who are not selected by the trustees in the exercise of the power, and if the trustees die, or refuse to execute the powers, the whole class takes the property.[5] (3.) Where the discretion applies to some ministerial act connected with the estate, such as powers of leasing, selling, appointing new trustees, felling timber, and the like. This class of powers is much more under the control of courts, than powers depending upon the exercise of opinion and judgment.[6] The court can enter into all matters in relation to those things that are beneficial to the estate, and into the motives of the trustees for exercising or refusing to exercise these powers; and courts will

[1] Pink *v.* De Thuisey, 2 Mad. 157; Walker *v.* Walker, 5 Mad. 424; Weller *v.* Weller, 2 Mad. 160 n.; French *v.* Davidson, 3 Mad. 396; Brown *v.* Higgs, 4 Ves. 719; 5 Ves. 508; 8 Ves. 568; Marlborough *v.* Godolphin, 2 Ves. 61; Lyman *v.* Parsons, 26 Conn. 493; 28 Barb. 564, reversing 4 Bradf. 268. See s. c. 20 N. Y. 103; N. Y. Rev. St. part 2, c. 1, tit. 2, art. 3, § 9; Grace *v.* Phillips, 2 Phil. 701; Leavitt *v.* Beirne, 21 Conn. 1.

[2] Pink *v.* De Thuisey, 2 Mad. 162 n.

[3] Clarke *v.* Parker, 19 Ves. 11; French *v.* Davidson, 3 Mad. 402.

[4] Wainwright *v.* Waterman, 1 Ves. Jr. 311; Keates *v.* Burton, 14 Ves. 434; *ante*, §§ 248–258; Cochran *v.* Paris, 11 Grat. 356.

[5] The whole matter of powers as trusts is discussed *ante*, §§ 248–258, and the cases are cited, which see.

[6] Milsington *v.* Mulgrave, 4 Mad. 491; Hewit *v.* Hewit, Amb. 508; Mortimer *v.* Watts, 14 Beav. 616.

not allow the trustees to exercise their powers in this respect in an arbitrary or capricious manner;[1] but if the court has acquired jurisdiction of the case by bill or decree, the trustees must act under the sanction of the court in appointing new trustees, making investments, sales, leases, and in varying the securities,[2] unless the instrument of trust declares that their discretion is to be uncontrolled.[3] And (4) where the discretion to be exercised is a mere matter of personal judgment, as where the consent or approbation of the trustees is required to a marriage, or to the conduct of an individual. The trustees alone can exercise these powers, and courts cannot generally interfere to control these mere personal judgments upon personal matters.[4] But the trustees must exercise a reasonable discretion; thus they ought not to pay money into the hands of a lunatic or drunkard to be wasted;[5] and if they have once executed the power by naming a sum to be paid, they cannot reduce it,[6] but in some cases they may make a further advance.[7]

§ 509. A general power in trustees to vary securities confers upon them power to do all the acts incidental or essential to the performance of that duty, and therefore they may sell and give receipts to purchasers for the purchase-money.[8] This is a power given for the security of the estate and the benefit of the trust property;[9] and it ought not to be exercised except when required by necessity or convenience,[10] and upon proper inquiry and circumspection.[11] Therefore trustees ought always to have an imme-

[1] Ibid.; Webb *v.* Shaftesbury, 7 Ves. 480; Attorney-General *v.* Clack, 1 Beav. 467; De Mannville *v.* Crompton, 1 V. & B. 359.

[2] Ibid.; Booth *v.* Booth, 1 Beav. 125; Pocock *v.* Reddington, 5 Ves. 794; Parry *v.* Warrington, 6 Mad. 155; Brice *v.* Stokes, 11 Ves. 324; Lord *v.* Godfrey, 4 Mad. 459; Broadhurst *v.* Balguy, 1 N. C. C. 28. And see Cafe *v.* Bent, 3 Hare, 245, and Hitch *v.* Leworthy, 2 Hare, 405.

[3] Milsington *v.* Mulgrave, 3 Mad. 403; Lee *v.* Young, 2 N. C. C. 536.

[4] Cole *v.* Wade, 16 Ves. 27; Walker *v.* Walker, 5 Mad. 424; Eton *v.* Smith, 2 Beav. 236; Cochran *v.* Paris, 11 Grat. 356; French *v.* Davidson, 3 Mad. 396; Brereton *v.* Brereton, 2 Ves. 87 n.; Clarke *v.* Parker, 19 Ves. 11.

[5] Gott *v.* Cook, 7 Paige, 538; Mason *v.* Jones, 2 Barb. S. C. 248.

[6] Mason *v.* Mason, 4 Sand. Ch. 631.

[7] Webster *v.* Boddington, 16 Sim. 177.

[8] Wood *v.* Harman, 5 Mad. 368. See *ante*, § 466.

[9] Lord *v.* Godfrey, 4 Mad. 459.

[10] Broadhurst *v.* Balguy, 1 N. C. C. 28.

[11] Hanbury *v.* Kirkland, 3 Sim. 271; Wormley *v.* Wormley, 1 Brock. 330; 8 Wheat. 421.

diate and advantageous investment in view before they sell the existing securities.[1] A sale for the mere purpose of converting real estate into personal, or *vice versa*, or without some well defined and proper purpose in view, would render them responsible for any loss.[2] Each trustee must be satisfied by inquiries of the propriety of the act, and he must not trust to the representations of his cotrustee.[3] This power is necessarily left in a large degree to the sound discretion of the trustees;[4] and if any check is imposed upon their discretion, as if the consent, or the consent in writing of the *cestui que trust*, or any other formalities are required before the trustees can act, they must strictly comply with all such requirements.[5] If the trustees have a discretionary power of changing the investments with the consent of the tenant for life, the court cannot compel them to exercise the power at the request of the tenant for life, if they refuse to do so in the *bona fide* exercise of their discretion.[6] But where the power is imperative on the trustees to invest in any particular securities, at the request of the *cestuis que trust*, the court will compel them to exercise the power.[7] But if the power is *imperative*, and there has been a great change of circumstances, as where the *cestuis que trust*, or their connections, to whom the trustees were required to loan the trust fund, have become bankrupt, the court will not compel the trustees to exercise the power.[8] The exercise of the power of varying the securities cannot alter or change the rights of the *cestuis que trust;* on the other hand, the rights of the *cestuis que trust* will be the same whether the trustees invest the fund in real or personal estate.[9] Power to vary the securities is a *usual* power to be inserted in settlements with the *usual* powers.[10]

§ 510. In early times, courts assumed jurisdiction and control

[1] Ibid.; Watts *v.* Girdlestone, 6 Beav. 188.

[2] Brice *v.* Stokes, 11 Ves. 324; Meyer *v.* Montriou, 5 Beav. 146.

[3] Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 N. C. C. 16.

[4] De Manneville *v.* Crompton, 1 V. & B. 354.

[5] Ibid.; Cocker *v.* Quayle, 1 R. & M. 535; Greenwood *v.* Wakeford, 1 Beav. 579; Kellaway *v.* Johnson, 5 Beav. 319.

[6] Prendergast *v.* Prendergast, 3 H. L. Ca. 195; Lee *v.* Young, 2 N. C. C. 532.

[7] Ross *v.* Goodsall, 1 N. C. C. 618; Beauclerk *v.* Ashburnham, 8 Beav. 322.

[8] Ibid.

[9] Lord *v.* Godfrey, 4 Mad. 455; Walter *v.* Maunde, 19 Ves. 424.

[10] Sampayo *v.* Gould, 12 Sim. 426.

over discretionary powers in trustees, and compelled trustees to execute them, or the court itself executed the powers in such manner as it judged most beneficial for the *cestuis que trust;* [1] but this jurisdiction is now repudiated, and courts will not exercise a mere discretionary power, either during the lifetime of the trustees, or after their death or refusal to execute it.[2] But if the power is in the nature of a trust for a class, with a power of selection in the trustees of particular persons of the class, and the trustees die or refuse to make the selection, the courts will still execute the trust for the whole class.[3] In one case a distinction was attempted to be established between a discretion in the trustee to be exercised upon matters of *opinion and judgment,* and a discretion to be exercised upon *matters of fact;* as where the trustees were to exercise certain powers over the estate, if the conduct of one of the beneficiaries was such as to gain their confidence and approval, the court seemed to distinguish between matters of judgment and matters of fact, and directed an inquiry.[4] Lord Hardwicke seemed to give some countenance to this distinction,[5] but the distinction is not established and acted upon; and in the nature of things such a distinction cannot be applied to the execution of powers by trustees. It is sufficient to hold them to good faith and fair intentions in the conduct of the trust.

§ 511. If the trustees exercise their discretionary powers in *good faith* and without fraud or collusion, the court cannot review or control their discretion.[6] Nor will a bill be entertained to compel

[1] Flanders *v.* Clarke, 1 Ves. 10; Wainwright *v.* Waterman, 1 Ves. Jr. 311; Clarke *v.* Turner, 2 Freem. 198; Gower *v.* Mainwaring, 2 Ves. 87, 110; Hewit *v.* Hewit, Amb. 508; Carr *v.* Bedford, 2 Ch. R. 77; Warburton *v.* Warburton, 2 Ch. R. 420; 1 Bro. P. C. 34; Wareham *v.* Brown, 2 Vern. 153.

[2] Maddison *v.* Andrew, 1 Ves. 60; Alexander *v.* Alexander, 2 Ves. 640; Kemp *v.* Kemp, 5 Ves. Jr. 849; Keates *v.* Burton, 14 Ves. 437; 2 Sugd. Pow. 190; Gower *v.* Mainwaring, 2 Ves. 88; Brereton *v.* Brereton, 2 Ves. 88 n.; Potter *v.* Chapman, Amb. 98; Lee *v.* Young, 2 N. C. C. 522; Caplin's Will, 11 Jur. (N. S.) 383; Prendergast *v.* Prendergast, 3 H. L. Ca. 195; Coe's Trust, 4 K. & J. 199.

[3] *Ante,* §§ 255–258, and cases cited.

[4] Walker *v.* Walker, 5 Mad. 424.

[5] Gower *v.* Mainwaring, 2 Ves. 87–110.

[6] Potter *v.* Chapman, Amb. 98; Cowley *v.* Hartstonge, 1 Dow, 378; Prendergast *v.* Prendergast, 3 H. L. Ca. 195; Attorney-General *v.* Moseley, 12 Jur. 889; 2 De G. & Sm. 398; Pink *v.* De Thuisey, 2 Mad. 157; Clarke *v.* Parker, 19 Ves.

the execution of a mere discretionary power.[1] The refusal of a trustee to exercise such a power is no breach of trust for which he can be removed, though he gives no reason for his refusal, and though the execution of the power would appear to be proper and beneficial to the estate.[2] But while the court cannot interfere with a discretion honestly exercised, a party interested in property subject to the discretion of a trustee, has a right to institute a bill for a discovery of the property, and also of all the acts of the trustee, and the reasons for the acts, in order that it may be seen whether the discretion of the trustee is honestly exercised or not. And if the administration of the trust is thus rightfully brought within the jurisdiction of the court, the power may be required to be exercised under the eye of the court, though the exercise of it must still remain in the discretion of the trustee, and not in that of the court.[3] It has been ruled, however, that the trustees might exercise their discretionary powers, although a bill had been filed for the purpose of having the trusts declared and carried into effect.[4] The trustee cannot, however, exercise his discretion from any fraudulent, selfish, or improper purposes, nor can he refuse to exercise a discretionary power for any such purposes; and if he acts, or refuses to act, upon such grounds, the court will interfere and give a remedy to the parties injured by the fraudulent act, or refusal to act, not for the purpose of controlling the discretion of the trustee, but to relieve the parties from the consequences of an improper exercise of the discretion;[5] and if the trustee refuses to

11; French *v.* Davidson, 3 Mad. 396; Wood *v.* Richardson, 4 Beav. 177; Morton *v.* Southgate, 28 Me. 41; Littlefield *v.* Cole, 32 Me. 552; Leavitt *v.* Beirne, 21 Conn. 2; Hawley *v.* James, 5 Paige, 485; Arnold *v.* Gilbert, 3 Sand. Ch. 556; Mason *v.* Mason, 4 Sand. Ch. 623; Bunner *v.* Storm, 1 Sand. Ch. 357; Gochenauer *v.* Froelich, 8 Watts, 19; Chew *v.* Chew, 28 Penn. St. 17; Cowles *v.* Brown, 4 Call, 477; Cochran *v.* Paris, 11 Grat. 356; Cloud *v.* Martin, 1 Dev. & Bat. 397; Aleyn *v.* Belchier, 1 Lead. Ca. Eq. 304. And see Berry *v.* Hamilton, 10 B. Mon. 135.

[1] Brereton *v.* Brereton, 2 Ves. 87 n.; Pink *v.* De Thuisey, 2 Mad. 157.

[2] Lee *v.* Young, 2 N. C. C. 532.

[3] Costabadie *v.* Costabadie, 6 Hare, 410.

[4] Sillibourne *v.* Newport, 1 K. & J. 603.

[5] Clarke *v.* Parker, 19 Ves. 12; Peyton *v.* Bury, 2 P. Wms. 628; French *v.* Davidson, 3 Mad. 396; Dashwood *v.* Bulkley, 10 Ves. 245; D'Aguilar *v.* Drinkwater, 2 V. & B. 225; Kemp *v.* Kemp, 5 Ves. 849; Mesgrett *v.* Mesgrett, 2 Vern. 580; 10 Ves. 243.

exercise his discretion from selfish and interested motives, as where he declines to give his consent to a sale, marriage, or settlement, the court may compel him to assent.[1]

§ 512. A *personal* power is sometimes given to trustees to consent to, or approve the marriage of the *cestui que trust;* and the enjoyment of the bounty of the testator by the beneficiaries, is sometimes made to depend upon the exercise of this power by trustees. These powers, if exercised in restraint of marriage, are not favored in equity.[2] Therefore, if an interest is *vested* in a beneficiary, subject to be divested in case the beneficiary marries without the consent or approbation of the trustee, and there is *no gift over* to take effect upon the marriage without such consent, the power or condition will be treated as void, and will not be enforced.[3] But this rule will not apply to a charge on real estate.[4] If the condition is *subsequent*, and the interest is given over on the failure of the donee to comply with it, the court will enforce the gift over if the first donee marry without the consent of the trustees.[5] It is said to be doubtful, whether a general gift of the residue will be a sufficient gift over to give validity to such power;[6] but if the direction is, that the particular gift shall fall into the residue, in case the donee marries without the consent of the trustees, it is a good gift over.[7]

§ 513. If the property once vests absolutely in the donee, and there is a general and unlimited condition that he shall not marry without the consent of the trustees, the necessity of the consent ceases, as soon as the interest vests; as where a legacy is given to

[1] Norcum *v.* D'Oench, 2 Bennett, Mo. 98.

[2] Stackpole *v.* Beaumont, 3 Ves. 96; Long *v.* Dennis, 4 Burr. 2052; Daley *v.* Desbouvierie, 2 Atk. 261.

[3] Semphill *v.* Hayley, Pr. Ch. 562; Garrett *v.* Pretty, 2 Vern. 293; 3 Mer. 120; Jervoise *v.* Duke, 1 Vern. 20; Harvey *v.* Aston, 1 Atk. 378; Wheeler *v.* Bingham, 3 Atk. 364; Lloyd *v.* Branton, 3 Mer. 117; 1 Rop. Leg. 715; W. *v.* B., 11 Beav. 621; Pool *v.* Bate, 11 Hare, 33; Marples *v.* Bainbridge, 1 Mad. 590; McIlvaine *v.* Gether, 3 Whart. 575; Hooper *v.* Dundas, 10 Barr, 75; Maddox *v.* Maddox, 11 Grat. 804.

[4] Ibid.; Reynish *v.* Martin, 3 Atk. 333; Berkley *v.* Ryder, 2 Ves. 535.

[5] Ibid.; Stratton *v.* Grimes, 2 Vern. 357; Dashwood *v.* Bulkley, 10 Ves. 230; Scott *v.* Tyler, 2 Bro. Ch. 431; 2 Lead. Ca. Eq. 105 and notes.

[6] Harvey *v.* Aston, 1 Atk. 375; *contra*, Wheeler *v.* Bingham, 3 Atk. 364; Lloyd *v.* Branton, 3 Mer. 118; Scott *v.* Tyler, 2 Lead. Ca. Eq. 396.

[7] Wheeler *v.* Bingham, 3 Atk. 368; Lloyd *v.* Branton, 3 Mer. 118.

a child at twenty-one, provided, if he marry without the consent of the trustees, he should forfeit it. The legacy vests at twenty-one, and if he marry afterwards without consent, the condition, being subsequent, is gone, and there is no forfeiture;[1] and where a child marries in the testator's lifetime, with his consent, but after the date of the will, such conditions, as to consent of trustees, are of no effect; and they do not apply to a second marriage.[2]

§ 514. Where power is given to a trustee to consent to a marriage, as a condition precedent to the gift's taking effect, nothing will vest in the donee until the condition is complied with; as where there is a gift in trust for a party *upon his marriage*, or *upon his marriage with the proper consent of the trustee*, the gift will not vest in the beneficiary until his marriage with the consent of the trustee.[3] Under such form of gift, it is immaterial whether there is a gift over or not.[4] The rule will apply, whether the consent to the marriage is required until a certain age, or during the whole life.[5] Where there was a gift in trust to a party, if he should marry with the consent of the trustees, and *over*, if he should marry *against* their consent, it was held, that *against* was equivalent to *without*, and that the gift went over, although it did not

[1] Pullen *v.* Ready, 2 Atk. 587; Desbody *v.* Boyville, 2 P. Wms. 547; Knapp *v.* Noyes, Amb. 662; Osborn *v.* Brown, 5 Ves. 527; Stackpole *v.* Beaumont, 3 Ves. 89; Malcolm *v.* O'Callaghan, 2 Mad. 354; Lloyd *v.* Branton, 3 Mer. 108; Graydon *v.* Hicks, 2 Atk. 18; Garrett *v.* Pretty, 2 Vern. 293; 3 Mer. 120 n.

[2] Clarke *v.* Berkely, 2 Vern. 720; Crommelin *v.* Crommelin, 3 Ves. 227; Parnell *v.* Lyon, 1 V. & B. 479; Wheeler *v.* Warner, 1 S. & S. 304; Smith *v.* Cowdery, 2 S. & S. 358; Coventry *v.* Higgins, 8 Jur. 182.

[3] Reeves *v.* Herne, 5 Vin. Abr. 343, pl. 41; Reynish *v.* Martin, 3 Atk. 330; Frye *v.* Porter, 1 Ch. Ca. 138; 1 Mod. 300; Bertie *v.* Falkland, 3 Ch. Ca. 129; Holmes *v.* Lysight, 2 Bro. P. C. 261; Hemmings *v.* Munckley, 1 Bro. Ch. 303; Scott *v.* Tyler, 2 Bro. Ch. 489; 2 Lead. Ca. Eq. 105, notes; 2 Dick. 712; Knight *v.* Cameron, 14 Ves. 389; Creagh *v.* Wilson, 2 Vern. 572; Gillett *v.* Wray, 1 P. Wms. 284; Harvey *v.* Aston, 1 Atk. 375; Newton *v.* Marsden, 2 John. & H. 356; Hotz's Est., 38 Penn. St. 422; Cornell *v.* Lovett, 35 Penn. St. 100; Taylor *v.* Mason, 9 Wheat. 350; Collier *v.* Slaughter, 2 Ala. 263; Stratton *v.* Grymes, 2 Vern. 357; Barton *v.* Barton, 2 Vern. 308; Hawkins *v.* Skeggs, 10 Humph. 31; Bennett *v.* Robinson, 10 Watts, 348; Commonwealth *v.* Stauffer, 10 Barr, 350; McCullough's App., 2 Jones, 197; Phillips *v.* Medbury, 7 Conn. 568.

[4] Ibid.; Clarke *v.* Parker, 19 Ves. 8; Malcolm *v.* O'Callaghan, 2 Mad. 349; Long *v.* Ricketts, 2 S. & S. 179; Stackpole *v.* Beaumont, 3 Ves. 89; Rop. Leg. 658.

[5] Ibid.; Lloyd *v.* Branton, 3 Mer. 108.

appear that the trustees opposed the marriage.[1] The trustees' powers are exhausted by consent to one marriage; if, therefore, they consent to one marriage, the beneficiary may marry a second time without their consent.[2] But the rule in relation to a first marriage without consent, and a second marriage with consent, is uncertain.[3]

§ 515. A general restraint of marriage, with or without the consent of trustees, or with any person, is illegal and void, as contrary to the policy of the law. Therefore, a gift, in trust, upon the condition that the beneficiary shall not marry at all, will vest in the donee, and the condition is void.[4] So all conditions, leading to a probable prohibition of marriage, are void.[5] But a condition, restraining marriage under the age of twenty-one, or before a reasonable age without consent, is valid.[6] So conditions that restrain marriage with a particular person, or with natives of a particular country, or of a particular religion, or conditions that prescribe the ceremonies of the marriage, are valid, and may be enforced in relation to the property.[7]

§ 516. Where there is a limitation of property to a person until marriage, and, upon marriage *over* to some other person, or during widowhood, or while single, or where there is an annuity, payable to a person until such time, or during such time, and then to cease, the limitation is valid. Such a gift is upon no condition at all, but is a clear limitation, that marks the duration and continuance of the interest.[8] But where a testator devised lands to

[1] Long *v.* Ricketts, 2 S. & S. 179; and see Harvey *v.* Aston, 1 Atk. 375; Pollock *v.* Croft, 1 Mer. 184.

[2] Hutcheson *v.* Hammond, 3 Bro. Ch. 128; Crommelin *v.* Crommelin, 3 Ves. 227; Low *v.* Manners, 5 B. & Ald. 967; 1 Rop. Leg. 709.

[3] Malcolm *v.* O'Callaghan, 2 Mad. 349.

[4] Waters *v.* Tazewell, 9 Ind. 291; Maddox *v.* Maddox, 11 Grat. 804; Keily *v.* Monck, 3 Ridgw. P. C. 205, 244, 249, 261; Hervy *v.* Aston, Comyn, 726; 1 Atk. 361; 1 Eq. Ca. Ab. 110, pl. 2 n. (a); Rishton *v.* Cobb, 9 Sim. 615; Morley *v.* Rennoldson, 2 Hare, 570; Connelly *v.* Connelly, 7 Moore, P. C. 438.

[5] Ibid.; Long *v.* Dennis, 4 Burr. 2052.

[6] Sutton *v.* Jewke, 2 Ch. R. 9; Creagh *v.* Wilson, 2 Vern. 573; Ashton *v.* Ashton, Pr. Ch. 226; Chauncy *v.* Graydon, 2 Atk. 616; Hemmings *v.* Munckley, 1 Bro. Ch. 304; Dashwood *v.* Bulkley, 10 Ves. 230; Stackpole *v.* Beaumont, 3 Ves. 96; Pearce *v.* Loman, 3 Ves. 139; Yonge *v.* Furse, 3 Jur. (N. S.) 603.

[7] Jervois *v.* Duke, 1 Vern. 19; Randall *v.* Payne, 1 Bro. Ch. 55; Perrin *v.* Lyon, 9 East, 170; Duggan *v.* Kelley, 10 Ir. Eq. 295; 1 Eq. Ca. Ab. 110, pl. 2 n. (a); Haughton *v.* Haughton, 1 Moll. 611.

[8] Jordan *v.* Holkam, Amb. 209; Barton *v.* Barton, 2 Vern. 308; Scott *v.*

trustees in trust for B. for life, provided she does not marry, and, after her decease or marriage, over to other persons, and the testator afterwards married B. himself, and republished his will, with the same proviso in it, it was held that B. was entitled to the property notwithstanding her marriage.[1]

§ 517. Where such powers of consent are given to trustees, the marriage of the *cestui que trust*, during the testator's lifetime with his consent or subsequent approval, renders them inapplicable, and they cannot be executed.[2] The assent of the trustees, when necessary, may be implied, as where they allow a courtship and marriage to take place, and make no objection.[3] In this case no particular form of consent was prescribed. Even where a written consent was prescribed, and the trustees negotiated the settlement and the marriage, it was held sufficient:[4] they should be estopped to deny their consent to a marriage of their own procurement. There need be no consent to a particular marriage, if the *cestui que trust* has a general consent or license to marry whom she chooses.[5] If the consent is required to be in writing, very loose and general expressions of consent in letters, if acted upon, will be construed into assent.[6] If the consent is required to be in writing, any fraud or procurement, on the part of the trustees, will estop them from insisting upon the forfeiture;[7] but if there is no collusive conduct,

Tyler, 2 Lead. Ca. Eq. 396; Lowe *v.* Peers, Wilm. 369; Bird *v.* Hunsdon, 2 Swans. 342; Marples *v.* Bainbridge, 1 Mad. 590; Webb *v.* Grace, 2 Phil. 701, reversing 15 Sim. 384; Richards *v.* Baker, 2 Atk. 321; Sheffield *v.* Orrery, 3 Atk. 282; Gordon *v.* Adolphus, 3 Bro. P. C. 306; Heath *v.* Lewis, 3 De G., M. & G. 954. The early case of Parsons *v.* Winslow, 6 Mass. 169, is not in accordance with the authorities, nor can it be sustained on principle.

[1] Cooper *v.* Cooper, 6 Ir. Ch. 217; Corkers *v.* Minons, 1 Ir. Jur. 316; West *v.* Kerr, 6 Ir. Jur. 141.

[2] Clarke *v.* Berkely, 2 Vern. 720; Coffin *v.* Cooper, cited 1 Ves. & B. 481; Parnell *v.* Lyon, 1 V. & B. 479; Wheeler *v.* Warner, 1 S. & S. 374; Coventry *v.* Higgins, 14 Sim. 30; Crommelin *v.* Crommelin, 3 Ves. 227; Smith *v.* Cowdery, 2 S. & S. 358.

[3] Mesgrett *v.* Mesgrett, 2 Vern. 580; Clarke *v.* Parker, 19 Ves. 12; Harvey *v.* Aston, 1 Atk. 375; O'Callaghan *v.* Cooper, 5 Ves. 126.

[4] Strange *v.* Smith, Amb. 263; Worthington *v.* Evans, 1 S. & S. 165.

[5] Mercer *v.* Hall, 4 Bro. Ch. 328; Pollock *v.* Croft, 1 Mer. 181.

[6] Daley *v.* Desbouverie, 2 Atk. 261; D'Aguilar *v.* Drinkwater, 2 V. & B. 225; Merry *v.* Ryves, 1 Eden, 1; Worthington *v.* Evans, 1 S. & S. 165; Le Jeune *v.* Budd, 6 Sim. 441.

[7] Strange *v.* Smith, Amb. 263; Clarke *v.* Parker, 19 Ves. 18; Farmer *v.* Compton, 1 Ch. R. 1.

and consent is required to be in writing, an implied or verbal consent cannot satisfy the condition.[1] A deed is not necessary, unless specially required by the will.[2] The consent must be given previously to the marriage, and the approbation of the trustees afterwards is immaterial, because no subsequent approbation could be a performance of the condition, or avoid a forfeiture for a breach of it.[3] If, however, the trustees gave their consent to the marriage at the proper time, but were prevented by accident from executing the formal writings until after the solemnization of it, it was held to be a compliance with the condition, as courts of equity may at all times relieve from accidents and mistakes.[4] If the trustees have once given their full consent to the marriage, with a knowledge of all the facts, they cannot withdraw it; for they have allowed the affections and feelings of the parties to become entangled, and it would be in the nature of a fraud to withdraw their consent.[5] But if any new facts should come to the knowledge of the trustees, which would render the marriage an improper one, they may withdraw their consent, and they ought to do so.[6]

§ 518. The consent of the trustees may be given conditionally, if the condition is not unreasonable. Thus an assent, *if a proper settlement is made*, or *if the cotrustees consent*, is conditional;[7] and if the parties fail or refuse to perform the condition, the consent may be withdrawn;[8] but if, in pursuance of the condition, a settlement is made after marriage, it will save the forfeiture.[9] All the trustees who accept the trust, must consent,[10] unless the dis-

[1] D'Aguilar *v.* Drinkwater, 2 V. & B. 225; Clarke *v.* Parker, 19 Ves. 12.

[2] Worthington *v.* Evans, 2 S. & S. 165.

[3] Reynish *v.* Martin, 3 Atk. 331; Clarke *v.* Parker, 19 Ves. 21; Berkley *v.* Ryder, 2 Ves. 532; Long *v.* Ricketts, 2 S. & S. 179; Malcolm *v.* O'Callaghan, 2 Mad. 349; Hemmings *v.* Munckley, 1 Bro. Ch. 304; Frye *v.* Porter, 1 Ch. Ca. 138; 1 Mod. 300. In Burleton *v.* Humphrey, Amb. 256, Lord Hardwicke held a different doctrine; but it has not been acted upon, and is not the law.

[4] Worthington *v.* Evans, 2 S. & S. 172; O'Callaghan *v.* Cooper, 5 Ves. 117.

[5] Le Jeune *v.* Budd, 6 Sim. 441; Farmer *v.* Compton, 1 Ch. R. 1; Strange *v.* Smith, Amb. 263; Merry *v.* Ryves, 1 Edm. 1; Dashwood *v.* Bulkeley, 10 Ves. 242.

[6] D'Aguilar *v.* Drinkwater, 2 Ves. & B. 234; 1 Rop. Leg. 699.

[7] O'Callaghan *v.* Cooper, 5 Ves. 517; Dashwood *v.* Bulkeley, 10 Ves. 230; D'Aguilar *v.* Drinkwater, 2 V. & B. 235.

[8] Dashwood *v.* Bulkeley, 10 Ves. 230.

[9] O'Callaghan *v.* Cooper, 5 Ves. 117; 10 Ves. 230.

[10] Clarke *v.* Parker, 19 Ves. 12. The *dictum* in Hervey *v.* Aston, 1 Atk. 375, has not been followed.

senting trustee is influenced by selfish and improper motives;[1] for, if the testator has named the parties who are to assent, although he has used words to indicate that he attached no particular importance to the assent of all, yet, the court cannot change the condition, and deprive those of their interest, to whom there is an express devise over.[2] A trustee may, however, authorize his cotrustee to consent for him, for that would be his own consent.[3] In general, the power to assent is given to the executors or trustees, *in that character* and not *personally*, and those who renounce the trust have no power;[4] yet the power may be conferred upon an executor or trustee *personally*, so that his assent may be required, although he renounce the trust.[5] If the power becomes impossible by the death of one or more of the trustees, it will be dispensed with so far as it is impossible to execute it literally;[6] and if all the trustees die, the power is absolutely gone. So, if the condition is subsequent, and the consent of executors or trustees in the plural number is required, and one dies, the condition is gone;[7] but if the death of the original trustee is provided for by the appointment of a new one, and the power extends to him, then the consent of the trustees must be had.[8] After a considerable lapse of time, and no action taken to disturb the possession of the property, the consent of the trustees will be presumed to have been given in proper form.[9]

§ 519. The exercise of this discretionary power, of assenting to the marriage of the *cestui que trust*, is of so peculiar a nature that courts of equity will exercise a control over it, and will not suffer the power to be abused; they will examine into the conduct and motives of the persons refusing their assent, and ascertain whether

[1] Peyton *v.* Bury, 2 P. Wms. 626; Mesgrett *v.* Mesgrett, 2 Vern. 580; Clarke *v.* Parker, 19 Ves. 12.

[2] Clarke *v.* Parker, 19 Ves. 15.

[3] Daley *v.* Desbouverie, 2 Atk. 261; Clarke *v.* Parker, 19 Ves. 12; D'Aguilar *v.* Drinkwater, 2 V. & B. 225, 235, 236.

[4] Worthington *v.* Evans, 2 S. & S. 165; 19 Ves. 16.

[5] Graydon *v.* Graydon, 2 Atk. 16, explained in 1 Rop. Leg. 695.

[6] 1 Rop. Leg. 691.

[7] Peyton *v.* Bury, 2 P. Wms. 626; Jones *v.* Suffolk, 1 Bro. Ch. 528; Graydon *v.* Hicks, 2 Atk. 16–18; Aislabie *v.* Rice, 3 Mad. 256; 8 Taunt. 459; Grant *v.* Dyer, 2 Dow, 93.

[8] Clarke *v.* Parker, 19 Ves. 15.

[9] *Re* Birch, 17 Beav. 358.

the refusal proceeds from a corrupt, selfish, or improper motive; and if it does, the court will relieve from a forfeiture incurred by a marriage without consent.[1] Lord Eldon said, this was a "dangerous power" in the court, and one delicate and difficult to exercise.[2] But there is no question that the courts will exercise it in a proper case, as where the trustees refuse their assent from anger, pique, resentment, or from interested motives, as where some interest in the property would come to them or their families, in case of a marriage without their assent, or the death of the *cestui que trust* before marriage, or where the trustees have themselves promoted and procured the marriage.[3] So, where a trustee refused to assent or dissent to a proposed marriage of the beneficiary, the court sent the case to a master to inquire, whether the marriage was a proper one, and to receive proposals for a settlement.[4]

[1] 1 Rop. Leg. 697.

[2] Dashwood *v.* Bulkeley, 10 Ves. 245; Clarke *v.* Parker, 19 Ves. 12.

[3] Mesgrett *v.* Mesgrett, 2 Vern. 580; 10 Ves. 243; Strange *v.* Smith, Amb. 264; Merry *v.* Ryves, 1 Eden, 6; Peyton *v.* Bury, 2 P. Wms. 628; Daley *v.* Desbouverie, 2 Atk. 261; Clarke *v.* Parker, 19 Ves. 19.

[4] Goldsmid *v.* Goldsmid, 19 Ves. 368; Coop. 225.

CHAPTER XVII.

TRUSTEES OF THE DRY LEGAL TITLE; TO PRESERVE CONTINGENT REMAINDERS; OF TERMS ATTENDANT; OF FREEHOLDS; AND OF LEASEHOLDS.

§§ 520, 521. Powers and duties of trustees of the dry legal title.
§§ 522, 523. Trustees of contingent remainders.
§§ 524, 525. Trustees of attendant terms.
§ 526. Powers and duties of trustees in possession of freeholds.
§ 527. Must pay rates and taxes and collect rents.
§ 528. Trustee's power of leasing.
§§ 529, 530. Their power where special directions are given as to leasing.
§ 531. Trustees of leaseholds.
§§ 532, 533. Power and duty to renew leases.
§ 534. Who is to bear the expense of renewing leases.
§ 535. When trustees may not renew leases.
§ 536. Liability of trustees for covenants in leases.
§ 537. The fine for renewing a lease.
§ 538. The right to renew leases a valuable right. Trustees cannot renew in their own names.

§ 520. It is a *simple* or dry trust, when property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of law. In such case the *cestui que trust* is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyances of the legal estate as he directs.[1] In short, the *cestui que trust* has an absolute control over the beneficial interest, together with a right to call for the legal title, and the person in whom the legal title vests is a *simple* or *dry trustee*.[2] Settlors sometimes convey estates in this manner for an ulterior purpose; or an active trust having been accomplished, the legal title and the beneficial interest may have fallen into this condition. The duties and powers of such dry trustees of the legal estate are few and simple. They are usually said to be threefold, and similar to those of the old feoffees to uses: (1.) To permit the *cestui que trust* to occupy and receive the incomes and profits of the estate; (2.) To execute such conveyances, or make such disposition

[1] Lewin on Trusts, 18. [2] Hill on Trustees, 316.

of the estate as the *cestui que trust* may direct; (3.) To protect and defend the title, or to allow their names to be used for that purpose.[1] At law they are the legal owners of the estate, and their names must be used in all suits at law affecting the legal title;[2] but in equity the *cestui que trust* is the owner, and the trustees will be restrained by injunction from using their power over the legal title to the injury of the *cestui que trust*.[3] If such trustees refuse from improper motives to convey the dry legal title, when required by a person clearly entitled to the equitable interest, the court will decree a conveyance, and impose costs upon the trustees for their refusal.[4] Even in an action at law, in the name of the trustee for the benefit of the *cestui que trust*, the trustee cannot release or discontinue the action, without the consent of the beneficiary; and if he does so, courts of law will set aside the release;[5] but where a trustee's name is thus used for the benefit of the *cestui que trust*, he is entitled to be indemnified against the costs, and the *cestui que trust* may be restrained in equity from proceeding until he has furnished such security.[6]

§ 521. In a simple trust of this nature, the dry trustee has no power of managing, or disposing of the estate, even although the *cestui que trust* is an infant, married woman, lunatic, or other person incapable of the management or control. Nor can he alter the nature of the property, by changing real estate into personal, or *vice versa*.[7] But there is this qualification of the rule,—if a trustee,

[1] 1 Cruise Dig. tit. 12, c. 4, § 6.

[2] Goodtitle *v.* Jones, 7 T. R. 47; Wake *v.* Tinkler, 16 East, 36; Cox *v.* Walker, 26 Me. 504; First Bap. Soc. in Andover *v.* Hazen, 100 Mass. 322; Beach *v.* Beach, 14 Vt. 28; Mathews *v.* Ward, 10 G. & John. 443; Moore *v.* Burnett, 11 Ohio, 334; Wright *v.* Douglass, 3 Barb. 559; Modecai *v.* Parker, 3 Dev. 425. In Pennsylvania, however, the action of ejectment is an equitable action, and the *cestui que trust* can maintain it for the possession even against the trustee.

[3] Balls *v.* Strutt, 1 Hare, 146.

[4] Boteller *v.* Allington, 1 Bro. Ch. 73; Willis *v.* Hiscox, 4 M. & Cr. 197; Jones *v.* Lewis, 1 Cox, 199; Lyse *v.* Kingdom, 1 Coll. 184; Penfold *v.* Bouch, 4 Hare, 471; Watts *v.* Turner, 1 R. & M. 634; Buttanshaw *v.* Martin, John. 89.

[5] Manning *v.* Cox, 7 Moore, 617; Barker *v.* Richardson, 1 Yo. & Jer. 362; Chitty, Contr. 605.

[6] Annesley *v.* Simeon, 4 Mad. 390; Chambersburg Ins. Co. *v.* Smith, 11 Penn. St. 120.

[7] Furiam *v.* Saunders, 7 Bac. Abr. Uses and Trusts, E.; Witter *v.* Witter, 3 P. Wms. 100.

having the legal title, and being in possession, makes a conveyance for a valuable consideration to a purchaser who has no notice of the trust, the title of the purchaser will prevail.[1] Such a transaction, however, under our registry laws is almost impossible, for the recording of the settlement or other deeds of the property is notice to all the world of the trust. So impersonal are the relations of dry trustees to the *cestui que trust*, that it is said they may purchase the estate of the beneficiary.[2] It is further to be remarked, that there can be but few of these dry trusts; for where there is no control, and no duty to be performed by the trustee, it becomes a simple use, which the statute of uses executes in the *cestui que trust;* and he thus unites both the legal and beneficial estate in himself.

§ 522. Trusts to preserve contingent remainders are less frequent in this country than in England; and they are less frequent in England since the statute of 8 & 9 Vict. c. 106, which enacted that a contingent remainder should be deemed capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner and in all respects as if such determination had not happened. In consequence of this act, there is no necessity for any machinery to preserve contingent remainders. Previous to the act, where there were no trustees to preserve them, they could be destroyed in two ways: First, contingent remainders were extinguishable by the surrender or merger of the particular estate in the inheritance; as, if lands were limited to A. for life, with remainder to his unborn children, with remainder to B., A. might surrender his life-estate to B., or B. might release his remainder to A., or both A. and B. might join in a conveyance of the fee; and thus in each case the contingent remainder was squeezed out, and if children were afterwards born to A. they had no remedy in law or equity. Second, they could be extinguished by the tenant for life with the concurrence of the person who stood next in the series of limitations; as, where the oldest son or heir of the tenant for life, being of age and next in the series, could unite with his father in making a tenant to the *præcipe* to bar all subsequent remainders. Thus the estate became the absolute property of the father and son, and the subsequent interests in remainder were sacrificed, except so far as father and son might choose to give them effect.[3]

[1] Millard's Case, 2 Freem. 43; Bovey *v.* Smith, 1 Vern. 149.

[2] Parker *v.* White, 11 Ves. 226.

[3] Lewin on Trusts, 308.

§ 523. To obviate these results, settlements were drawn in one of two modes: First, the legal estate was limited to the use of the parent for ninety-nine years, if he should live so long, with remainder to the use of trustees and their heirs, during the life of the termor upon trust to preserve the contingent limitations, and on his death to other uses in remainder; or to the use of trustees and their heirs, during the life of the parent in trust for him, and on his death to the other uses in remainder. Secondly. The use was to the parent for life, with remainder to trustees and their heirs, during the life of the parent, in trust to preserve the contingent limitations, and on his death to other uses in remainder. In the first form of settlement, the object in view, by vesting the freehold in trustees, was to preserve the contingent limitations from being destroyed by the surrender or merger of the particular estate, which would have been practicable had the freehold been limited to the parent himself, and also to prevent the barring of the entail and the alienation of the estate for purposes not authorized by the spirit of the settlement. In the second form, it was the duty of the trustees, as before, to preserve the contingent limitations; but, as the freehold in possession was vested in the parent, the trustees had no power to prevent a recovery by the father and son as soon as the son came of age; but if the tenant for life committed a forfeiture, as by a feoffment in fee in order to defeat the contingent remainders, it was then the duty of the trustees to enter and so vest the possession of the freehold in themselves; and it was their further duty, as in the first form, though the settlor himself might not have contemplated such a purpose, not to concur in putting an end to the settlement, except where such interference was prudent and proper.[1]

[1] Lewin on Trusts, 309 (5th Lond. ed.), 404 (2d Amer. ed.). There is a very considerable amount of learning in the books upon the duty of trustees under these circumstances: when they should concur in determining the contingent estates, when they should concur in changing the uses and the limitations for the accommodation and benefit of families, and when they should apply to the court for instruction and direction in the performance of their duties. The statute 8 & 9 Vict. c. 106 renders the machinery of trustees to preserve contingent remainders no longer necessary in England, and Mr. Lewin has left all the learning upon the subject out of the last edition of his valuable treatise on Trusts. The reader will find it in the second American edition, and in Hill on Trustees, 318. It is not thought necessary to pursue the subject further, as, in nearly all the Amer-

§ 524. Where a term for years is created by mortgage or by will for securing jointures or portions, or where a term is carved out of the inheritance for any particular purpose, and there is no condition in the instrument that the term shall cease when the purposes of its creation are satisfied, although the term or time for which it was carved out has not elapsed, the holder of the term for the remainder of the time holds it in trust for the owner of the inheritance, and it is said to be a term attendant upon the legal title. It is sometimes convenient in English conveyancing to keep these terms outstanding in the hands of a trustee, as the owner has the right to call at any time for a conveyance of them to himself; and such term may give the owner of the inheritance a legal title to the possession, anterior to some possible incumbrances that may have been put upon the estate prior to his purchase of the inheritance. In the same manner, purchasers in America sometimes take assignments of mortgages made long before their purchase, in order, by foreclosure or otherwise, to gain a title prior to other possible incumbrances, anterior to their purchase of the fee.

§ 525. Trustees of these dry terms hold them in trust for the owners of the inheritance. The rights and duties of the trustees of such terms are very similar to the rights and duties of trustees of the dry legal estate.[1]

§ 526. Trustees of freeholds are the legal owners of the estate, and they alone can be recognized in a court of law.[2] Their right to the possession will depend entirely upon the construction of the instrument of trust, and the nature of the duties required.[3] If

ican States, statutes similar to the statute of 8 & 9 Vict. render trustees unnecessary to preserve such remainders. Mr. Washburn cites the statutes of the various States. 2 Wash. Real Prop. pp. 202, 262, 263, 266 (1st ed.). See also Hill on Trustees, 318, n.; 2 Green. Cruise, 270, and n.; 285, n.; 4 Kent, Com. 252. In Pennsylvania, however, trustees may still be necessary for this purpose. Dunwoodie *v.* Reed, 3 S. & R. 435; Toman *v.* Dunlop, 8 Penn. St. 72. The case of Vanderheyden *v.* Crandall, 2 Denio, 9, was decided before the change by the statutes in New York.

[1] These terms are now abolished in England by Stat. 8 & 9 Vict. c. 112, and have ceased to be important. They never prevailed to any great extent in this country, and it is not necessary to enlarge upon the subject. The reader who desires to see the learning upon this matter will find it in Hill on Trustees, 324–329; 1 Green. Cruise, 414, 418, 424, 442, 443; 2 Green. Cruise, 63, 170.

[2] *Ante*, § 522. [3] *Ante*, § 329.

their duties are such that they cannot perform them without the possession, the court will give it to them.[1] The situation and condition, therefore, of the *cestuis que trust* may be important on the question of the possession and control of the trustee; as if the *cestui que trust* is a married woman, an infant, or a lunatic, incapable of managing or controlling the estate, the trustee must of necessity have the possession and management.[2] If the trustees have the possession, control, and management, they may make necessary repairs;[3] but, without some general or special authority, they cannot enter upon large improvements.[4] If they are trustees for the sale of land they will not be allowed for improvements,[5] and no allowance can be made for cultivating such lands;[6] nor will the trustees be responsible for not renting land that comes to them in trust for sale.[7]

§ 527. Where trustees are in possession, and have the management of the estate, they must pay all rates and taxes,[8] and protect the estate from tax sales; they may, therefore, insure, and good management would demand it, but they are not bound to do so.[9] Where they have the management, they must use due diligence in collecting rents. If they are directed to accumulate the rents, or to receive them for any other purpose, they will become personally liable if they allow the tenants to fall in arrear, and a loss is thus imposed upon the estate.[10]

§ 528. When trustees are charged with the payment of annuities, debts, or legacies, or any other sums out of the estate, but have no power of sale, they have an implied power of leasing upon the ordinary terms or custom of the State or town in which the land is situated.[11] If the trust consists of farming lands, the

[1] *Ante*, § 329; Tidd *v.* Lister, 5 Mad. 433.

[2] Tidd *v.* Lister, 5 Mad. 433.

[3] Fontaine *v.* Pellet, 1 Ves. Jr. 337; Bowes *v.* Strathmore, 8 Jur. 92; Green *v.* Winter, 1 John. Ch. 26.

[4] Ibid.; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; L'Amoureux *v.* Van Rensselaer, 1 Barb. Ch. 34; Wykoff *v.* Wykoff, 3 W. & S. 481; Ames *v.* Downing, 1 Bradf. 321.

[5] Green *v.* Winter, 1 John. Ch. 28.

[6] Ibid.

[7] Burr *v.* McEwen, Baldw. C. C. 154; Griffin *v.* Macaulay, 7 Grat. 476.

[8] Burr *v.* McEwen, Baldw. C. C. 154; Lovat *v.* Leeds, 31 L. J. Ch. 503.

[9] Ibid.

[10] Tebbs *v.* Carpenter, 1 Mad. 290.

[11] Naylor *v.* Arnitt, 1 R. & M. 501; Newcomb *v.* Keteltas, 19 Barb. 608; Hedges *v.* Riker, 5 John. Ch. 163; Black *v.* Ligon, Harp. Eq. 205.

trustees can grant ordinary farming leases; if of houses in a city, they can grant the ordinary leases of such property.[1] But they will not be justified in granting any unusual leases; as, building-leases, or leases for a long term.[2] If, under such circumstances, a trustee uses due diligence in granting a lease at a proper rent, and for a proper term, he will not be responsible, although a much larger sum may be obtained, before the lease expires, by reason of an increase or rise in rents.[3] It is said, that the neglect must approximate fraud to impose such a liability upon a trustee.[4] If, however, the estate consists of a plantation and slaves, or of a farm fully stocked, the trustee may not lease it at all, but he may employ the personal property upon the estate in its cultivation.[5] If the tenant for life in occupation of the lands becomes insolvent, and his rent is largely in arrear, the trustees will be reimbursed for all the necessary expenses of ejecting him, and they will be justified in releasing to him the arrears of rent, and in paying a *bonus* as among the expenses of obtaining the possession. These expenses are for the benefit of the estate.[6] Under the general implied powers of leasing, trustees can only grant a lease in possession, and cannot grant a lease in reversion;[7] and it is doubted if they can make a lease to commence at a future day.[8]

§ 529. If special powers of leasing are conferred upon trustees, they must follow the powers strictly.[9] Any deviation from the manner of leasing pointed out in the trust instrument would be a breach of the trust. Thus where leases are to be in possession and not in reversion, or where the lessor is not to take any fine or premium from the lessee, a lease made contrary to these powers is improper and would be set aside.[9] Where there is power to lease for a certain number of years, a lease for a less number is good,[10] but a lease for a longer term than that prescribed is bad, as contrary to the power;[11] although it is said, that such a lease may be sustained in equity for the proper number of years, and that the

[1] Ibid.; Greason *v.* Keteltas, 17 N. Y. 491; Pearse *v.* Baron, Jac. 158.
[2] Ibid.
[3] Ferraby *v.* Hobson, 2 Phil. 255.
[4] Ibid.
[5] Dennis *v.* Dennis, 15 Md. 73.
[6] Blue *v.* Marshall, 3 P. Wms. 381.
[7] Sussex *v.* Worth, Cro. Eliz. 5; 2 Sug. Pow. 370.
[8] Sinclair *v.* Jackson, 8 Cow. 581.
[9] Bowes *v.* East London Water Works Co., 3 Mad. 375; Jac. 324.
[10] Isherwood *v.* Oldknow, 3 M. & S. 382.
[11] Sinclair *v.* Jackson, 8 Cow. 581.

excess only is void.[1] Under a power to lease for twenty-one years, a lease for twenty-one years, determinable at the option of the lessee, is a good execution of the power;[2] but where lands, not within the authority to lease, are joined in the same lease at one rent with lands within the power, the whole lease is without authority, for there can be no apportionment of the rent.[3] If the lease is not strictly within the terms of the special power, the receiving of rent by the *cestuis que trust* for several years will not confirm the lease, unless they are aware of the defective execution of the power.[4] It seems to be in accordance with sound principle, that a lease, which is void for want of power in the trustee to execute it, is incapable of confirmation by the *cestuis que trust* who have no power either to make or confirm leases;[5] but perhaps a long acquiescence by them in the occupation under the lease, accompanied by valuable improvements made by the lessee, might estop them from setting up a claim to avoid the lease.[6] If the freehold is vested in the trustees, the lease will take effect out of their legal interest, and will be valid in law, though it may be a breach of the trust; but a court of equity can in all cases set aside any conveyance or lease which is a breach of the trust.[7] If there is any fraud or collusion in the trustee, the lease will be set aside, or the lessee may be converted into a trustee; as, where the trustee and a third person by collusion suffered a lease to be forfeited in order that such person might obtain the lease to himself, he was held to be a constructive trustee.[8]

§ 530. Where the special power is to lease lands usually let, or upon the usual rent, it will apply *prima facie* to such lands only as have been generally let, and to the ordinary adequate rent;[9] but where the general scope of the whole instrument involves an intention that all the lands shall be let, the words will be construed to embrace all;[10] and the joining of several parcels of land

[1] Pawcey *v.* Bowen, 1 Ch. Ca. 23; 3 Ch. R. 11.

[2] Edwards *v.* Millbank, 4 Drew. 606.

[3] Doe *v.* Stephens, 6 Q. B. 208.

[4] Bowes *v.* East London Water Works Co., 3 Mad. 375; Jac. 324.

[5] Sinclair *v.* Jackson, 8 Cow. 581.

[6] Black *v.* Ligon, Harp. Eq. 205. But see 4 Kent, 107.

[7] Bowes *v.* East London Water Works Co., 3 Mad. 375; Jac. 324.

[8] Aspinall *v.* Jones, 2 Bennet (Mo.), 209.

[9] Cardigan *v.* Montague, 2 Sugd. Pow. App., 14, 339; Orbey *v.* Mohun, 2 Vern. 531; Pr. Ch. 257; 2 Roll. Ab. 261, pl. 11, 12.

[10] Goodtitle *v.* Funucan, Doug. 565; 2 Sugd. Pow. 349.

in one lease, which have been *usually* let separately, will not vitiate the execution of the power.[1] The *usual* rent means the old and uniform custom, and not the rent reserved on a single lease, executed just before the creation of the power.[2] Where the power is to make a lease containing "usual and reasonable covenants," the rule is to follow a lease of the lands in existence at the time of the creation of the power if there is such a lease.[3] Where a widow was to have the right to cultivate as much land as she pleased, and the executors were to lease the balance, the power of leasing was held to extend to the whole estate upon the death of the widow.[4] If the trustees have a fee, determinable upon a contingent event, they nevertheless have power to make a lease to extend beyond their interest in the land.[5] A power to lease for lives will not authorize a lease for years; but under a power to lease not exceeding twenty-one years, or three lives, a lease for years may be granted.[6] So a lease for two lives will be good under a power to lease for three lives.[7] In granting a lease for lives, it must be during lives in being, and all must be running at the same time;[8] if some of the lives have expired, there is authority to grant a lease during the life of the survivor.[9] A power to lease land generally will not authorize a lease of unopened mines, but a general power will authorize a lease of opened mines. Trustees should not grant leases of mines without impeachment of waste.[10] In deciding the length of the term for which the lease may be granted, trustees must be guided by the best interests of the estate; at law they may exercise the power by granting the longest term;[11] but in equity they are subject to the supervision of the court.[12] If they enter into covenants in leases, they will be personally bound.[13]

[1] Doe *v.* Stephens, 6 Q. B. 208; Doe *v.* Williams, 11 Q. B. 688.
[2] Doe *v.* Hole, 15 Q. B. 848.
[3] Doe *v.* Stephens, 6 Q. B. 208.
[4] Hoyle *v.* Stowe, 2 Dev. 318.
[5] Greason *v.* Keteltas, 17 N. Y. 491.
[6] Whitlock's Case, 8 Co. R. 69 b; 1 Sugd. Pow. 514; 2 ib. 354.
[7] 2 Sugd. Pow. 365.
[8] Doe *v.* Halcombe, 7 T. R. 13; 2 Sugd. Pow. 364; Raym. 263.
[9] Doe *v.* Hardwicke, 10 East, 549.
[10] Campbell *v.* Leach, Amb. 740; Daly *v.* Beckett, 6 C. B. 114; Lee *v.* Balcarras, 6 C. B. 849.
[11] Muskerry *v.* Chinnery, Ll. & G. 185; 1 Sugd. Pow. 548.
[12] Sutton *v.* Jones, 15 Ves. 587; Black *v.* Ligon, Harp. Eq. 205; 4 Kent, 107.
[13] Greason *v.* Keteltas, 17 N. Y. 491.

Whether the heirs of trustees can execute the power of leasing depends upon the terms of the power, whether it is a personal confidence, or is a trust that goes with the estate and office of the trustee.[1]

§ 531. Where the trust property consists of leasehold estates, questions often arise respecting the duty of the trustees to renew, and on whom the expense shall fall. These estates are not so common in the United States as in England, but it may be important to state the law on the subject, together with the American authorities. It has before been stated, that where a leasehold is limited in the instrument of trust to a tenant for life with remainder over, and is rapidly diminishing in value through the expiration of the term, it is the duty of the trustee to sell the lease and invest the proceeds, and to pay the income of such investment to the tenant for life, and the principal to the remainder-man. Where there is a *specific* gift of the leasehold, or other depreciating property, the tenant is entitled to receive the income in specie.

§ 532. It is the duty of the trustees to renew all leases at the regular periods, where an *express* trust is created for that purpose.[2] In the absence of such trust the duty may be *implied* from the expressions used by the settlor, or from the whole scope of the instrument.[3] In the absence of such guides, it has been held that where a leasehold interest is settled in trust for life with remainders over, it must be the general intention that the interest should continue, and be preserved for the benefit of all who take under the limitations of the trust; and that it is the duty of the trustees to renew, although there are no particular or general expressions directing a renewal.[4] So in the case of marriage articles, if renewable leaseholds are part of the estates to be settled, the court will order a direction to the trustees to renew to be inserted in the set-

[1] Robson *v.* Flight, 10 Jur. (N. S.) 1228; 11 Jur. (N. S.) 147; 5 N. R. 344; 34 Beav. 110.

[2] Montford *v.* Cadogan, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; Colegrave *v.* Manby, 6 Mad. 72; 2 Russ. 238; Bennett *v.* Colley, 5 Sim. 181; 2 M. & K. 235.

[3] Curtis *v.* Lukin, 5 Beav. 147; Lock *v.* Lock, 2 Vern. 666; Hulkes *v.* Barrow, Taml. 264.

[4] Verney *v.* Verney, Amb. 88; 1 Ves. 428; White *v.* White, 4 Ves. 33; Montford *v.* Cadogan, 17 Ves. 448; 19 Ves. 638; Lock *v.* Lock, 2 Vern. 666; Milsington *v.* Mulgrave, 3 Mad. 491; 5 Mad. 471; Hulkes *v.* Barrow, Taml. 264.

tlement.[1] If the trustees have a power of renewal in the form of a *discretionary* power, it will generally be construed as an absolute direction to renew, but the manner and time may be optional; for where trustees are appointed to preserve estates for those who are to take in succession, it can hardly be supposed that it would be left discretionary with them to destroy the interests of those who are to take in the future.[2]

§ 533. The mere fact that renewable leaseholds are settled upon persons to take in succession does not *per se* give the remainder-man a right to call upon the tenant for life to pay the expenses of a renewal.[3] In such case it is within the discretion of the tenant for life to renew. And even where a devise was made to a tenant for life, subject to all fines as they became due yearly and for every year, the tenant for life was not obliged to renew.[4] But if the tenant for life does renew, he cannot use his renewal to deprive the remainder-man of his rights, but such remainder-man will be entitled to the interest given him under the settlement, upon paying the proportional part of the expenses of renewal;[5] nor will the mere fact of the *interposition of a trustee* in the settlement indicate an intention that the tenant for life shall renew;[6] but such duties may be imposed directly, or by implication that a renewal must be made.[7]

§ 534. If trustees neglect to renew leases, they will be liable to the *cestuis que trust* for all the loss and damage that accrues by reason of the neglect. Thus, if a remainder-man subsequently effects a renewal at an increased cost and expense, they must reimburse him, or they may be ordered to renew at their own expense.[8] If

[1] Graham *v.* Londonderry, cited Stone *v.* Theed, 2 Bro. Ch. 246; Pickering *v.* Vowles, 1 Bro. Ch. 197.

[2] Milsington *v.* Mulgrave, 3 Mad. 491; 5 Mad. 472; Mortimer *v.* Watts, 14 Beav. 616; Verney *v.* Verney, 1 Ves. 430; Harvey *v.* Harvey, 5 Beav. 134; Luther *v.* Bianconi, 10 Ir. Eq. 203.

[3] White *v.* White, 4 Ves. 32; 9 Ves. 561; Nightingale *v.* Lawson, 1 Bro. Ch. 443; Stone *v.* Theed, 2 Bro. Ch. 248; Capel *v.* Wood, 4 Russ. 500.

[4] Capel *v.* Wood, 4 Russ. 500.

[5] Stone *v.* Theed, 2 Bro. Ch. 248; Nightingale *v.* Lawson, 1 Bro. Ch. 440; Coppin *v.* Fernyhough, 2 Bro. Ch. 241; Fitzroy *v.* Howard, 3 Russ. 225.

[6] O'Ferrall *v.* O'Ferrall, Ll. & G. t. Plunk. 79; French *v.* St. George, 1 Dr. & Wals. 417; Lawrence *v.* Maggs, 1 Ed. 453.

[7] Verney *v.* Verney, 1 Ves. 429; White *v.* White, 4 Ves. 33; Hulkes *v.* Barrow, Taml. 264; Lock *v.* Lock, 2 Vern. 666.

[8] Montford *v.* Cadogan, 17 Ves. 485; 19 Ves 635; 2 Mer. 3; Colegrave *v.*

the tenant for life has received an increased income, by reason of the non-renewal, the trustees may withhold income from him to equalize what they may have been obliged to pay. If there are two successive tenants for life, they must contribute according to the duration of their respective interests.[1] The same principles are applicable where estates are settled without the intervention of a trustee, and the tenant for life is directed to renew. The remainder-man may renew in case of neglect by the tenant for life, and call upon his estate for reimbursement; and if the lease has expired and is lost, so that it cannot be renewed, the remainder-man may have compensation in damages.[2] But if the remainder-man pays an unreasonable sum for the renewal, the estate of the tenant for life will not be compelled to pay the whole, but the court will refer it to a master to determine a reasonable amount.[3] A purchaser from the tenant for life is not, however, compelled to make these payments, although he has notice of the settlement, unless the assignment to him expressly provides that the interest taken by him is subject to a trust for renewal.[4]

§ 535. Trustees, however, will not be liable for not renewing, where the trust for renewal cannot be carried into effect on account of its illegality.[5] If there is an illegal direction to accumulate rents and profits, for the purpose of renewal, the trustee cannot be called upon to renew, for the reason that the fund, from which he is to pay the expenses of renewal, cannot legally exist.[5] So a lessor is not obliged to renew a release, unless it contains covenants to that effect. Therefore, if the lessor refuses to renew, or if he demands unreasonable terms, the trustees are not liable for not renewing.[6] In such case, however, the tenant for life cannot be allowed the exclusive benefit of the non-renewal; but so much of the expenses as would have come out of his interest will be invested for the benefit of the *cestuis que trust*, including the remainder-men.[7] If a leasehold is a loss to the estate, by calling

Manby, 6 Mad. 87; 2 Russ. 238; Milsington *v.* Mulgrave, 2 Mad. 491; 5 Mad. 472.

[1] Ibid.

[2] Colegrave *v.* Manby, 6 Mad. 87; 2 Russ. 238; Bennett *v.* Colley, 5 Sim. 181; 2 M. & K. 225.

[3] Ibid.

[4] Montford *v.* Cadogan, 19 Ves. 635.

[5] Curtis *v.* Lukin, 5 Beav. 147.

[6] Colegrave *v.* Manby, 6 Mad. 82; Tardiff *v.* Robinson, 6 Mad. 83, n.

[7] Ibid.; Bennett *v.* Colley, 2 M. & K. 231; 5 Sim. 181.

for the payment of more rent than is received, the trustees must get rid of the leasehold by assignment, and they have been held responsible for not doing so.[1]

§ 536. The trustee in whom the leasehold interest vests, by the settlement or will, is liable, as assignee of the lease, to perform all its covenants during the continuance of his interest. Therefore, if he ceases to be trustee or assign the lease, he will be liable for no covenants, unless they are broken while it was held by him.[2] But an executor of a lessee is liable upon the covenants, by reason of the privity of estate;[3] and so a trustee will be liable, if he has bound himself personally. On this account, an executor or trustee cannot be required by the *cestuis que trust* to assign over the estate before he is indemnified for such liability.[4]

§ 537. By the law of tenures, as established under the feudal system, the tenant was obliged to pay a fee or fine to his superior lord, upon every alienation of his land, whether in fee, or for life or for years. Hence, to this day in England, upon every renewal of a lease, there is a fine or a fee, considerable in amount, to be paid.[5] In the United States, all such restraints upon the alienation of lands are inconsistent with the spirit of our laws and institutions, and are absolutely void, even if annexed as terms or conditions in the instruments under which the lands are held.[6] Therefore, one great head of equity jurisdiction, in the matter of trusts in leasehold estates, is obsolete in the United States. In England, it is frequently a matter of doubt and construction to determine whose estate and interest shall pay the fine and expenses of the renewal.[7]

§ 538. The right to renew a lease is a valuable right, and may

[1] Rowley *v.* Adams, 4 M. & Cr. 534.

[2] Onslow *v.* Corrie, 2 Mad. 330; Valliant *v.* Dodemede, 2 Atk. 546; Pitcher *v.* Toovey, 1 Salk. 81; 2 Ventr. 228; Taylor *v.* Shum, 1 B. & P. 21; Rowley *v.* Adams, 4 M. & Cr. 532; Trevele *v.* Coke, 1 Vern. 165.

[3] Brett *v.* Cumberland, Cro. Jac. 521.

[4] Simmonds *v.* Borland, 3 Mer. 567; Marsh *v.* Wells, 2 S. & S. 90.

[5] 2 Black. Com. 72.

[6] Livingston *v.* Stickles, 8 Paige, 398; De Peyster *v.* Michael, 6 N. Y. 467; Overbagh *v.* Petrie, 6 N. Y. 510; 8 Barb. 28.

[7] For the reasons stated in the text, it is not important in this country to notice all the rules and distinctions which have been established by the authorities in England. If important, they may be found in Lewin on Trusts, 295–308, and Hill on Trustees, 434–439.

be sold and conveyed.[1] Courts recognize this right, and protect it for the benefit of the trust estate. If trustees are deprived of this right by the acts of third persons, they are entitled to compensation; as where the land is taken for public works, by virtue of some statute, trustees, having a right by custom or by covenant to renew a lease, will have the right to compensation for the land taken.[2] Nor can a trustee renew a lease, in his individual name and for his private benefit, even if the lessor utterly refuses to renew the lease for the benefit of the *cestui que trust*;[3] for the reason that the trustee cannot avail himself of his situation to make any advantage or profit to himself, and if he makes a profit by renewing a lease in his own name, it enures to the benefit of the trust estate, or he shall continue to hold it as trustee.[4] The same rule extends to all persons who hold any position of influence and confidence in respect to others, as tenants for life, tenants in common, and partners. All such persons, if they obtain the renewal of a lease, hold it for the benefit of those interested with them in the estate.[5] The parties, however, who undertake to enforce this trust, must do equity, by repaying their proportion of the expenses incurred in the renewal.[6]

[1] Phyfe *v.* Wardwell, 5 Paige, 268; Anderson *v.* Lemon, 8 N. Y. 236.

[2] Jones *v.* Powell, 4 Beav. 96.

[3] Keech *v.* Sandford, Sel. Cas. Ch. 61; 1 Lead. Ca. Eq. 36, notes; Holt *v.* Holt, 1 Ca. Ch. 190; Fitzgibbon *v.* Scanlan, 1 Dow. P. C. 269; James *v.* Dean, 11 Ves. 392; 15 Ves. 236; Parker *v.* Brooks, 9 Ves. 583; Rowe *v.* Chichester, Amb. 719; Killick *v.* Flexney, 4 Bro. Ch. 161; Griffin *v.* Griffin, 1 Sch. & Lef. 352; Holdridge *v.* Gillespie, 2 John. Ch. 33; McClanahan *v.* Henderson, 2 A. K. Marsh. 388; Galbraith *v.* Elder, 8 Watts, 81; Heager's Ex'rs, 15 S. & R. 65; Fisk *v.* Sarber, 6 W. & S. 18.

[4] Nesbitt *v.* Tredennick, 1 B. & B. 29; James *v.* Dean, 11 Ves. 369.

[5] Palmer *v.* Young, 1 Vern. 376; Pickering *v.* Vowles, 1 Bro. Ch. 197; Fitzgerald *v.* Raynsford, 1 B. & B. 37, n.; Giddings *v.* Giddings, 3 Russ. 241; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Rowe *v.* Chichester, Amb. 715; Eyre *v.* Dolphin, 2 B. & B. 290; Foster *v.* Marriott, Amb. 658; Tanner *v.* Elworthy, 4 Beav. 487; Randall *v.* Russell, 3 Mer. 196; Vanhorn *v.* Fonda, 5 John. Ch. 388; Smiley *v.* Dixon, 1 Penn. 439.

[6] Randall *v.* Russell, 3 Mer. 196; James *v.* Dean, 11 Ves. 396.

CHAPTER XVIII.

POWERS AND DUTIES OF TRUSTEES AS BETWEEN TENANT FOR LIFE AND REMAINDER-MAN.

§ 539. Trustee must act impartially between tenant for life and remainder-man.
§ 540. When tenant for life is entitled to the possession.
§ 541. Where the trust fund is personal property.
§ 542. In what place personal property may be used.
§ 543. Trustee must have possession of stocks and similar securities. Power of attorney to tenant for life.
§§ 544, 545. As to extra cash dividends and stock dividends by corporations.
§ 546. As to the increase of stock upon a farm or plantation.
§ 547. Of property that perishes or is consumed in the use, or decreases in value.
§ 548. Rights of tenant for life under an absolute direction for conversion.
§ 549. Reversionary interests must be sold for benefit of tenant for life.
§ 550. As to the right of tenant for life to income during the first year, — and after the first year.
§ 551. Various rules upon the same subject.
§ 552. As to repairs by tenant for life.
§ 553. As to insurance.
§ 554. As to taxes, rates, and incumbrances.
§ 555. Where tenant for life becomes bankrupt.
§ 556. As to the apportionment of rent, income, dividends, and annuities.

§ 539. Where property is settled upon a trustee to hold in trust for one person for life, and the remainder over for some other person or persons, it is the duty of the trustee to consult the interest of both the tenant for life and the remainder-man. The trustee must act impartially, and not give either an advantage at the expense, or to the prejudice, of the other.[1] A court of equity can correct any mismanagement between the trustee, and either the tenant for life or the remainder-man; it has even set aside a decree obtained by collusion between the trustee and tenant for life.[2]

§ 540. The right of the tenant for life to the possession has

[1] Mortlock v. Buller, 10 Ves. 308; Cowgill v. Oxmantown, 3 Y. & C. 369; Watts v. Girdleston, 6 Beav. 188; Langston v. Ollivant, Coop. 33; Stuart v. Stuart, 3 Beav. 430; Pechel v. Fowler, 2 Anst. 550; Mahon v. Stanhope, cited 2 Sugd. Pow. 512; Marshall v. Sladden, 4 De G. & Sm. 468; Moseley v. Marshall, 22 N. Y. 200.

[2] Wright v. Miller, 4 Seld. 9.

already been stated.[1] Where property is devised specifically, and the right of the trustees to convert it is excluded, and the tenant for life can have no beneficial enjoyment without possession, the trustees must allow him such possession.[2] As was before said, if the title of the tenant for life is a legal and not an equitable title, he is, of course, entitled to the possession;[3] but the tenant for life is, in such case, an implied or *quasi* trustee for the remainder-man, and a court of equity can enjoin him from injuring the inheritance.[4] But if the title is equitable merely, the trustees must see that the equitable tenant for life does not commit waste of any kind;[5] and if he is tenant without impeachment for waste, the trustees must see that the estate is not materially lessened in value by the use made of it.[6] But the trustees cannot compel the tenant for life to repair; and neither the court nor the trustees can interfere with the possession on such grounds.[7] It has been held, however, in the United States, that the tenant for life is obliged to keep the buildings in which he lives from going to decay by using ordinary care, but that he is not obliged to expend any extraordinary sums.[8] Although the rules as to waste are the same in this country and in England, yet it has been said that there should be a different application of them here, on account of the difference of circumstances, and that tenants for life are encouraged to open mines and cut timber, for the reason that such acts are rather improvements than waste, in America.[9] This may be true in some parts

[1] *Ante*, § 329.

[2] Tidd *v.* Lister, 5 Mad. 432; 10 B. Mon. 290.

[3] *Ante*, § 328; Moseley *v.* Marshall, 22 N. Y. 200.

[4] Joyce *v.* Gunnels, 2 Rich. Eq. 259; Horrey *v.* Glover, 2 Hill, Ch. 515; Clarke *v.* Saxon, 1 Hill, Ch. 69; Shibley *v.* Ely, 2 Halst. Ch. 181; Wilson *v.* Edmonds, 4 Fost. 545; Broom *v.* Curry, 19 Ala. 805.

[5] Tidd *v.* Lister, 5 Mad. 432; Freeman *v.* Cook, 6 Ired. Eq. 376; Woodman *v.* Good, 6 W. & S. 169.

[6] Waldo *v.* Waldo, 7 Sim. 261; Leeds *v.* Amherst, 14 Sim. 357; 2 Phil. 117; Burge *v.* Lambe, 16 Ves. 174; Marker *v.* Marker, 9 Hare, 1; 4 Eng. L. & Eq. 95; Newdigate *v.* Newdigate, 1 Sim. 131; Wykham *v.* Wykham, 19 Ves. 14; Smythe *v.* Smythe, 2 Swans. 251; Morris *v.* Morris, 15 Sim. 510; Brydges *v.* Brydges, 2 Sim. 150; Davies *v.* Lee, 6 Ves. 786; Chamberlain *v.* Dummer, 3 Bro. Ch. 549; Woodman *v.* Good, 6 W. & S. 169; Briggs *v.* Oxford, 19 Jur. 817; 1 De G., M. & G. 363; Whitfield *v.* Burnett, 2 P. Wms. 242.

[7] Powis *v.* Blagrave, 1 Kay, 495; 4 De G., M. & G. 448; Gregg *v.* Coates, 23 Beav. 33.

[8] Wilson *v.* Edmonds, 11 Fost. 545.

[9] Williams on Real Prop., 23, n.; Lynn's App., 31 Penn. St. 44.

of the country, where it is important to clear the land and develop its resources, but it is not true in the older States.

§ 541. Where the tenant for life is entitled to the beneficial use of movable articles, heirlooms, furniture, plate, pictures, and similar things, the trustees must take in the first instance a schedule of the articles delivered to such tenant for life signed by him ;[1] but if there is any danger that the articles will be wasted, secreted, or carried away, security may be insisted upon, and the trustees or the *cestui que trust* in remainder may apply to the court for an injunction, and a decree that the tenant for life be required to give proper security for their safety.[2] In Pennsylvania, there is special legislation authorizing the executor to take security.[3] In case of a legacy for life of money or stocks, the tenant for life cannot have possession of them without giving security for the protection of the remainder-man.[4]

§ 542. Personal chattels, like furniture and other articles, may

[1] Leeke *v.* Bennett, 1 Atk. 471; Bill *v.* Kynaston, 2 Atk. 82; Cheshire *v.* Cheshire, 2 Ired. Eq. 590; Westcott *v.* Cady, 5 John. Ch. 334; Henderson *v.* Vaulx, 10 Yerg. 30; Covenhoven *v.* Shuler, 2 Paige, 122; De Peyster *v.* Clendinning, 8 Paige, 295; Spear *v.* Tinkham, 2 Barb. Ch. 211; Emmons *v.* Cairnes, 3 Barb. 243; Langworthy *v.* Chadwick, 13 Conn. 42; Hudson *v.* Wadsworth, 8 Conn. 363; Nance *v.* Coxe, 16 Ala. 125; Mortimer *v.* Moffatt, 4 Hen. & Munf. 503; Slanning *v.* Style, 3 P. Wms. 336.

[2] Woodman *v.* Good, 6 W. & S. 169; Swann *v.* Ligan, 1 McCord, Ch. 227; Henderson *v.* Vaulx, 10 Yerg. 30; Covenhoven *v.* Shuler, 2 Paige, 122; Braswell *v.* Morehead, 1 Busb. Eq. 26; Lippincott *v.* Warder, 14 S. & R. 118; Ramey *v.* Green, 18 Ala. 771; Kinnard *v.* Kinnard, 5 Watts, 108; Wescott *v.* Cady, 5 John. Ch. 334; Langworthy *v.* Chadwick, 13 Conn. 42; Bill *v.* Kynaston, 2 Atk. 82; Frazer *v.* Beville, 11 Grat. 9; Foley *v.* Burnell, 1 Bro. Ch. 279; Hudson *v.* Wadsworth, 8 Conn. 363; Holliday *v.* Coleman, 2 Munf. 162; Mortimer *v.* Moffatt, 4 Hen. & Munf. 503; Chisholm *v.* Starke, 3 Call, 25; McLemore *v.* Good, 1 Harp. Eq. 272; Cheshire *v.* Cheshire, 2 Ired. Eq. 569; Sutton *v.* Cradock, 1 Ired. Eq. 134; Howell *v.* Howell, 3 Ired. Eq. 522; Clarke *v.* Saxon, 1 Hill, Ch. 75; Spear *v.* Tucker, 2 Barb. Eq. 211; Condy *v.* Adrian, 1 Hill, Ch. 154. Where a purchaser from the tenant for life was compelled to give security. Walcott *v.* Cady, 5 John. Ch. 51; Pringle *v.* Allen, 1 Hill, Ch. 135; Howe *v.* Dartmouth, 2 Lead. Ca. Eq. 262.

[3] Act, 1834; Dunlop, 528; Rodgers *v.* Rodgers, 7 Watts, 19; Lippincott *v.* Warder, 14 S. & R. 118, and Kinnard *v.* Kinnard, 5 Watts, 108, were decided before this legislation.

[4] Patterson *v.* Devlin, 1 McMul. Eq. 459; Freeman *v.* Cooke, 6 Ired. 679; Eichelberger *v.* Barnitz, 17 S. & R. 293; Rodgers *v.* Rodgers, 7 Watts, 19; Kinnard *v.* Kinnard, 5 Watts, 108.

be used by the tenant for life if he is entitled to the possession in any house or place; or he may let them out for hire,[1] but he cannot pawn or sell them beyond the extent of his interest; [2] but articles in a house, in the nature of heirlooms, are annexed to the house, and go with it, therefore they cannot be removed.[3]

§ 543. Where the trust property consists of stocks and other personal securities, the trustee must retain possession for the benefit of the remainder-man; but he may put the tenant for life in possession of the dividends, interest, or income, by giving him a power of attorney to collect them as they become due. The power should be restricted to the collection of the income; for if he gave the tenant for life power to sell the securities, he would commit a breach of the trust. Nor should it be used after the death of the tenant for life; for the trustee would be responsible to the remainder-man for all income received by the representatives of the tenant, accruing after his death. Care must be taken by the trustee, after giving the power, himself not to receive the dividends; for that would be a revocation of the power, and a new one would be necessary. So the death of the trustee, or of one of several trustees, would be a revocation.[4] If, at any time, the tenant for life obtains more than belongs to him, the trustee may withhold, or recoup from, subsequent income.[5]

§ 544. Considerable difference of opinion and practice has existed respecting the rights of the tenant for life, and of the remainder-man, to extraordinary dividends or bonuses from corporations. The early English rule held that *extra* dividends paid in cash, and *a fortiori* if they were declared or paid in capital stock, went to the capital of the trust fund, and were held by the trustee for the remainder-man; and that the income only from such extra dividends belonged to the tenant for life.[6] This rule, applied to extra cash dividends from the earnings of the capital stock of corporations, worked a great hardship upon the tenant for life, and it is

[1] Marshall *v.* Blew, 2 Atk. 217.

[2] Hoare *v.* Parker, 2 T. R. 376.

[3] Cadogan *v.* Kennett, Cowp. 432.

[4] Sadler *v.* Lee, 6 Beav. 324; Hill on Trustees, 386; Lewin, 485.

[5] Williams *v.* Allen, 32 Beav, 650; Barratt *v.* Wyatt, 30 Beav. 442.

[6] Brander *v.* Brander, 4 Ves. 801; Paris *v.* Paris, 10 Ves. 184; Witts *v.* Steere, 13 Ves. 67; Clayton *v.* Gresham, 10 Ves. 288; Hooper *v.* Rossiter, 13 Price, 774; 1 McClel. 527; Preston *v.* Melville, 16 Sim. 163.

unreasonable. In Barclay *v.* Wainwright, Lord Eldon first threw a doubt over the cases, by decreeing an increased or extra dividend to the tenant for life.[1] It was afterwards said, that wherever the increased dividend was made clearly and distinctly as a dividend only, the tenant for life should have it, but where it was not clearly given as a dividend, it was considered as an accretion to the capital, and went to the remainder-man.[2] Thus cash dividends, extra dividends, or bonuses declared from the earnings of corporations, are now held to be income and to belong to the tenant for life.[3] So also dividends and bonuses earned before the testator's death, but declared afterwards, are held to be income and to belong to the tenant for life.[4] But the enhanced price for which stocks sell, by reason of dividends earned, but not declared, belongs to the remainder-man and not to the tenant for life.[5] Where a tenant for life is entitled to the income, a year or more after the testator's death having expired, and stocks are sold before the day of the dividend, in order to complete a purchase of land which was directed by the will, the tenant for life is entitled to compensation for the loss of his income.[6] So if, under a gift in a will to an executor of so much stock or other property as will produce $2000 per year, which is to be paid over to a tenant for life, property is set apart in good faith with the consent of all parties, sufficient to produce $2000, and afterwards the property produces much more, and there is no provision in the will for such a contingency, the tenant for life will be entitled to the whole income, and may maintain a bill in equity for it.[7]

§ 545. Another question has lately arisen upon which there is much diversity of opinion and practice. The question is, to whom stock dividends, so called, belong. Are they income, and belong to

[1] Barclay *v.* Wainwright, 14 Ves. 66; Norris *v.* Harrison, 2 Mad. 279.

[2] Hooper *v.* Rossiter, McClel. 527.

[3] Price *v.* Anderson, 15 Sim. 473; Bates *v.* Mackinley, 31 Beav. 280; Johnson *v.* Johnson, 15 Jur. 714; 5 Eng. L. & Eq. 164; Murray *v.* Glasse, 17 Jur. 816; Cuming *v.* Boswell, 2 Jur. (N. S.) 1005; Clive *v.* Clive, Kay, 600; Plumbe *v.* Neild, 6 Jur. (N. S.) 529; Wright *v.* Tucket, 1 Johns. & Hem. 266; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Ware *v.* McCandlish, 10 Leigh, 595; Read *v.* Head, 6 Allen, 174.

[4] Bates *v.* Mackinley, 31 Beav. 280.

[5] Scholfield *v.* Refern, 32 L. J. Ch. 627.

[6] Londesborough *v.* Somerville, 19 Beav. 295.

[7] Russell *v.* Loring, 3 Allen, 126.

the tenant for life; or capital, and belong to the remainder-man? By the early English rule, they went with all extra cash dividends or *bonuses* to the remainder-man.[1] This rule has been so far changed, that dividends in money which come from the earnings of the capital invested belong to the tenant for life.[2] But this question has arisen where a corporation has capitalized a part of its earnings, by using them to enlarge its property, or to improve its value. In such cases, corporations sometimes vote to issue and apportion among their stockholders new certificates of stock, which certificates (in whole or in part) represent the amount of earnings that have been capitalized, as some of the books call it. On one side of this question, it is urged that nothing is income from the stock of a corporation until the corporation itself has set it apart as income, and declared it to be payable in money as a dividend; that a corporation may in good faith determine whether it will declare a dividend or not, and it may also declare whether any part of its earnings shall be turned into capital or not; that if a corporation in good faith uses a part of its earnings in enlarging and improving its works, and thereby increases the value of its stocks, such increased value belongs to the remainder-man; that it is immaterial whether a corporation allows the old shares to stand at this increased value, or whether it issues new certificates of shares to represent this new and increased value of its capital stock; that nothing is a dividend, in the legal sense of the word, which is not a division of money from what the corporation has determined to be income; that if a corporation determines to apply a certain sum of money in its hands to purposes for which capital is usually applied, and to issue new certificates of stock to its shareholders, in the proportion of their number of shares, to represent such sum, it is in no legal sense a dividend, but an apportionment of capital, and although such proceedings are in popular

[1] Brander *v.* Brander, 4 Ves. 800; Paris *v.* Paris, 10 Ves. 185; Witts *v.* Steere, 13 Ves. 67; Clayton *v.* Gresham, 10 Ves. 288; Hooper *v.* Rossiter, 13 Price, 774; 1 McClel. 527; Preston *v.* Melville, 16 Sim. 163.

[2] Barclay *v.* Wainwright, 14 Ves. 66; Norris *v.* Harrison, 2 Mad. 279; Hooper *v.* Rossiter, 1 McClel. 527; Price *v.* Anderson, 15 Sim. 473; Bates *v.* Mackinley, 31 Beav. 280; Johnson *v.* Johnson, 5 Eng. L. & Eq. 164; 15 Jur. 714; Murray *v.* Glasse, 17 Jur. 816; Cuming *v.* Boswell, 2 Jur. (N. S.) 1005; Clive *v.* Clive, Kay, 600; Plumbe *v.* Neild, 6 Jur. (N. S.) 529; Wright *v.* Tucket, 1 John. & Hem. 266; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Ware *v.* McCandlish, 11 Leigh, 595.

language and in corporate votes often called stock dividends, they are not dividends in law, but are accretions to the capital, and go to the remainder-man. It is further urged in illustration, that if the trust fund is invested in land, and the land rises in value from its situation, or from the use and necessary improvements made by the tenant for life, such increased value becomes capital and belongs to the remainder-man. Chief-Baron Alexander, Vice-Chancellor Wood, now the Lord Chancellor, and the Supreme Court of Massachusetts, have adopted this view, and have determined that such appropriations of earnings and the new certificates of stock, representing additions to the capital stock, whether declared under the name of stocks, dividends, or however appointed or apportioned by the corporation or its directors, are capital and belong to the remainder-man.[1] The rule laid down in these several cases seems to be this, that where the apportionment of shares, or stock dividend, so called, creates new capital, in addition to that already existing, thereby enlarging and increasing the value of the property, whether it comes from earnings or from other sources, as from rise in value, it belongs to the remainder-man; while all dividends paid in cash or otherwise, not in addition to or in diminution of the capital, go to the tenant for life. These courts, observing this general distinction, range all cases under one or the other head, without so much regard to the name given to the dividend as to the actual character of the transaction. Thus *In re* Barton's Trust, and in Minot *v.* Paine,[2] where the earnings were not divided as cash, but were expended on the property, the capital increased and a stock dividend declared, it was held to go to the remainder-man; while in Leland *v.* Hayden,[3] the corporation having purchased its own stock with its earnings, and then divided it among its stockholders, it was held that it went to the tenant for life, it not being an accretion to the capital. But in Daland *v.* Williams, the court, looking to the substance of the transaction, held that, although the dividend was declared in stock or cash at the option of the stockholder, yet if he, being a trustee, elected to take the stock, and it was for the interest of the estate that he should, and all the parties so agreed, it then belonged to the re-

[1] Hooper *v.* Rossiter, 1 McClel. 527; *In re* Barton's Trust, L. R. 5 Eq. 238; Minot *v.* Paine, 99 Mass. 101.

[2] Ibid.

[3] Leland *v.* Hayden, 102 Mass. 550.

mainder-man and not to the tenant for life.[1] On the other hand, it has been claimed in behalf of the tenant for life, that, as nothing but profits can be divided, all dividends declared, whether in stock or cash, being the produce, proceeds, or result of the property, belong to the tenant for life. Cases involving this question have been decided in several States, contrary to the decisions in Massachusetts and the courts in England; and it has been decreed that stock dividends, in whole or in part, belong to the tenant for life, and not to the remainder-man. In Pennsylvania, it was held that all accumulations in stock, after the death of a testator, are as much a part of the income of the principal as current dividends, and as such belong to the tenant for life; and that no action whatever of the corporation could deprive the tenant for life of them and give them to the remainder-man; that the value of stock held by the testator at the time of his death is the capital of the trust, and must remain subject to the trusts in the will; that all income of such capital, whether in the form of other certificates or not, must be regarded as income.[2]

[1] Daland *v.* Williams, 101 Mass. 571.

[2] Earp's App., 28 Penn. St. 368. The question stated at length in this section is important to tenants for life and to remainder-men; and from the character of the decisions in the various States, and from the great number of States in which no decision has yet been had, it may be considered an open question, at least in a great majority of the States. In only two States have there been decisions in the courts of last resort, and in those States the decisions are quite different, not to say antagonistic. There is no doubt of the doctrine in England. Beginning with the rule, that all extra dividends or "bonuses," even if paid in cash, should go to the remainder-man [see cases before cited], it gradually came about that all such dividends made as "dividends" from the earnings, produce, proceeds, interest, or income of the corporation, should be considered income, and should belong to the tenant for life. But while such was the rule in regard to all dividends, made as dividends, it became equally well settled that all appropriations from the earnings made to the capital, or stock dividends as they are sometimes called, belong to the remainder-man. Thus in Hooper *v.* Rossiter, 1 McClel. 536 (1824), Ch. Baron Alexander said: "All the cases proceed upon the same principle. It seems from all of them, from the first to the last, that wherever the addition was made clearly and distinctly, as dividend only, the tenant for life was to have it; but wherever it was not clearly given as a dividend, it was considered as an accretion of capital divisible among the proprietors. I have looked into all the cases with great care, and that seems to be the result of them. Whether the testator makes use of the expression 'dividends,' or 'dividends and profits,' or 'dividends, interest, and profits,' or (as in this case), 'interest, dividends, profits, and proceeds,' I look upon all of them to come to the same thing, and that this is too nice a circumstance to found any distinction on. This disposes of the claim of the plaintiff, as tenant for life."

While in New York and New Jersey, masters were appointed to inquire and determine how much of the stock dividend was capital,

Again, in 1868, *In re* Barton's Trusts, L. R., 5 Eq. 244, Vice-Chancellor Wood, in answer to the argument and the observation of Lord Eldon, that the corporation has the power to give the property to the tenant for life, or to the remainder-man, said: "The dividend to which the tenant is entitled is the dividend which the company chooses to declare. And when the company meet and say, that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account, and turn it into capital, it is competent for them to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain. . . . If a man has his shares placed in settlement, he gives his trustees, in whose names they stand, a power of voting, and he must use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said, that they 'will not divide' this money, but turn it into capital, capital it must be from that time. I think that is the true principle." The meaning of this is, that where a corporation votes "not to divide" its earnings, but to turn it into capital, it becomes capital to the corporation, and that what is capital to the corporation must be capital to its shareholders; and although the corporation may vote that such increased capital shall be apportioned or divided among its shareholders *pro rata*, it is not a "dividend" of "profits" or "interest" or "income," or "proceeds," or "produce," within the meaning of a testator in his will, or within the meaning of the law. The same principle was reiterated by V. C. Malins, in Dec. 1870, in Ricketts *v.* Harling. Weekly Notes, Dec. 17, 1870, p. 260. The Supreme Court of Massachusetts, in Minot *v.* Paine, 99 Mass. 101, probably intended to establish this general doctrine, but the opinion went somewhat further, and laid down a rule which is not properly guarded, and as a rule it has been modified or abandoned in the later decisions. The rule, as stated, is "to regard cash dividends, however large, as income, and stock dividends, however made, as capital." In Simpson *v.* Moore, 30 Barb. 637, there was a cash dividend of eighteen per cent, which embraced a part of the capital of the corporation, it being a bank in process of liquidating and winding up its affairs. This manner of declaring a dividend would not prejudice where the same person was entitled to the whole sum beneficially; but where a tenant for life was entitled to the income, and a remainder-man was entitled to have the capital reinvested, it became necessary, of course, to determine the proportions belonging to each. And so in Leland *v.* Hayden, 102 Mass. 550, where a dividend was made of the stock of the corporation, which stock had been bought in by the corporation itself with its earnings, and the dividend so made did not represent any increase of the capital stock, the court decreed it to be income and to belong to the tenant for life. If the court had been content to reaffirm the principle of the later English cases, such as Hooper *v.* Rossiter, and *Re* Barton's Trusts, and had not laid down the rule as quoted above from Minot *v.* Paine, it would have saved some misapprehension. This rule, in the broad terms in which it is stated, has been thus modified in Leland *v.* Hayden, and the rule as stated in the text seems to be the result of the Massachusetts decisions on this subject.

Earp's App., 28 Penn. St. 368, is a leading case against the authority

or made to represent an increase in the value of the property, and how much came from income or earnings, and also how much of the

of the English and Massachusetts cases. In that case a testator had 541 shares of stock in a corporation, the par value of which was $50, but which at the time of his death, in 1848, were worth $125 per share. The shares went on increasing in value, in addition to regular dividends, so that, in 1854, the corporation called in the old certificates, and issued certificates for 1350 shares of the value of $80 per share, in place of the 541 held by the testator at his death. Or, by another mode of calculating, the shares were worth $67,500 at the time of the testator's death, and $108,000 in 1854. The question arose whether this increase of $40,500 belonged to the tenants for life or the remainder-men. The action of the corporation, in making this change of certificates, does not very clearly appear; nor does it very clearly appear whether the increased value was wholly from accumulation of profits, or whether any part of it was from the rise of the value of the property. Perhaps this is not material, from the view taken by the court. Chief-Justice Lewis in the opinion says: "It is equally clear, that the profits, arising since the death of the testator, are 'income' within the meaning of the will, and should be distributed among the appellants (tenants for life). The profits amounted, at the time of the issue of new certificates of stock, to the sum of $40,500, exclusive of the current semiannual dividends which have been previously declared and paid. That sum is the rightful property of the appellants. The managers might withhold the distribution of it for a time, for reasons beneficial to the interests of the parties entitled. But they could not, by any form of procedure whatever, deprive the owners of it, and give it to others not entitled. The omission to distribute it semiannually, as it accumulated, makes no change in its ownership. The distribution of it among the stockholders, in the form of new certificates, has no effect whatever upon the equitable right to it. It makes no kind of difference whether this fund is secured by 541 or by 1350 certificates. Its character cannot be changed by the evidence given to secure it. Part of it is 'principal,' the rest is 'income' within the meaning of the will. The principal must remain unimpaired during the lives of the appellants, and the 'income' arising since the death of the testator is to be distributed among them. Standing upon principle, and upon the intent of the testator plainly expressed in his will, we have no difficulty whatever in making this disposition of the fund." In regard to this case, it may be said that it goes too far. It cannot be sustained in all its broad assertions, whether they are necessary for the decision of the case or not. For instance, it has never been supposed that a stockholder in a corporation had any ownership in the earnings of a corporation before the corporation itself had set apart a sum as earnings, and declared and divided it as a dividend. If, therefore, a corporation, acting in good faith, uses its earnings in improving its property, and neglects to apportion or divide them, how can a tenant for life enforce his ownership? Can a court of equity compel a corporation, acting in good faith, to declare a dividend? Further, it has generally been supposed, that if a corporation does not declare a dividend, and the value of the stock increases from the use of the earnings, as capital in its business, or if the value of its stock rises from any reason, and the stock is sold by the trustee for an enhanced price, all the increased value

stock dividend was made up of accumulations of earnings before, and how much from earnings after, the investment.[1]

over the original appraised value belongs to the trust fund, and the income thereof only goes to the tenant for life, and the fund to the remainder-man. But if this is not so, and the increased value of the stock goes to the tenant for life, as held by Chief-Justice Lewis, is the converse of his proposition true; and if stock sells for less than its appraised value at the time of the institution of the trust, can the trustee withhold dividends or income from the tenant for life until the original appraised value is made good? The authority of a corporation to apply any part of its earnings to the permanent improvement of its property, and thus to deprive the tenant for life of his share of the income or earnings of the corporation, is denied in this case, at least so far as the rights of a tenant for life are concerned. In short, the proposition or assertion of this case that the earnings are the rightful property of the tenant for life, and that no action of the corporation can alter his rights to them, cannot be sustained in practice, for the simple reason that nothing belongs to the stockholder until a dividend is made, and, until a dividend is made, the tenant for life has no rights or ownership to be altered or affected by the action of the corporation. It was said by Lord Eldon, that the corporation has it in its power to give the benefit to the tenant for life or not; and this he said not as a proposition of law, but as a statement of the practice of the courts. The corporation cannot alter any of the rights of the tenant for life, nor can it invest any of his money in a manner not agreeable to him, for the simple reason that until the corporation has declared the dividend the tenant for life has no rights to be altered, and no money to be invested. It is only after the corporation has made a dividend, and the trustee has it in hand, that the tenant for life has any right, or is in any position to claim any thing. The corporation must deal with its stockholders as absolute owners. If, therefore, the corporation has a right to turn any part of its "income" into capital, as against the absolute owner, who has not only the life interest, but the whole interest in himself, it must have the same right as against the trustee, who, so far as the corporation is concerned, is the absolute owner of the stocks. The corporation, then, would seem to have the right, acting in good faith, to apply its income as capital to its business, especially if the corporation itself, or its directors, acting within the scope of their authority, vote to do so. If the corporation votes to do so, and thus increases the value of the shares in the hands of the trustees, but creates no new shares, can the tenant for life call for this increased value? If he can, and the case in Pennsylvania seems so to decide, a new principle will be established in the government of corporations and in the administration of trusts. It is apparent from these observations, that the opinion in the case of Earp's Appeal cannot be carried to the logical conclusions to which it leads. It is proper to say, however, that the nature of the acts by the corporation does not very clearly appear. Whether the corporation intended to make a stock dividend or not, or whether the accumulations were used in the legitimate business of the

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[1] Clarkson *v.* Clarkson, 18 Barb. 646; Simpson *v.* Moore, 30 Barb. 638; Van Doren *v.* Olden, 19 N. J. (4 C. E. Green), 117.

§ 546. A different rule seems to apply to the gift of a farm and stock of cattle for life. In such cases, all improvements made upon

corporation as capital, or whether it remained accumulated income not divided, and not applied to capital, does not certainly appear; perhaps for the reason that the court treats such considerations as immaterial. In New York, the case of Simpson *v.* Moore, 31 Barb. 638, has little to do with the question, for the reason that the cash dividend made in that case was partly composed of earnings, and partly of capital of a corporation that was winding up its affairs. But the case of Clarkson *v.* Clarkson, 18 Barb. 646, is a direct decision upon the point, that, if a corporation makes a stock dividend from its gains, profits, income, and proceeds, such stock dividend must be considered as income from the original investment, and belongs to the tenant for life; but if any thing is given to the trustee, not as interest, dividend, or proceeds, but as part of the capital, it is capital, and belongs to the remainder-man. The court sent the case to a referee to determine the facts. In New Jersey, in the case of Van Doren *v.* Olden, 19 N. J. 117, the chancellor approved of the reasoning of the court in New York and Pennsylvania, and sent the case to a master to inquire and report how much of the stock dividend was capital, and how much income, and also how much of the stock dividend was made up of accumulations before the investment of the trust fund in the stock of the corporation, and how much of it came from earnings after the investment. The Court of Massachusetts notices a difficulty in making satisfactory inquiries on these points, as corporations might refuse to expose their business, or they might be out of the jurisdiction of the court, and situated so that it would be impossible to arrive at a satisfactory result. It is quite important that a principle should be established to guide trustees in the performance of their duties, as in many cases the remainder-men are infants, or they are not even in existence when the question arises, and should be settled. Generally, the rights of such *cestuis que trust* cannot be definitively adjusted until they are competent to act for themselves, and call for a settlement of the accounts. Thus, trustees may be compelled to rectify any mistake they may make in this matter years after the event.

In Read *v.* Head, 6 Allen, 174, it was decided that dividends of a land company, whose income was made from sales of its land or capital in business, belonged to the tenant for life under the will of a testator, although such sales might exhaust the capital of the corporation and entirely defeat the remainder-man. This decision went upon the ground that it was the intention of the testator when he devised the income of such stock to one for life, that, as the tenant for life could have no income except from such dividends as came from capital, he must take the dividends as made. All the cases profess to go upon the intention of the testator. Therefore a testator may foreclose this question in his will by giving such directions as to leave no question as to his intention.

In Atkins *v.* Allen, 12 Allen, 359, where a corporation increased the number of its shares, and required the par value of such shares to be paid in by the subscribers therefor; and as the shares were above par, and as the right to subscribe for the same was a valuable right, it gave this right to its old stockholders, — it was determined that this right belonged to the capital invested, and went to the remainder-man with the capital; that it was neither a cash nor a stock dividend,

the real estate by the tenant for life will accrue to the remainder-man as of course. But any increase in the farming stock will belong to the tenant for life. He is under no obligation to increase the stock upon the farm; and if he does so, the increase will not be capital, but will inure to the benefit of the tenant for life or his representatives.[1] A different rule was applied in the Southern States in relation to the gift of negro slaves for life. In Virginia, Alabama, North Carolina, and South Carolina, the increase of such slaves was added to the capital, and went to the remainder-man.[2] In Maryland, the general rule was applied, and the tenant for life took the increase of the slaves;[3] but where the *income* of a farm, on which there were slaves, was given to one for life, the increase was allowed to the remainder-man.[4] In Pennsylvania, it was held that

nor income of any kind, but an advantage, or possibility, or opportunity belonging to the capital; see Gray *v.* Portland Bank, 3 Mass. 364, to the same effect. But in Wiltbank's App., 64 Penn. St. 256, a corporation increased its shares, and gave the right to subscribe therefor to its old shareholders at par; a trustee took the shares that the trust estate was entitled to subscribe for, and paid for them with his own money, and sold the shares for an advance. This advance he carried to the credit of the capital of the trust fund, which would eventually have gone to the remainder-man. But the court held, that this advance above the par value was a "premium" on the stock, and was a "product" of it, and belonged to the tenant for life. If this case is carried to its logical results, it must be held that if a trustee sells stock for more than it is appraised in his inventory, or if he invests in the stock of a corporation, and such stock increases in value from any cause, he must in all cases pay the increased value to the tenant for life. This may not be just and equal for the remainder-man, for he must bear all the risks of depreciation, or of total loss from long delay; while, on the other hand, if this rule is carried out, it is not possible for him to reap any advantage from an increase of value.

[1] Robertson *v.* Collier, 1 Hill, Eq. 370; Calhoun *v.* Ferguson, 3 Rich. Eq. 170; Woods *v.* Sullivan, 1 Swans. 507; Horrey *v.* Glover, 2 Hill, Eq. 515; Patterson *v.* High, 8 Ired. Eq. 52; Scott *v.* Dobson, 1 H. & McH. 160; Wooten *v.* Burch, 2 Md. Ch. 191; Holmes *v.* Mitchell, 4 Md. Ch. 163; Patterson *v.* Devlin, 1 McMul. 459; Evans *v.* Iglehart, 6 G. & J. 172; Poindexter *v.* Blackburn, 1 Ired. Eq. 286; Hunt *v.* Watkins, 1 Humph. 498; Saunders *v.* Houghton, 8 Ired. Eq. 217.

[2] Ellison *v.* Woody, 6 Munf. 368; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Covington *v.* McEntire, 2 Ired. Eq. 316; Patterson *v.* High, 8 Ired. Eq. 52; Milledge *v.* Lamar, 4 Des. 616; Strong *v.* Brewer, 7 Ala. 713; Robertson *v.* Collier, 1 Hill, Eq. 370; Patterson *v.* Devlin, 1 McMul. 459; Horrey *v.* Glover, 2 Hill, Eq. 515.

[3] Scott *v.* Dobson, 1 H. & McH. 160; Holmes *v.* Mitchell, 4 Md. Ch. 163; Evans *v.* Iglehart, 6 G. & J. 172; Wooten *v.* Burch, 2 Md. Ch. 191.

[4] Holmes *v.* Mitchell, 4 Md. Ch. 263; 4 Md. R. 532.

the remainder-men were entitled to farm stock and implements purchased by the tenant for life to keep up the stock and tools; but this was under the special words of a will.[1] The general rule is, that the tenant for life is under no obligation to replace those things given for life, which are consumed by the using, and, if he purchases other articles in the place of them, such articles are his own.[2]

§ 547. Where there is a *specific* gift for life of things which are consumed in the using, the tenant for life must have the possession and the use, according to the gift, and the gift or remainder over is void.[3] But if the gift of such articles, or of perishable articles, is *residuary* or *general*, the trustee must sell the articles and invest the proceeds, so that the tenant for life may receive the interest or income, and the principal sum remain for the remainder-man.[4] If the property consists of leaseholds, annuities, or other interests, which grow less valuable by lapse of time, they must be sold, and the proceeds invested in some permanent form, so that the interest can be paid to the tenant for life, and the remainder-man can receive a proper sum as principal.[5] If the trustee does not convert

[1] Flowers *v.* Franklin, 5 Watts, 265.

[2] Patterson *v.* Devlin, 1 McMul. 459; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Black *v.* Ray, 1 Dev. & Bat. Eq. 443; Covenhoven *v.* Schuler, 2 Paige, 131.

[3] Tyson *v.* Blake, 22 N. Y. 558; Shaw *v.* Huzzey, 41 Me. 495; Scott *v.* Perkins, 28 Me. 22; McDonnald *v.* Walgrove, 1 Sand. Ch. 275; McLane *v.* McDonald, 2 Barb. S. C. 537; Wright *v.* Miller, 8 N. Y. 25.

[4] Clark *v.* Clark, 8 Paige, 152; Williamson *v.* Williamson, 6 Paige, 298; Randall *v.* Russell, 3 Mer. 194; Porter *v.* Tournay, 3 Ves. 314; Andrew *v.* Andrew, 1 Coll. 690; Spear *v.* Tinkham. 2 Barb. Ch. 211; Emmons *v.* Cairns, 3 Barb. 243; Cairns *v.* Chaubert, 9 Paige, 160; Woods *v.* Sullivan, 1 Swan, 507; Covenhoven *v.* Shuler, 2 Paige, 122; Eichelberger *v.* Barnitz, 17 S. & R. 293; Booth *v.* Ammerman, 4 Bradf. 132; Bradner *v.* Falkner, 2 Kern. 472; Patterson *v.* Devlin, 1 McMul. Eq. 459; Robertson *v.* Collier, 1 Hill, Eq. 373; Horrey *v.* Glover, 2 Hill, Eq. 515; Calhoun *v.* Furgeson, 7 Rich. Eq. 165; Saunders *v.* Houghton, 8 Ired. Eq. 217; Taylor *v.* Bond, 1 Busb. Eq. 25; Homer *v.* Shelton, 2 Met. 194. In Maryland, however, under the act of 1798, c. 101, it was held that the general rule as to conversion was not in force in that State, and that the tenant for life under a *general* residuary clause was entitled to enjoy the articles of property that fell into the residue *in specie.* Evans *v.* Iglehart, 6 G. & J. 192. But if the residue consists of money, or property, the use of which is a conversion into money, the executor or trustee must convert it into money and invest it. Evans *v.* Iglehart, 6 Gill & J. 192; Wooten *v.* Burch, 2 Md. Ch. 199.

[5] *Ante*, §§ 449, 450; Howe *v.* Dartmouth, 7 Ves. 137; Mills *v.* Mills, 7 Sim. 501; Litchfield *v.* Baker, 2 Beav. 481; Alcock *v.* Sloper, 2 M. & K. 701;

such property within a reasonable time, the remainder-man can proceed against him as for a breach of trust. The tenant for life will be compelled to refund whatever he has received beyond his equitable proportion, and the trustees, in the event of the failure or inability of the tenant for life to refund, must make good the difference.[1] If, however, the remainder-man acquiesces for a long time in the receipt of the whole actual income by the tenant for life, or does not claim any relief for such payments, the court will confine its decree to conversion. So, if all parties consent that annuities and other rights may not be sold, the court will sanction their retention by the trustees.[2] The rights of tenant for life and remainder-man will depend very much upon the construction of the will and the directions contained in it.[3] If leaseholds and terminable annuities are rapidly growing less valuable, or if other property is perishing, and they are given *specifically* in the will for the tenant for life, he is entitled to them, although the remainder-man will be entirely excluded; for the reason that the testator himself had the right to make such disposition of his estate as he saw fit, and if he conferred upon the remainder-man only the possible chance of taking what might be left by the tenant for life unex-

Fearns *v.* Young, 9 Ves. 552; Pickering *v.* Pickering, 2 Beav. 57; 4 M. & Cr. 298; Dimes *v.* Scott, 4 Russ. 200; Cairns *v.* Chaubert, 9 Paige, 160; Clark *v.* Clark, 8 Paige, 152; Benn *v.* Dixon, 10 Sim. 636; Eichelberger *v.* Barnitz, 17 S. & R. 293; Covenhoven *v.* Shuler, 2 Paige, 132; Wooten *v.* Burch, 2 Md. Ch. 190. Farming stock is not within the rule. Groves *v.* Wright, 2 K. & J. 347.

[1] Ibid. In Meyer *v.* Simonson, 5 De G. & Sm. 726, Vice-Chancellor Parker stated the rules which govern the court on the subject as follows: "The personal estate of a testator may be considered as divided into three different classes: (1.) Property which is found at the testator's death invested in such securities as the court can adopt, as money in the funds or on real securities. The tenant for life is entitled to the whole income of this. (2.) Property which can be converted into money without sacrificing any thing by a forced sale. As to this the rule is clear: it must be converted and the produce must be invested in securities which the court allows, and the tenant for life is entitled to the income of such investment. (3.) Property which, according to a reasonable administration, is not capable of an immediate conversion, and which cannot be sold immediately without involving a sacrifice of both principal and interest. In this case the rule is to take the value of the testator's interest, and to give the tenant for life the income of that present value."

[2] Litchfield *v.* Pickering, 2 Beav. 481; Pickering *v.* Pickering, 4 M. & Cr. 298; Glengall *v.* Barnard, 5 Beav. 245.

[3] Moseley *v.* Marshall, 22 N. Y. 205.

hausted, the remainder-man will receive all that was intended for him and he has no right to complain.[1]

§ 548. If there is a *positive direction* in a will that the trustees shall convert the personal property into government or real securities, and hold them in trust for one for life and remainder over, the *cestui que trust* for life is entitled to receive only so much income as would have arisen from the personal estate, if converted and invested within a year after the testator's death. It has already been stated that trustees are allowed one year to convert the estate into the securities directed by the will, or allowed by the law.[2] If, therefore, a security bearing a much higher rate of interest remains undisposed of, they cannot pay the whole interest so arising to the tenant for life; and if they pay to him the whole extra interest, they would be liable to make good to the remainder-man the difference between what should have been paid under the above rule, and the sum actually paid.[3] If they afterwards dispose of the security, thus bearing a higher rate of interest, more advantageously than they could have done within the year, they will not be allowed to reimburse themselves for the sums they are liable to pay to the remainder-man; but they will be charged with all the interest they received, and with the full amount for which they sold the securities, and will be credited only with the amount that they should have paid the tenant for life.[4] It is said, however, that if there is no express direction in the will for conversion, the trustees will be justified in paying over to the tenant for life all the income received from the securities, whatever the rate of interest,[5] for trustees have a discretion to convert or not as they see fit.[6]

[1] Howe *v.* Dartmouth, 7 Ves. 149; Lord *v.* Godfrey, 4 Mad. 455; Vaughan *v.* Buck, 1 Phil. 80; Bethune *v.* Kennedy, 1 M. & Cr. 116; Pickering *v.* Pickering, 4 M. & Cr. 299; Phillips *v.* Sargent, 7 Hare, 33, where it was held that, if the trustees wrongfully converted such property, the tenant for life was entitled to the whole fund to the exclusion of the remainder-man. Beaufoy's Est., 1 Sm. & Gif. 22; *Re* Steward's Est., 1 Dru. 636; Howe *v.* Howe, 14 Jur. 359; Cotton *v.* Cotton, 14 Jur. 950; Morgan *v.* Morgan, 14 Beav. 72; Pickup *v.* Atkinson, 4 Hare, 628; Prendergast *v.* Prendergast, 3 H. L. Ca. 195.

[2] *Ante*, § 462.

[3] Dimes *v.* Scott, 4 Russ. 195.

[4] Ibid.

[5] Howe *v.* Dartmouth, 7 Ves. 150; Williamson *v.* Williamson, 6 Paige, 303; Prendergast *v.* Prendergast, 3 H. L. Ca. 195; Meyer *v.* Simonson, 5 De G. & Sm. 726.

[6] Yeates *v.* Yeates, 28 Beav. 637.

§ 549. The trustee must exert himself equally to protect the tenant for life and the remainder-men. Therefore, if there are reversionary interests or rights that may not fall in during the life of the tenant for life, so that he can enjoy a benefit from them, the trustee must sell and convert them into money, if they have a value and admit of conversion.[1] As the tenant for life, if entitled to the possession, is a *quasi* or implied trustee for the remainder-man, and is accountable for the highest good faith,[2] so the trustee and the remainder-man must exercise the like good faith towards the tenant for life; and if they join in evicting him from the possession, they will be compelled to make good the rent, whether they received any or not, and that without any equitable allowances.[3]

§ 550. In Sitwell *v.* Bernard, the testator directed his personal estate to be laid out in lands to be settled upon A. for life with remainder over, and that "the interest of his personal estate," meaning interest upon debts due that could not be collected immediately, "should be accumulated and laid out in lands to be settled to the same uses." Of course, if the collections of some outstanding debts were deferred for a considerable time, and the interest accumulated as directed, the tenant for life would lose the income of all the estates to be purchased with the accumulated interest. To obviate this hardship upon the tenant for life, the court confined the accumulation to one year from the testator's death, on the ground that one year was allowed for settling estates and collecting debts, and that, at the expiration of that time, the trustees should be presumed to be ready to make the investment as directed; and if it was not made at that time, that the tenant for life would be entitled to the interest received upon the personal estate, in the place of the income that he would receive from the real estate if the investment was made at the end of one year.[4] On the other hand, if a testator

[1] Howe *v.* Dartmouth, 7 Ves. 150; Fearnes *v.* Young, 9 Ves. 549; Dimes *v.* Scott, 4 Russ. 200; *ante*, § 450.

[2] *Ante*, § 540.

[3] Kaye *v.* Powell, 1 Ves. Jr. 408.

[4] Sitwell *v.* Bernard, 6 Ves. 520; Entwistle *v.* Markland, and Stuart *v.* Bruere, cited 6 Ves. 528, 529; Griffith *v.* Morrison, cited 1 J. & W. 311; Tucker *v.* Boswell, 5 Beav. 607; Kilvington *v.* Gray, 2 S. & S. 396; Parry *v.* Warrington, 6 Mad. 155; Stair *v.* Macgill, 1 Bligh, (N. S.) 662; Walker *v.* Shore, 19 Ves. 387; Taylor *v.* Clark, 1 Hare, 167.

devises his real estate to be sold, and the proceeds thereof, and the rents and profits, in the mean time to be laid out in securities to be settled on A. for life, with remainders over, the accumulation of the rents and profits will be allowed for only one year; that is, there will be one year allowed for the sale of the estate, and the rents and profits may accumulate for that time. If the investment is not then made, the tenant for life is entitled to the rents and profits, as if the sale and investment had been made, and until it is made.[1] From the expressions used by Lord Eldon, in the case of Sitwell *v.* Bernard, it was supposed that in no case could the tenant for life receive any part of the income, where there was a direction to convert personalty into land, or land into personalty; and it was so determined in two cases,[2] but it is now settled, that the tenants for life shall have the first year's income, where there is no express direction to accumulate.[3]

§ 551. The rule, that a tenant for life has an interest in the first year's income varies according to the circumstances of each case. Mr. Lewin[4] states the following propositions and distinctions, gathered from the cases: (1.) The tenant for life of a residue is not entitled to the income accruing, during the delay allowed for the payment of the legacies, on so much of the testator's property as is subsequently applied in paying them.[5] (2.) If a testator desires that his personal estate shall be laid out and invested either in government or real securities in trust for one for life, with remainders over; or in a purchase of lands, with a direction, express or implied, for the investment thereof in the mean time in government or real security, and that the lands to be purchased shall be in trust for A. for life, with remainders over, — the income of the "government and real securities," of which the testator was possessed at the time of his death, these being the very investments contemplated by his will, belongs from the time of the death to the

[1] Noel *v.* Henley, 7 Price, 241; Vickers *v.* Scott, 3 M. & K. 500; Vigor *v.* Harwood, 12 Sim. 172; Greisley *v.* Chesterfield, 13 Beav. 288; Beauland *v.* Halliwell, 1 C. P. Coop. t. Cott. 169, note (a).

[2] Sitwell *v.* Bernard, 6 Ves. 520; State *v.* Hollingworth, 3 Mad. 161; Taylor *v.* Hibbert, 1 J. & W. 388.

[3] Angerstein *v.* Martin, T. & R. 238; Hewitt *v.* Morris, T. & R. 244; Macpherson *v.* Macpherson, 16 Jur. 847.

[4] Lewin on Trusts, 247, 248, 249 (5th ed.).

[5] Holgate *v.* Jennings, 24 Beav. 623; Crawley *v.* Crawley, 7 Sim. 427; Crawley *v.* Dixon, 23 Beav. 512; Fletcher *v.* Stevenson, 9 Hare, 371.

e nant for life.[1] (3.) If the sale and investment, or conversion, is made immediately, during the first year, the tenant for life is entitled to the produce of the property in the converted form "from the time of the conversion," although the trustee had the whole year to convert it.[2] (4.) Where, at the death of the testator, the property is not in the state in which it is directed to be, the tenant for life, before the conversion, is entitled, as the court has decided, not to the actual produce, but to a reasonable fruit of the property, from the death of the testator up to the time of the conversion, whether made in the course of the first year or subsequently; as, if personal estate is directed to be laid out in government or real securities, and part of the personal estate consists of bonds, stocks, &c., not being government or real securities, the tenant for life is entitled to the dividends from the death of the testator, or so much three per cent consolidated bank annuities as such part of the personal estate, not being government or real securities, would have purchased at the expiration of one year from the testator's death.[3] (5.) Where the non-conversion is attended with any risk to the property, as in case of bonds, &c., the remainder-man, whose interest is thus imperilled, has a right to share in the extra profit of the annual produce;[4] but suppose land to have yielded a rental beyond what would have been the annual produce of the purchase-money, and there has been no depreciation, can the remainder-man call back the extra rent received by the tenant for life; or as the remainder-man gets all that was ever intended for him, viz., the undepreciated property, may the tenant for life keep the full rent? If not, then conversely, if the land yields no annual fruit, or less than what the purchase-money would yield, the tenant for life should have a claim against the remainder-man.[5] But if the tenant for life is also a trustee for sale, and neglects to sell, he cannot be allowed to put

[1] Hewitt *v.* Morris, T. & R. 241; La Terriere *v.* Bulmer, 2 Sim. 18; Angerstein *v.* Martin, T. & R. 232; Caldicott *v.* Caldicott, 1 Y. & C. Ch. 337.

[2] La Terriere *v.* Bulmer, 2 Sim. 18; Gibson *v.* Bott, 7 Ves. 89; Angerstein *v.* Martin, T. & R. 240.

[3] Dimes *v.* Scott, 4 Russ. 495; Douglass *v.* Congreve, 1 Keen, 410; Taylor *v.* Clark, 1 Hare, 161; Morgan *v.* Morgan, 14 Beav. 72; Holgate *v.* Jennings, 24 Beav. 623; Llewellyn's Trust, 29 Beav. 171; Hume *v.* Richardson, 8 Jur. (N. S.) 686.

[4] Dimes *v.* Scott, 4 Russ. 495; Stroud *v.* Gwyer, 28 Beav. 130.

[5] Yates *v.* Yates, 28 Beav. 637.

into his own pocket the higher annual produce which has arisen "from his own" laches; for no trustee can derive a profit from the exercise or non-exercise of his own office.[1] (6.) In Gibson *v.* Bott,[2] leaseholds from a defect of title could not be sold, and the court gave the tenant for life interest at four per cent on the value from the death of the testator. It does not appear from the report at what time the value was to be taken; but according to recent cases it should have been ascertained at the expiration of one year from the testator's death.[3] (7.) If a testator's estate comprises funds not immediately convertible, but receivable by instalments, such as a testator's share in a partnership, assessed at a certain sum and payable by instalments, carrying interest at five per cent, the tenant for life is allowed four per cent, from the death of the testator, on the value taken at the expiration of one year from the testator's death.[4] (8.) If it appears from the terms of the will, that the testator intended to give his trustees a discretion as to the time of conversion, which discretion has been fairly exercised, and that the tenant for life was to have the actual income until conversion, the case must be governed by the testator's intention, and not by the general rule.[5]

[1] Wightwick *v.* Lord, 6 H. L. Ca. 217. [2] 7 Ves. 89.

[3] Caldicott *v.* Caldicott, 1 Y. & C. Ch. 312; Sutherland *v.* Cook, 1 Coll. 503.

[4] Llewellyn's Trust, 29 Beav. 171; Meyer *v.* Simonson, 5 De G. & Sm. 723.

[5] Mackie *v.* Mackie, 5 Hare, 70; Wrey *v.* Smith, 14 Sim. 202; Sparling *v.* Parker, 9 Beav. 524; Johnstone *v.* Moore, 4 Jur. (N. S.) 356; Murray *v.* Glasse, 17 Jur. 816.

Mr. Hill says, that "the interest which the tenant for life will take during the first year after the testator's death is yet an unsettled question. This question admits of four possible solutions, and the decisions of very eminent judges may be urged in support of each: (1.) First, the tenant for life may be entitled to nothing until the expiration of a twelvemonth from the testator's death, according to the opinion of Sir John Leach in Scott *v.* Hollingworth, 3 Mad. 161; Vickers *v.* Scott, 3 M. & K. 509, and of Sir Thos. Plumer in Taylor *v.* Hibbert, 1 J. & W. 308. See Tucker *v.* Boswell, 5 Beav. 607, and the income in the mean time is to be added to and form a part of the capital of the residue. Both those learned judges appear to have assumed, that this opinion was in accordance with the established rule of the court, and Sir Thos. Plumer treats this general rule as having been so settled by Lord Eldon in the case of Sitwell *v.* Bernard, 6 Ves. 522. However, in the subsequent case of Angerstein *v.* Martin, T. & R. 238, and see Hewitt *v.* Morris, T. & R. 244, that great judge himself disclaimed any intention of establishing any such general rule by his decision in Sitwell *v.* Bernard, 6 Ves. 522; a decision which he stated to have been founded on the direction to accumulate, which formed an ingredient in that case, and his

§ 552. The liability of the equitable tenant for life, in respect to repairs and waste, is substantially the same as the liability of a

lordship's further observations on the decisions in Sitwell *v.* Bernard and Scott *v.* Hollingworth have materially weakened the authority of those cases, if indeed they do not expressly overrule them. The case of Vickers *v.* Scott, 3 M. & K. 500, arose upon real estate, which was directed to be sold, and the point in question does not seem to have been much argued in that case. (2.) According to the decision of A. Hart, V. C., in La Terriere *v.* Bulmer, 2 Sim. 18, the *cestui que trust* for life during the first year after the testator's death will take the income of such parts of the estate as are properly invested at the testator's death, or may become so invested during that year. Lord Eldon's decisions in Gibson *v.* Bott, 7 Ves. 95; Hewitt *v.* Morris, T. & R. 241, are also in favor of this doctrine, which is also strongly supported by the observations of Sir J. Wigram, V. C., in the recent case of Taylor *v.* Clark, 1 Hare, 173. See also Caldicott *v.* Caldicott, 1 N. C. C. 312. (3.) The tenant for life may be entitled to the income arising from the property in its existing state during the first year from the testator's death. And this view of the law is supported by Lord Eldon's decision in the case of Angerstein *v.* Martin, T. & R. 232, and that of Lord Langdale, M. R., in Douglass *v.* Congreve, 1 Keen, 410. It has been observed by Vice-Chancellor Wigram, 1 Hare, 172, 1 N. C. C. 318, that it might be a question whether Lord Eldon's decree in Angerstein *v.* Martin was intended to impeach the law as laid down in La Terriere *v.* Bulmer; and even if such were Lord Eldon's intentions, it must have been considered as overruled in Lord Lyndhurst's decision in Dimes *v.* Scott, 4 Russ. 209. The later case of Douglass *v.* Congreve, 1 Keen, 410, which is clearly inconsistent with Dimes *v.* Scott, was also strongly questioned by Vice-Chancellor Wigram in the recent case of Taylor *v.* Clark, 1 Hare, 172, in which all the authorities on this subject are collected and reviewed, and his honor's decision in which he followed Dimes *v.* Scott, in preference to Douglass *v.* Congreve, is directly at variance with the latter case. (4.) According to the determination of Lord Lyndhurst in Dimes *v.* Scott, the tenant for life will take, not the interest actually arising from the property during the first year after the testator's death, but the amount of the dividends on so much three per cent stock as would have been produced by the conversion of the property at the end of that year. And this solution of the question has recently been adopted by Vice-Chancellor Wigram in the case of Taylor *v.* Clark, 1 Hare, 161." Hill on Trustees, pp. 388, 389.

Mr. Hill further observes, "that, in this conflict of authority, the question can be put to rest only by the decision of the court of the highest authority. And that in the mean time the fourth alternative, as established by Lord Chancellor Lyndhurst in Dimes *v.* Scott, 4 Russ. 209, and adopted in Taylor *v.* Clark, 1 Hare, 172, must be considered as carrying with it the greatest authority in its favor." Mr. Spence, Eq. Jur. 564, fully discusses the authorities, and approves of Dimes *v.* Scott. That case was also followed in Morgan *v.* Morgan, 14 Beav. 72, in which the case of Douglass *v.* Congreve was overruled. Holgate *v.* Jennings, 24 Beav. 623; *Re* Llewellyn's Trust, 29 Beav. 171; Hume *v.* Richardson, 8 Jur. (N. S.) 686, followed Dimes *v.* Scott. And see Robinson *v.* Robinson, 1

legal tenant for life,[1] except that the trustee cannot interfere with the possession of the equitable tenant for life if he neglects to repair; nor for permissive waste,[2] if there is nothing in the settlement that gives him the management or control of the estate. A legal tenant for life may cut timber for repairs,[3] though he cannot cut timber for sale, or to pay for repairs.[4] So a trustee may cut timber for repairs, if the tenant for life will furnish the means for using the timber in repairing; for the trustee can sell no timber for repairs, nor can he use any other trust funds for the purpose, unless specially authorized by the instrument of trust. Nor can the trustees raise any sum out of, or make any charge upon, the *corpus* of the estate itself for repairs, however the want of such repairs may be occasioned.[5] The equitable tenant for life must defray the expenses of such repairs out of his own income, or the trustee must defray them out of the interest of the tenant for life. The repairs of the tenant for life are his own voluntary act; and, however substantial and beneficial to the estate and the remainder-man, he can make no claim for them upon the inheritance. Nor would a court, upon his application, direct any repairs to be made at the expense of the remainder-man;[6] though it was said in one

De G., M. & G. 247; Scholefern *v.* Redfen, 2 Dr. & Sm. 173; 32 L. J. Ch. 627; Meyer *v.* Simonson, 5 De G. & Sm. 726.

In the United States, the question has not been largely discussed; but in Evans *v.* Iglehart, 6 G. & J. 191, and Williamson *v.* Williamson, 6 Paige, 303, the court assumed that the law was correctly stated in the third alternative, or in Angerstein *v.* Martin, 2 Sim. 18. In Massachusetts, the matter is regulated by statute, that the tenant for life shall be entitled to the income for the first year upon the fund given for his use. Gen. Stat. c. 97, § 23.

[1] Powis *v.* Blagrave, 4 De G., M. & G. 458, and cases cited; Harnett *v.* Maitland, 16 M. & W. 257.

[2] Powis *v.* Blagrave, Kay, 495; 4 De G., M. & G. 448; *Re* Skingley, 3 M. & G. 221; Gregg *v.* Coates, 23 Beav. 33.

[3] Co. Lit. 54 b.

[4] Co. Lit. 53 b; Gower *v.* Eyre, G. Coop. 156; Marlborough *v.* St. John, 5 De G. & Sm. 181.

[5] Bostock *v.* Blakeney, 2 Bro. Ch. 653; Hibbert *v.* Cooke, 1 S. & S. 552; Nairn *v.* Majoribanks, 3 Russ. 582; Caldicott *v.* Brown, 2 Hare, 144; Thurston *v.* Dickinson, 2 Rich. Eq. 317; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Jones *v.* Dawson, 19 Ala. 672; Thurston *v.* Thurston, 6 R. I. 296; Martin's App., 23 Penn. St. 438. In this case it was doubted if it was constitutional for the legislature to authorize such an expenditure by the trustee.

[6] Hibbert *v.* Cooke, 1 S. & S. 552; Caldicott *v.* Brown, 2 Hare, 144; Bostock *v.* Blakeney, 2 Bro. Ch. 653; Hamer *v.* Tilsley, Johns. (Eng.) 486; Dent *v.*

case that the rule might not be without exception; as where an estate was settled to certain uses, and a fund was directed to be applied to the purchase of an estate to be settled to the same uses, it might be more beneficial to the remainder-man that part of the fund should be applied to the repair and preservation of the estate already settled.[1] It would be an extraordinary case, however, to justify such a proceeding.[2] But where trustees are directed to purchase, or invest in real estate, they may put such estate in tenantable repair, and the expense of such repair will be chargeable to the trust fund as part of the purchase-money.[3] A testator may be under such obligations in his leases or leaseholds which he devises for life to one, with remainder over, that the trustees must make repairs, and charge the expense to the *corpus* of the estate.[4] So it has been held, that where a tenant for life makes large and permanent repairs, and subsequently the trustee sells the estate for the accommodation of all parties, the tenant for life may have a fair proportion for his repairs out of the *corpus* of the proceeds of the sale.[5]

§ 553. Both the equitable tenant for life and the remainder-man have an insurable interest in the trust estate; and if one insures his own interest in the buildings, and they are burned, neither can call upon the other for any part of the insurance money. The trustee also has an insurable interest in the buildings upon the trust estate; and, if he insures, and the buildings are entirely destroyed by fire, the insurance money received is so far a conversion of the property into personalty that the trustee cannot rebuild, unless he is specially directed by the instrument of trust to do so; but the money so received must remain personal property, and the tenant for life and the remainder-man will receive their respective rights and interests according to the terms of the settlement.[6] If a building is partially burned or injured, and the trustees have an

Dent, 30 Beav. 363; Nairn *v.* Majoribanks, 3 Russ. 582; Corbett *v.* Laurens, 5 Rich. Eq. 301; Sharshaw *v.* Gibbs, 1 Kay, 333.

[1] Caldicott *v.* Brown, 2 Hare, 145; *Re* Barrington's Est., 1 John. & Hem. 142.

[2] Dunne *v.* Dunne, 3 Sm. & Gif. 22; Dent *v.* Dent, 30 Beav. 363.

[3] Parsons *v.* Winslow, 16 Mass. 361.

[4] Harris *v.* Payner, 1 Drew. 174. And see a distinction in Hickling *v.* Boyer, 1 De G., M. & G. 762.

[5] Gambril *v.* Gambril, 3 Md. Ch. 259.

[6] Graham *v.* Roberts, 8 Ired. Eq. 99; Haxall *v.* Shippen, 10 Leigh, 536.

insurance policy, they should apply the money to the repair of the building.[1] Of course the repair of trust property is frequently the subject of express provisions in wills and settlements, and trustees must be governed by the directions contained in the instrument of trust. So there are frequent directions in instruments of trust respecting insurance of property, and the use and application of the insurance money in case of loss or damage by fire. Trustees will be governed by such directions in all cases. In Pennsylvania, there are express enactments by which repairs can be made upon trust property at the mutual expense of the tenant for life and the remainder-man; the manner of the repairs and the proportion of the expenses are to be determined by a court upon the application of any party in interest.[2]

§ 554. It is the duty of the trustee to see that the equitable tenant for life, in rightful possession of the estate, pays all rates and taxes; but if the trustee pays them he cannot charge them in his account.[3] So the equitable tenant for life must pay the interest upon all incumbrances upon the estate,[4] to the extent of the rents and profits.[5] If a tenant pays off, and takes an assignment of an incumbrance to himself, his representatives may claim from the remainder-man the difference between the rents and profits of the estate and the interest upon the incumbrance, if he notifies the remainder-man that the rents and profits are insufficient to pay the interest;[6] in such cases, the tenant for life cannot be charged with wilful default, like a mortgagee in possession, except upon some very peculiar ground.[7] A second tenant for life is not under any obligation to apply the rents and profits accruing to him to pay off arrears of interest which accrued during the life of the preceding tenant for life; but such arrears become,

[1] Brough *v.* Higgins, 9 Grat. 408.

[2] Act May 3, 1855, § 3; Purdon's Dig. 973.

[3] Fountaine *v.* Pellett, 1 Ves. Jr. 342; Tupper *v.* Fuller, 7 Rich. Eq. 170; Cairns *v.* Chabert, 2 Edw. Ch. 312; Jones *v.* Dawson, 19 Ala. 672. In case of a widow being tenant for life, one-third of the taxes and repairs were charged to her, Cochran *v.* Cochran, 2 Des. 521; but no general principle can be stated upon this case.

[4] Jones *v.* Sherrard, 2 Dev. & Bat. Eq. 187; Hinves *v.* Hinves, 3 Hare, 609; Caulfield *v.* Maguire, 2 Jo. & La. 141; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; 4 Kent, 74.

[5] Kensington *v.* Bouverie, 7 De G., M. & G. 134; 24 L. J. Ch. 442.

[6] Ibid.; Kensington *v.* Bouverie, 7 H. L. Ca. 557.

[7] Ibid.

as between the second tenant for life and the remainder-man, a charge upon the inheritance.[1] The expenses of cultivating a farm or plantation, or of running a manufacturing establishment, must be wholly defrayed by the tenant for life, or the person entitled to the income arising from such operations.[2] If the land under incumbrance is sold, the proceeds may be invested, and the tenant for life may take the income for life, or the net proceeds may be divided according to the annuity tables. The tables, however, are not to be taken absolutely; for reference must be had to the health of the tenant for life, and also to the condition of the land and its annual income, and whether the land is so situated that the price is rising or falling, and whether it can be easily improved.[3]

§ 555. If an equitable tenant for life becomes bankrupt or insolvent, all his interest goes to his assignees, and the trustee must hold it subject to their disposition;[4] unless the property is so given that it goes over upon the bankruptcy of the *cestui que trust.* Although a condition restraining the alienation of an equitable estate is void, as in case of a legal estate,[5] yet a gift made in such form that it is to go over upon alienation or bankruptcy of the *cestui que trust* is good.[6] A general provision that a *cestui que trust* shall not alienate his interest, or that it shall not go to his creditors or to his assignees, if the interest is an absolute one, is void, as contrary to the rule of law, that when an estate is given to a man, no restrictions inconsistent with the gift are valid.[7] But if the

[1] Sharshaw *v.* Gibbs, 1 Kay, 333; Penrhyn *v.* Hughes, 5 Ves. 99, appears to be overruled.

[2] Tupper *v.* Fuller, 7 Rich. Eq. 170; Jones *v.* Dawson, 19 Ala. 672; North Amer. Coal Co. *v.* Dyett, 7 Paige, 9.

[3] Niemcewicz *v.* Gahn, 3 Paige, 652; Atkins *v.* Kron, 8 Ired. Eq. 1; Gambril *v.* Gambril, 3 Md. Ch. 259; Chesson *v.* Chesson, 8 Ired. Eq. 141; William's Case, 3 Bland, 186; Jones *v.* Sherrard, 2 Dev. & Bat. 189; 4 Kent, 74.

[4] *Ante,* § 386.

[5] Rockford *v.* Hackman, 9 Hare, 475; 10 Eng. L. & Eq. 67.

[6] Dommet *v.* Bedford, 3 Ves. 149; Cooper *v.* Wyatt, 5 Mad. 482; Shee *v.* Hale, 13 Ves. 404; Brandon *v.* Aston, 2 N. C. C. 24; Twopenny *v.* Peyton, 10 Sim. 487; Page *v.* Way, 2 Beav. 20; Lewes *v.* Lewes, 6 Sim. 304; Rockford *v.* Hackman, 9 Hare, 475; Dickson's Trust, 1 Sim. (N. S.) 37; *Ex parte* Baddam, 2 De G., F. & J. 625; Muggridge's Trusts, John. (Eng.) 625; Dorsett *v.* Dorsett, 31 L. J. Ch. 122; Joel *v.* Mills, 3 K. & J. 458; *In re* Stultz, 17 Jur. 615.

[7] Hallett *v.* Thompson, 5 Paige, 583; Heath *v.* Bishop, 4 Rich. Eq. 46; Dick *v.* Pitchford, 1 Dev. & Bat. 480; Rider *v.* Mason, 4 Sand. Ch. 352.

limitations are interwoven into the gift itself, they are valid; as if an estate is given to A. until he becomes bankrupt, the limitation is part of the gift, and the estate will go over upon the happening of the event.[1] If, however, any interest remains in the *cestui que trust* for life, it must go to his assignees.[2] If it is in the discretion of the trustees whether the *cestui que trust* shall have an interest or not, the assignees will take nothing;[3] but if the trustees have exercised their discretion, the assignees will take the interest conferred by it.[4] If the limitation is to take effect only upon alienation by the *cestui que trust*, it will not take effect upon bankruptcy, and the assignees will be entitled.[5] The law does not permit a man to settle his property on himself, with a limitation over in case of bankruptcy.[6]

§ 556. At common law rent could not be apportioned; and, if a tenant for life died near the end of a quarter, his representatives could receive no part of the rent for the term. Statutes have now changed that rule in England;[7] and there are statutes in many of

[1] Stagg *v.* Beekman, 2 Edw. Ch. 89; Ashurst *v.* Given, 5 W. & S. 323; Vaux *v.* Parke, 7 W. & S. 19; Eyrick *v.* Hetrick, 13 Penn. St. 491; Girard Ins. Co. *v.* Chambers, 46 Penn. St. 485; Norris *v.* Johnston, 5 Barr, 289; Fisher *v.* Taylor, 2 Rowle, 33; Shee *v.* Hale, 13 Ves. 404; Cooper *v.* Wyatt, 5 Mad. 482; *Ex parte* Oxley, 1 B. & B. 257; Sharpe *v.* Cossent, 2 Beav. 470; Yarnold *v.* Moorhouse, 1 R. & M. 364; Lockyer *v.* Savage, 2 Strange, 947; Stevens *v.* James, 4 Sim. 499; Kearsly *v.* Woodcock, 3 Hare, 185; Churchhill *v.* Marks, 1 Coll. 441; Large's Case, 2 Leon, 82. As to other limitations, see Grace *v.* Webb, 2 Phil. 701; Lloyd *v.* Lloyd, 2 Sim. (N. S.) 255; Heath *v.* Lears, 1 Eq. R. 55; Potts *v.* Richards, 24 L. J. Ch. 488; Hooper *v.* Dundass, 10 Barr, 75; Commonwealth *v.* Stauffer, 10 Barr, 350; Maddox *v.* Maddox, 11 Grat. 804.

[2] Rippon *v.* Norton, 2 Beav. 63; Younghusband *v.* Gisborne, 1 Coll. N. C. C. 400; Piercy *v.* Roberts, 1 M. & K. 4; Lord *v.* Bunn, 2 N. C. C. 98; Green *v.* Spicer, 1 R. & M. 395; Snowden *v.* Dales, 6 Sim. 524; Rockford *v.* Hackman, 9 Hare, 475.

[3] Godden *v.* Crowhurst, 10 Sim. 642; Kearsley *v.* Woodcock, 3 Hare, 185; Lord *v.* Bunn, 2 N. C. C. 98; Twopenny *v.* Peyton, 10 Sim. 487; 1 Coll. Ch. 400; 10 Jur. 419.

[4] Ibid.

[5] Lear *v.* Leggett, 2 Sim. 479; 1 K. & M. 690; Whitfield *v.* Pricket, 2 Keen, 608; Wilkinson *v.* Wilkinson, G. Coop. 259; 3 Swans. 528.

[6] Braman *v.* Stiles, 2 Pick. 463; Mackason's App., 22 Penn. St. 330; Pope *v.* Elliott, 8 B. Mon. 56; Graff *v.* Bonnett, 31 N. Y. 19; Higginbottam *v.* Holme, 19 Ves. 88; *Ex parte* Hill, 1 Cooke, Bank. Law, 291; Murphy *v.* Abraham, 15 Ir. Eq. 371; *In re* Murphy, 1 Sch. & L. 44.

[7] 11 Geo. II. c. 19; 4 Wm. IV. c. 22; St. Aubin *v.* St. Aubin, 1 Dr. & Sm. 611; Longworth's Est., 23 L. J. Ch. 104.

the United States making rent apportionable.[1] In States where there are such statutes, the trustees must pay so much of the rent as accrued before the death of the tenant for life to his representatives, and the balance to the remainder-man.[2] But an annuity to a tenant for life is not apportionable; and, if the tenant dies within three days of the day of payment, his representatives are not entitled to any proportion of the annuity.[3] But where an annuity is given to a widow in lieu of dower, or for maintenance of an infant, or for the separate maintenance of a married woman, an apportionment is made on the ground that such annuity is necessary for support till the death of the annuitant.[4] Dividends upon shares in corporations and upon stocks are not apportionable, and nothing is earned for the shareholders until the dividends are declared.[5] But interest money upon notes, bonds, mortgages, and similar securities, accrues from day to day, although it is not payable until a fixed day, it is therefore apportionable, and trustees must pay the proportion accruing during the life of the tenant for life to his representatives.[6] In Massachusetts, annuities, rent, interest, and income are made apportionable in all cases by statute, unless the instrument of trust manifests a different intention.[7]

[1] 3 Kent, Com. 471; 3 Green. Cruise, Dig. 117, note.

[2] Price *v.* Pickett, 21 Ala. 741.

[3] Wiggin *v.* Swett, 6 Met. 194; Tracy *v.* Strong, 2 Conn. 659; Earp's Will, 1 Pars. Eq. 468; Mannings *v.* Randolph, 1 Southard, 144; Waring *v.* Purcell, 1 Hill, Eq. 199; Gheen *v.* Osbern, 17 S. & R. 171; McLemore *v.* Goode, Harp. Eq. 275.

[4] Hay *v.* Palmer, 2 P. Wms. 581; Pearly *v.* Smith, 3 Atk. 260; Howell *v.* Hanforth, 2 Blackstone, R. 1016; Gheen *v.* Osborn, 17 S. & R. 171. But see Tracy *v.* Strong, 2 Conn. 659; Fisher *v.* Fisher, 4 Am. Law Jour. (N. S.) 539.

[5] Earp's Will, 1 Pars. Eq. 168; 28 Penn. St. 368; Wilson *v.* Harman, 2 Ves. 672; Rashleigh *v.* Master, 3 Bro. Ch. 99. But see *Ex parte* Rutledge, Harp. Eq. 65.

[6] Earp's Will, 1 Pars. Eq. 168; 28 Penn. St. 368; Sweigart *v.* Berks, 8 S. & R. 299; Roger's Trust, 1 Dr. & Sm. 611.

[7] Gen. Stat. c. 97, § 24.

CHAPTER XIX.

TRUSTS UNDER A WILL FOR THE PAYMENT OF DEBTS; FOR THE PAYMENT OF LEGACIES; AND FOR RAISING PORTIONS.

§ 557. At common law, the personal estate only of a deceased person was liable for his debts, unless they were debts by specialty, or matter of record. However large his real estate might be, no recourse could be had to it to pay simple-contract debts, although his personal property was utterly insufficient to meet them.[1] The common law has been changed, and it is now provided by statute that copyhold and freehold estates shall be assets for the payment of simple-contract and other debts. The operation of the act is confined to those estates where no provision is made by will for payment of debts, or to those which the person dying has not by his last will charged with, or devised subject to, the payment of, his debts.[2]

[1] Kidney *v.* Coussmaker, 1 Ves. Jr. 436, Mr. Sumner's notes.
[2] 3 & 4 Wm. IV. c. 104.

§ 558. The law in England stands thus: personal estate always has been liable for debts, and is now primarily liable, so far as it will go. All creditors have the right to proceed for payment of their claims out of such personalty, and the deceased person can make no provision, or trust by will, which shall in any way change, alter, postpone, or defeat the rights of creditors in personal property; that is to say, a trust created by will in personal property was and is wholly inoperative in relation to creditors.[1] But real estate, being wholly exempt from simple-contract debts of the deceased person, he may be devised in trust for their payment. Courts favored these trusts, for the reason that it was just and equitable that a man's debts should be paid, and if he charged his lands in any way for their payment, or created a trust for that purpose, such trusts would be so carried into effect as to answer the purposes for which they were created, and the ends of justice. By the statute above cited, real estate in England is now made assets for the payment of debts; but if the deceased person in his will has charged the whole or a particular part of his real estate, or created a trust in the whole or any part of it, creditors must have recourse to such real estate for the payment of their claims in the manner pointed out in the will.[2] Thus, in England, a trust created by a will in real estate, unlike a trust in chattels, is valid and of controlling effect for the payment of debts.

§ 559. In the United States, both real and personal property are liable for the debts of a deceased person; and no valid trust can be created by will for the payment of debts in either personal or real estate. The statutes of the several States point out how estates shall be administered for the payment of debts. Creditors in all cases have the right to demand payment, according to the provisions of the statutes. Thus trusts, charges, or other directions in wills for the payment of debts have no legal operation, so far as creditors are concerned. If a testator gives to A. his real estate in trust to pay his debts, creditors may still claim that the estate shall be settled in a probate court, and the land sold under a license, and the proceeds applied according to law, and not according to the terms of the will. So absolute is this rule that credi-

[1] Evans *v.* Tweedy, 1 Beav. 55; Freake *v.* Cranefeldt, 4 M. & Cr. 499; Jones *v.* Scott, 4 Cl. & Fin. 398, overruling Lord Brougham in same case, 1 R. & M. 255.

[2] Collis *v.* Robins, 1 De G. & Sm. 139.

tors do not hold the relation of *cestuis que trust* to the trustees, or other persons appointed under a will to apply the property to the payment of debts. It is well understood, that the statute of limitations does not run against a *cestui que trust* so long as the relation of trustee and *cestui que trust* is acknowledged to exist; but a trust or charge in a will upon certain property for the payment of debts creates no such relation, between the trustee and creditor, that the statute of limitations ceases to operate. On the contrary, the claims of a creditor against the estate of a deceased person will be barred by the statute of limitations, notwithstanding certain property is given in trust, or charged with the payment of such claims.[1] The principle is, that the statutes having limited the time within which claims against a deceased person's estate must be presented, the mere fact that he designates certain property to pay his debts (which the creditors are not obliged to resort to) shall not avail to prolong the time for presentation of claims. But if the creditors assent to the trust thus created in a will, and an executor settles the estate accordingly, the creditors will be estopped from claiming a legal settlement of the estate; and the executor will become a trustee to settle the estate, as directed in the will and assented to by the creditors.[2] And it is said that a trust thus created to pay debts will prevent the lien of a judgment from expiring without being renewed, unless the creditor has neglected to renew the judgment within the statute period.[3] So it has been held that if a testamentary trustee, to pay debts, sells the lands which he is directed to sell for their payment, and applies the money to the purposes named, the land will be discharged from the lien of the other creditors.[4]

§ 560. But while the creation of a trust by will, in personal or real estate, is wholly without legal operation so far as creditors are

[1] Carrington *v.* Manning, 13 Ala. 628; Lewis *v.* Bacon, 3 Hen. & Mun. 106; Bull *v.* Bull, 8 B. Mon. 332; Agnew *v.* Fetterman, 4 Barr, 62; Cornish *v.* Wilson, 6 Gill, 318; Hines *v.* Spruill, 2 Dev. & Bat. Eq. 93; Man *v.* Warner, 4 Whart. 455; Jones *v.* Scott, 4 Cl. & Fin. 398; Freake *v.* Cranefeldt, 3 M. & Cr. 499; Evans *v.* Tweedy, 1 Beav. 55; Hall *v.* Bumstead, 20 Pick. 2; Smith *v.* Porter, 1 Binn. 209; Rooseveldt *v.* Mark, 6 John. Ch. 266; Rogers *v.* Rogers, 3 Wend. 503.

[2] Bank of U. S. *v.* Beverly, 1 How. 134.

[3] Baldy *v.* Brady, 15 Penn. St. 111; Alexander *v.* McMurry, 8 Watts, 504; Trinity Church *v.* Watson, 50 Penn. St. 518.

[4] Cadbury *v.* Duval, 10 Barr, 267.

concerned, it may be of the utmost consequence, as between heirs, legatees, devisees, and other persons interested in the estate. Thus where a testator gave two-thirds of a farm, and all the stock and property connected with it to a son in fee, with an express order and direction that the son should pay all his just debts out of the estate so given, and then gave all the residue, both real and personal, to his wife in fee, and made her executrix of the will, the debts not being paid by the son, the creditors brought suits at law against the executrix. The son had sold the farm, but part of the purchase-money had been applied to pay a debt due to the purchaser from the son, and part was unpaid, the purchaser having notice of the terms of the bequest to the son. The executrix brought a bill against the son and the purchaser, who had the purchase-money in his hands, to compel the performance of the trust, and the payment of the debts out of the farm thus bequeathed to the son. Mr. Justice Story after having stated the result says: "It remains only to advert to the objection, that the present plaintiffs are not competent to maintain the present suit because they have not yet paid the testator's debts. The argument is, that the creditors alone have a right to maintain a suit to enforce the charge, unless they have been paid by the executrix or the devisees. The right of the creditors to enforce the charge in equity cannot be doubted.[1] But I am also of the opinion, that the executrix, who, by the law of the State, is responsible for the payment of the debts, where there are real or personal assets, has also a right to enforce the charge. She might procure a license from the proper authority to sell the real estate, upon the deficiency of the personal assets, pursuant to the statute. She might in this way, perhaps, reach the estate charged with the debts; but the remedy would be circuitous, and might be inadequate to all the purposes of equity. She is not compellable to adopt that course; but may directly, by the assistance of a court of equity, reach the fund which, in the eyes of such a court, is appropriated for the payment of the debts. If she can do this after payment of the debts, there is no reason why she may not do it before, since she is entitled to avert an impending mischief, and is not bound to advance her own money to pay the creditors. Besides, the testator has disposed of all his real and personal estate by his will; and the executrix, who is a

[1] Green v. Lowe, 3 Bro. Ch. 218.

residuary legatee and devisee, has no right to apply the personal estate bequeathed to other legatees to the payment of the debts where there are other funds appropriated to the purpose; and she has a direct interest to relieve property devised to herself from the burden of the debts. The like remark equally applies to the other plaintiffs, who are devisees exonerated by the will from any contribution or lien. I entertain no doubt, therefore, that the plaintiffs are competent to maintain the present suit. It is the common case of a party subjected to a burden chargeable upon her in law, but from which she is entitled to be relieved in equity by a paramount obligation on another to exonerate her from the whole burden."[1]

§ 561. This case of Gardner *v.* Gardner, and Mr. Justice Story's opinion sufficiently explain the effect of a testator's attempting to create a trust or charge upon a portion of his property for the payment of his debts. Though the creditors may reach the property directly through the executor, and seize that which the testator has charged, or any other property, those of the testator's heirs, legatees, or devisees, who have been disappointed or may be disappointed and deprived of their rights by being compelled to part with the property given to them, may bring a process against the devisee or trustee who has received the property charged with the payment of debts, and compel him to execute the trust imposed upon him, or charged upon the property given to him.

§ 562. The general rule of the English and American courts is, that the personal property of a deceased person is primarily liable for the payment of his debts. It has been seen that, at common law, personal assets were exclusively liable for simple-contract debts. When real estate in England became subject to debts, the same rule applied as was always held in the United States, — that real estate should not be called upon for payment until the personal property was exhausted. This rule extends to the payment of debts secured by mortgage, so that the heir to whom the mortgaged property has descended has a right to call upon the executor to apply the personal assets to the discharge of the mortgage.[2]

[1] Gardner *v.* Gardner, 3 Mason, 178.

[2] McCampbell *v.* McCampbell, 5 Lit. 95; Wyse *v.* Smith, 4 G. & J. 295; M'Dowell *v.* Lawless, 6 Monr. 141; Haleyburton *v.* Kershaw, 3 Des. 105; Dunlop *v.* Dunlop, 4 Des. 305; Stuart *v.* Carson, 1 Des. 500; Garnet *v.* Macon, 6 Call, 608; 2 Brock, 185; Rogers *v.* Rogers, 1 Paige, 188; Livingston *v.* Liv-

§ 563. The next fund in order for the payment of debts is that portion of the real estate specially set apart in the will, or charged with, or given in trust for the payment of debts. Of course, where a testator has indicated what part of his real estate shall be devoted to the payment of debts, it is just and equal between those interested in his estate, aside from creditors, that his will should be carried out. A distinction is drawn between a particular and specific charge upon a particular parcel or portion of land, and a general charge of debts.[1]

§ 564. Next in order for the payment of debts is lands which descend to the heir. There being no intention expressed concerning this land, it comes next after the personalty, which is always first, and that part of the land which by an express direction is made liable for debts. If these two funds are not sufficient, that part of the testator's land, which had descended to his heirs, without any intention whatever expressed in regard to them, must, if necessary, be taken to discharge his debts.[2]

ingston, 3 John. Ch. 148; Haye *v.* Brewer, 3 G. & J. 153; Stevens *v.* Gregg, 10 G. & J. 143; Tessier *v.* Wyse, 3 Bland, 185; Lewis *v.* Thornton, 6 Munf. 87; Hawley *v.* James, 5 Paige, 318; Ancaster *v.* Mayer, 1 Bro. Ch. 454; Mackay *v.* Green, 3 John. Ch. 56; Livingston *v.* Newkirk, 3 John. Ch. 312; Stroud *v.* Burnett, 3 Dana, 394; Schemerhorn *v.* Barhydt, 9 Paige, 29; Chase *v.* Lockerman, 11 G. & J. 185; Seaver *v.* Lewis, 14 Mass. 83; Adams *v.* Brackett, 4 Met. 280; Gore *v.* Brazier, 4 Mass. 354; Brydges *v.* Phillips, 6 Ves. 570; Kelsey *v.* Western, 2 Comst. 500; Gibson *v.* McCormick, 10 G. & J. 65; Holman's App., 12 Harris, 174; Dandridge *v.* Minge, 4 Rand. 397; Lupton *v.* Lupton, 2 John. Ch. 614; Morris *v.* Mowatt, 2 Paige, 587; Mollan *v.* Griffith, 3 Paige, 402; Hancock *v.* Minott, 8 Pick. 29; Ruston *v.* Ruston, 2 Yeates, 54; Todd *v.* Todd, 1 S. & R. 453; Martin *v.* Frye, 17 S. & R. 426; Miller *v.* Harwell, 3 Murph. 195; McLoud *v.* Roberts, 4 Hen. & M. 443; Foster *v.* Crenshaw, 3 Munf. 514; Waring *v.* Waring, 2 Bland, 673; Marsh *v.* Marsh, 10 B. Mon. 360; Leavitt *v.* Wooster, 14 N. H. 551; Sims *v.* Sims, 2 Stock. Ch. 158; Clinefetter *v.* Ayers, 16 Ill. 329; Hayes *v.* Jackson, 6 Mass. 149; 4 Kent, 421; Hewes *v.* Dehon, 3 Gray, 206.

[1] Manning *v.* Spooner, 3 Ves. 114; Donne *v.* Lewis, 2 Bro. Ch. 257; Milnes *v.* Slater, 8 Ves. 295; Davies *v.* Topp, 1 Bro. Ch. 524; Powis *v.* Corbet, 3 Atk. 556; Harmood *v.* Oglander, 8 Ves. 131; Martin *v.* Frye, 17 S. & R. 426.

[2] Oneal *v.* Mead, 1 P. Wms. 693; Cope *v.* Cope, 2 Salk. 449; Howell *v.* Price, 1 P. Wms. 291; White *v.* White, 2 Vern. 43; Johnson *v.* Milksopp, 2 Vern. 112; Evelyn *v.* Evelyn, 2 P. Wms. 659; Gray *v.* Gray, 1 Ch. Ca. 296; Gower *v.* Mead, Pr. Ch. 2; Commonwealth *v.* Shelby, 13 S. & R. 348; Warley *v.* Warley, 1 Bailey's Eq. 398; Robards *v.* Wortham, 2 Dev. Eq. 173; Livingston *v.* Livingston, 3 John. Ch. 148.

§ 565. The last fund to be resorted to for the payment of debts is land specifically devised, although there may be a general charge of debts upon all the lands. The testator may be supposed to have expressed a particular intention that the specific devisees of land shall have it at any rate, unless all other funds for the payment of his debts have been exhausted, and it is necessary to resort to the specifically devised land, in order that his debts may be paid.[1]

§ 566. Thus the general rule is, that a deceased person's estate is to be applied to the payment of his debts in the following order: (1.) The general personal estate; (2.) Estates specifically devised for the payment of debts; (3.) Estates descended; (4.) Estates specifically devised, though charged generally with the payment of debts. And it requires express words, or the clear intent of the testator, to disturb this order.[2] Therefore, while creditors are not generally confined to this order for the payment of their claims, legal representatives, heirs, legatees, and devisees have rights against each other for relief in case this order is disarranged; for instance, if land, specifically devised, is taken for the payment of debts, the specific devisee may call upon the legal representatives to make up his loss from the personal estate in their hands; if that has been already exhausted, he may call upon the land that was specifically devised for the payment of debts; if that has been applied, he may call upon the heir to whom any portion of the land has descended; if such land has already been taken, then the specific devisees shall contribute ratably to each other.[3]

§ 567. This order of payment or contribution among those interested in an estate, is called the marshalling of assets. Of course, it is subject to the will of the testator, for he may direct out of

[1] Livingston *v.* Livingston, 3 John. Ch. 148; Chase *v.* Lockerman, 11 G. & J. 186; Ruston *v.* Ruston, 2 Yeates, 54.

[2] Stephenson *v.* Heathcote, 1 Ed. 38; Inchquin *v.* French, 1 Cox, 1; Webb *v.* Jones, 1 Cox, 245; Bootle *v.* Blundell, 1 Mer. 193; Barnwell *v.* Cawdor, 3 Mad. 453; Watson *v.* Brickwood, 9 Ves. 447; Livingston *v.* Newkirk, 3 John. Ch. 312; Livingston *v.* Livingston, 3 John. Ch. 148; Stroud *v.* Barnett, 3 Dana, 394; Warley *v.* Warley, 1 Bail. Eq. 397; Schemerhorn *v.* Barhydt, 9 Paige, 29; Chase *v.* Lockerman, 11 G. & J. 185; Cook *v.* Dawson, 29 Beav. 123; Seaver *v.* Lewis, 14 Mass. 83; Hewes *v.* Dehon, 3 Gray, 205; Plympton *v.* Fuller, 11 Allen, 140.

[3] Livingston *v.* Livingston, 3 John. Ch. 148; Gen. Stat. Mass. c. 92, §§ 29–36; Blaney *v.* Blaney, 1 Cush. 107.

what part of his estate his debts shall be paid; but it requires a direct expression, or a manifest intent to change this order. It might be supposed, that, if a testator gave away his personal property, and charged his debts upon his real estate, it would be a plain manifestation of an intention to change the order. But such is not the case; for when a testator gives his personal estate, he is supposed to give it subject to the payment of his debts, that being the first fund available for the purpose; and when he charges his real estate with the payment of his debts, he is supposed to charge his real estate with the payment of such debts as may remain unpaid after his personal estate is exhausted. Merely giving away personal estate, and charging debts upon the real estate is not inconsistent with the application of the personal estate to the payment of debts, so far as it will go, and of calling upon the real estate only when the personal estate is exhausted. Therefore the rule is, that there must not only be a giving away of the personalty and a charging of debts on the realty; but there must be something further to show that the testator intended to exonerate the whole personalty from the payment of the debts, and to charge all the debts upon the realty, and not simply what debts may remain after exhausting the personal estate.[1]

§ 568. Legacies, whether specific or general, are payable out of the personal assets of a testator, and the duty of paying them devolves upon the executor in the due course of his administration. If all the personal assets are exhausted in the payment of debts, specific legatees have a claim for compensation out of some other fund, if in law they have a higher equitable claim in the marshalling of the assets; or for contribution, if they stand upon the same equitable equality. If, however, the personal assets are exhausted in the payment of debts, general legacies must fail, unless the testator has charged the payment of them upon his real estate. If there

[1] Ancaster *v.* Mayer, 1 Bro. Ch. 454; 1 Lead. Ca. Eq. 505, with English and American notes; Aldrich *v.* Cooper, 8 Ves. 382; 2 Lead. Ca. Eq. 56, English and American notes; Silk *v.* Prime, 1 Bro. Ch. 138, n.; 1 Dick. 384; 2 Lead. Ca. Eq. 82 and notes. The purpose of this work, in treating of trusts for the payment of debts, does not call for a more particular statement of the rules that govern the marshalling of assets among all the persons who may call for such marshalling by reason of some interest being taken from them or endangered. The reader will find the cases, both English and American, collected in the notes to the leading cases above referred to, and the rules of law stated and illustrated with a clearness and affluence of learning rarely equalled.

is a charge for the payment of legacies out of the real estate, the devisee or the heir, as the case may be, will hold the real estate as a trustee for their payment.[1]

§ 569. If the trust is created in express words, or if the payment of the legacy is directly charged upon a particular part, or the whole of the real estate, there can be no question as to the trust, or liability of the estate to pay the legacy; but where the trust depends upon the construction to be put upon general words, or upon implication from the use of certain phrases, it has been a question of considerable doubt whether expressions and words, sufficient to charge the payment of debts upon real estate, are also adequate to charge it with legacies. The ground of the doubt is this, that the payment of debts is a duty, and courts will construe very general and loose expressions into an intention to pay such debts out of the real estate, in case of the failure of the personal estate, but that legacies are mere voluntary gifts, and they will not be charged upon real estate, unless there is a manifest intent to do so.[2] In the late cases, however, the doubt is not referred to, and the general tendency is to charge the real estate with the payment of legacies by the same words that would charge the payment of debts upon real estate.[3] Whether legacies are charged upon lands or not, is in all cases a matter of intention, to be gathered from the whole will.[4] Thus a mere direction that all debts and legacies are to be paid is not a charge of legacies upon the real estate; nor is a devise of all the rest of his real and personal estate, not before devised, a charge of legacies upon land,—there being no other

[1] Stevens *v.* Gregg, 10 G. & J. 143.

[2] Davis *v.* Gardner, 2 P. Wms. 187, 190; Kightley *v.* Kightley, 2 Ves. Jr. 328; Kneeling *v.* Brown, 5 Ves. 362; Williams *v.* Chitty, 3 Ves. 551.

[3] Williams *v.* Chitty, 3 Ves. 551; Trott *v.* Vernon, Pr. Ch. 430; 1 Vern. 708; Tompkins *v.* Tompkins, Pr. Ch. 397; Elliot *v.* Hancock, 2 Vern. 143; Lypet *v.* Carter, 1 Ves. 499; Ellison *v.* Airey, 2 Ves. 568; Mirehouse *v.* Scaife, 2 M. & C. 708; Patterson *v.* Scott, 1 De G., M. & G. 531.

[4] Jones *v.* Selby, Pr. Ch. 288; Trent *v.* Trent, 1 Dow. 102; Austen *v.* Halsey, 6 Ves. 475; Miles *v.* Leigh, 1 Atk. 574; Minor *v.* Wicksteed, 3 Bro. Ch. 627; Webb *v.* Webb, Barn. 86; Dowman *v.* Rust, 6 Rand. 587; Van Winkle *v.* Van Houten, 2 Green, Ch. 191; Lupton *v.* Lupton, 2 John. Ch. 618; Paxson *v.* Potts, 2 Green, Ch. 322; Harris *v.* Fly, 7 Paige, 421; Logan *v.* Deshay, 1 Clarke, Ch. 209; Brandt's App., 8 Watts, 198; Wright's App., 12 Penn. St. 256; Ripple *v.* Ripple, 1 Rawle, 386; Montgomery *v.* McElroy, 3 W. & S. 370; Hoes *v.* Van Hoesen, 1 Comst. 122; Gridley *v.* Andrews, 8 Conn. 1; Stevens *v.* Gregg, 10 G. & J. 143; Simmons *v.* Drury, 2 G. & J. 32.

words tending to show that the legacy is first to be paid from the land. But if real estate is devised, after the payment of debts and legacies, there is no question; for the *residue*, after the payment of the legacies, is devised.[1]

§ 570. Where a testator gives several legacies, and blends both his real and personal estate into one fund for the payment of his debts and legacies, and devises the residue, the legacies are charged upon the real estate, if the personal estate is insufficient to pay both debts and legacies; for a devise of the *residue* can only refer to what is left after satisfying all previous gifts.[2] But whatever may be the disposition made of the property, or however the legacies may be given, there must be a manifest intent, clearly deducible from the will, that legacies are to be paid from the real estate upon failure of the personal estate, or they cannot be charged upon the land.[3] Thus where the devisee of real estate is appointed executor, and he is expressly directed to pay debts and legacies, he will be held to be a trustee for the legatee, or the land in his hands will be subject to the charge or trust for the debts and legacies.[4] But if land is devised to an executor, and there is no direc-

[1] Ibid.; Newman *v.* Johnson, 1 Vern. 45; Harris *v.* Ingledew, 3 P. Wms. 91; Trott *v.* Vernon, 2 Vern. 708; Bench *v.* Biles, 4 Mad. 187; Tompkins *v.* Tompkins, Pr. Ch. 397; Kentish *v.* Kentish, 3 Bro. Ch. 257.

[2] Cornish *v.* Willson, 6 Gill, 299; Kirkpatrick *v.* Rogers, 7 Ired. Eq. 44; Tracy *v.* Tracy, 15 Barb. 503; Canfield *v.* Bostwick, 21 Conn. 550; Aubrey *v.* Middleton, 2 Eq. Ca. Ab. 479; Hassel *v.* Hassel, 2 Dick. 256; Bright *v.* Larcher, 3 De G. & J. 148; Kidney *v.* Coussmaker, 1 Ves. Jr. 436; Bench *v.* Biles, 4 Mad. 187; Brudenell *v.* Boughton, 2 Atk. 268; Mirehouse *v.* Scaife, 2 M. & Cr. 695; Cole *v.* Turner, 4 Russ. 376; Edgell *v.* Haywood, 3 Atk. 358; Greville *v.* Brown, 7 H. L. Ca. 689; Field *v.* Peckett, 29 Beav. 568; Hassanclever *v.* Tucker, 2 Binn. 525; Witman *v.* Norton, 6 Binn. 395; Nichols *v.* Postlethwaite, 2 Dall. 131; McLanahan *v.* Wyant, 1 Penn. R. 111; McGlaughlin *v.* McGlaughlin, 24 Penn. St. 22; Gallagher's App., 48 Penn. St. 121; Adams *v.* Brackett, 5 Met. 280; Dowman *v.* Rust, 6 Rand. 587; Van Winkle *v.* Van Houten, 2 Green, Ch. 172; Carter *v.* Balfour, 19 Ala. 815; Lewis *v.* Darling, 16 How. 10; Buckley *v.* Buckley, 11 Barb. 43.

[3] Adams *v.* Brackett, 5 Met. 282; Lupton *v.* Lupton, 2 John. Ch. 614; Stevens *v.* Gregg, 10 G. & J. 143; Gridley *v.* Andrews, 8 Conn. 1; and see Paxson *v.* Potts, 2 Green, Ch. 320; Francis *v.* Clemow, 1 Kay, 435; Wheeler *v.* Howell, 3 K. & J. 198; Gyett *v.* Williams, 2 John. & H. 429; Owing's Case, 1 Bland, 290.

[4] Henvell *v.* Whittaker, 3 Russ. 343; Dover *v.* Gregory, 10 Sim. 393; Alcock *v.* Sparhawk, 2 Vern. 228; Doe *v.* Pratt, 6 Ad. & El. 180; Elliot *v.* Hancock, 2 Vern. 143; Cross *v.* Kennington, 9 Beav. 150; Downman *v.* Rust, 6 Rand.

tion to pay legacies, they cannot be charged upon the land in his hands.[1] If, however, the personalty is grossly insufficient to pay the debts and legacies, very slight indications in the will will be laid hold of by the court to raise an implied intention that the executor is to pay the legacies out of the real estate given to him.[2] The use of the word "devise," in giving the legacies, has been relied upon as some evidence that the testator intended to charge them upon his real estate;[3] and so stress has been laid upon the fact that the heir at law was appointed residuary legatee, devisee, and executor;[4] and so the fact that the legacy was to a child, or other person whom the testator was under some moral obligation to support, has been considered as some evidence that the testator intended the legacy to be paid out of his real estate, if the personal estate was insufficient.[5]

§ 571. Where there is a general direction given to the executor to pay debts and legacies, he is to pay them out of the personal estate only.[6] If there is a deficiency of personal assets, they must be first applied to the payment of debts, and the legacies fail in the absence of a manifest intention to pay them out of the real estate.[7] Where real estate is devised, subject to the payment of debts and legacies, the real estate is to be resorted to in aid of the personal; and the personal must be first exhausted before the real estate can be called upon, unless there is a plain intention that the personal estate is to be entirely exonerated.[8] There is a distinction, how-

587; Van Winkle *v.* Van Houten, 2 Green, Ch. 172. But see Parker *v.* Fearnley, 2 S. & S. 592; Paxson *v.* Potts, 2 Green, Ch. 313; Nyssen *v.* Gretton, 2 Y. & C. Exch. 222.

[1] Stevens *v.* Gregg, 10 G. & J. 143.

[2] Harris *v.* Fly, 7 Paige, 421; Luckett *v.* White, 10 G. & J. 480.

[3] Trott *v.* Vernon, Vern. 708; Hassel *v.* Hassel, 2 Dick. 526.

[4] Aubrey *v.* Middleton, 2 Eq. Ca. Ab. 497; Alcock *v.* Sparhawk, 2 Vern. 238; Downman *v.* Rust, 6 Rand. 587; Van Winkle *v.* Van Houten, 2 Green, Ch. 191.

[5] Lypet *v.* Carter, 1 Ves. 499.

[6] Parker *v.* Fearnley, 2 S. & S. 592; Warren *v.* Davies, 2 M. & K. 49.

[7] Hoover *v.* Hoover, 5 Barr, 351.

[8] Amesbury *v.* Brown, 4 Ves. 482; Holford *v.* Wood, 4 Ves. 76; Hancock *v.* Minot, 8 Pick. 29; Leavitt *v.* Wooster, 14 N. H. 550; Hassanclever *v.* Tucker, 2 Binn. 525; Ruston *v.* Ruston, 2 Yeates, 65; Fenwick *v.* Chapman, 9 Pet. 466; Bank of U. S. *v.* Beverly, 1 How. 134; Lewis *v.* Darling, 16 How. 10; Hoes *v.* Van Hoesen, 1 Comst. 122; Buckley *v.* Buckley, 11 Barb. 43; Chase *v.* Lockerman, 11 G. & J. 186.

ever, between a general charge of legacies on land, and a devise of land subject to the payment of a specific sum of money, or upon condition that the devisee pays a certain sum, or in trust to pay a certain sum.[1] In such cases, the gift of the sum is contained in the devise of the land; and such sum is not to come out of the personalty at all, but is confined to the land *exclusively*.[2] There is a great difference between this class of legacies and debts; for debts are a charge upon the personalty at all events, and independent of the will, while general legacies are given by will voluntarily, and are confined to payment out of the personalty, unless an intention can be found in the will to charge them on the real estate, upon failure of the personal; but these gifts out of the real estate have no existence, except in the gift of the real estate, and can in no event be made a charge upon the personal estate.[3]

§ 572. As the charge of legacies upon real estate is wholly a matter of intention in the testator it may happen that some of the legacies given in a will are charged upon the real estate, and some are not. Thus where a testator devised lands subject to certain legacies mentioned, and then gave *other* legacies, and devised the residue of his lands, it was held by Lord Thurlow, that the last-named legacies were not charged upon the real estate.[4] So the testator may direct that certain portions of his real estate shall be exempt from the payment of legacies, although he charges the legacies generally upon his real estate.[5]

§ 573. If a testator charges some legacies on his land, and leaves others not so charged, and the legacies payable out of the land are paid out of the personal estate, those legacies not payable out of the land, have a right to stand in the place of the legacies that

[1] Clery's App., 35 Penn. St. 54.

[2] Whaley *v.* Cox, 2 Eq. Ca. Ab. 549; Amesbury *v.* Brown, 1 Ves. 482; Noel *v.* Henley, 7 Price, 241; Phipps *v.* Annesley, 2 Atk. 57; Wood *v.* Dudley, 2 Bro. Ch. 316; Holford *v.* Wood, 4 Ves. 89; Read *v.* Lichfield, 3 Ves. 479; Fowler *v.* Willoughby, 2 S. & S. 354; Spurway *v.* Glynn, 9 Ves. 483; Gitting *v.* Steele, 1 Swans. 24; Hoover *v.* Hoover, 5 Barr, 351; Halliday *v.* Summerville, 2 Penn. R. 533.

[3] Bickham *v.* Crutwell, 3 M. & C. 763; Noel *v.* Henley, 7 Price, 241; 2 Jarm. Pow. Dev. 708.

[4] Howe *v.* Medcroft, 1 Bro. Ch. 261; Masters *v.* Masters, 1 P. Wms. 421; Strong *v.* Ingraham, 6 Sim. 197; Radburn *v.* Jervis, 3 Beav. 450. But see Rooke *v.* Worrell, 11 Sim. 216.

[5] Birmingham *v.* Kirwin, 2 Sch. & Lef. 448.

were expressly charged upon the land. For although there is generally no marshalling in favor of general legatees or annuitants, yet if legatees who can resort to the real estate exhaust the personal, the legatees who have only the personal shall be subrogated, and their legacies become a charge upon the real estate.[1] So if debts are expressly charged upon real estate, legatees shall be paid out of the personal estate, as against the heir or devisee.[2]

§ 574. Where an executor, who is also appointed trustee for the investment and holding of legacies, has set apart and invested the legacies, he will cease to be executor as to those particular legacies, but will be holden as trustee; and the testator's estate will no longer be holden for the payment of the legacy, if it is afterwards lost.[3] In the United States, it is usual for the executor in such cases to receive an appointment as trustee, and give a bond to the judge of probate for the performance of the trust; but the executor may act as trustee, and the sureties on his bond as executor will be holden for his acts.[4] The estate of the testator will not be holden for any loss, if the executor has clearly set aside any fund as payment of a legacy, although he holds the same in his own hands as trustee for the legatee. If, however, the executor has not

[1] Hanby v. Roberts, Amb. 127; Masters v. Masters, 1 P. Wms. 421; Bonner v. Bonner, 13 Ves. 379; Bligh v. Darnley, 2 P. Wms. 619.

[2] Patterson v. Scott, 1 De G., M. & G. 531; Conron v. Conron, 7 H. L. Ca. 168; Bardwell v. Bardwell, 10 Pick. 19; Mollan v. Griffith, 3 Paige, 402; Smith v. Wyckoff, 11 Paige, 49; Loomis's App., 10 Barr, 390; Mirehouse v. Scaife, 2 M. & Cr. 695, is overruled. This rule does not apply, in England, to legacies for charitable purposes, as the statutes of mortmain might thereby be eluded. Mogg v. Hodges, 2 Ves. 62; Williams v. Kershaw, note to Hobson v. Blackburn, 1 Keen, 273; Philanthropic Soc. v. Kemp, 4 Beav. 581; Sturges v. Dimsdale, 6 Beav. 462; Robinson v. Geldard, 3 Mac. & Gor. 735. It is not within the purpose of this work to trace the rules in regard to the marshalling of assets. See Aldrich v. Cooper, 2 Lead. Ca. Eq. 56, for an able review of the cases and statement of all the rules; and see Teas's App., 23 Penn. St. 228; Miller v. Harwell, 3 Murph. 194; Tombs v. Roch, 2 Coll. 494; Fleming v. Buchanan, 3 De G., M. & G. 976.

[3] Page v. Leapingwell, 18 Ves. 463; Wilmot v. Jenkins, 1 Beav. 401; Tyson v. Jackson, 30 Beav. 384; Byrchall v. Bradford, 6 Mad. 13, 235; *Ex parte* Chadwin, 3 Swans. 380; Philippo v. Munnings, 2 M. & Cr. 309; Newman v. Williams, 10 L. J. (N. S.) Ch. 106.

[4] Dorr v. Wainwright, 13 Pick. 388; Brown v. Kelsey, 2 Cush. 248; Hubbard v. Lloyd, 6 Cush. 524; Prior v. Talbot, 10 Cush. 1; Hall v. Cushing, 9 Pick. 395; Newcomb v. Williams, 9 Met. 534; Conkey v. Dickinson, 13 Met 53.

settled an account in probate court, and charged off the amount of the legacy paid to him as trustee, he must show some act, such as setting apart and payment, or the legatee will still be entitled to receive the legacy out of the estate of the testator. The mere mental determination of the executor to set aside a certain fund as payment of a legacy, and to hold the same thereafter as trustee, is not sufficient.[1]

§ 575. If the testator names any time for the payment of legacies, they will bear interest from that time. It has already been seen, that the tenant for life is entitled to income upon the estate given for his use, after the expiration of one year from the testator's death, on the ground that the executor or trustee has one full year to reduce the estate to possession, and to convert and invest it.[2] So if a testator names no time for the payment of legacies, they will be payable in one year after his death, and will bear interest from that time,[3] unless a contrary intention is shown in the will.

§ 576. Where an express trust is created in lands for the payment of legacies, or they are devised to an executor, trustee, or other person beneficially, and he is to pay the legacies charged, and such trustee, executor, or other person accepts the devise and the trust, he will become personally liable to execute the trust and pay the legacies.[4] The lands so charged with the trust of paying legacies may be followed into whosesoever hands they come; for the title of the devisee or trustee being by will and recorded, purchasers will be charged with constructive notice.[5] A payment of the legacy by the note of the trustee or devisee, and a receipt in full signed by

[1] Miller *v.* Congdon, 14 Gray, 114; Newcomb *v.* Williams, 9 Met. 534; Conkey *v.* Dickinson, 13 Met. 63.

[2] *Ante*, § 548.

[3] 2 Rop. Leg. 222; 2 Kent, 417; Hite *v.* Hite, 2 Rand. 409; Birdsall *v.* Hewlett, 1 Paige, 32; Glen *v.* Fisher, 6 John. Ch. 33; Trippe *v.* Frazier, 4 H. & J. 446; 2 Redf. on Wills, 465–475.

[4] Lockwood *v.* Stockholm, 11 Paige, 387; Dodge *v.* Manning, 11 Paige, 334; Bank of United States *v.* Beverly, 1 How. 134; Mahar *v.* O'Hara, 4 Gilm. 424; Solliday *v.* Gruver, 7 Penn. St. 452; Mittenberger *v.* Schlegel, 7 Penn. St. 241; Bugbee *v.* Sargent, 23 Me. 269; Glen *v.* Fisher, 6 John. Ch. 33; Larkin *v.* Mason, 53 Barb. 267.

[5] Harris *v.* Fly, 7 Paige, 421; Aston *v.* Galloway, 3 Ired. Eq. 126; Wallington *v.* Taylor, Saxton, 314; Howard *v.* Chaffee, 2 Dr. & Sm. 236; Dodge *v.* Manning, 11 Paige, 334; Mahar *v.* O'Hara, 4 Gilm. 424; Mittenberger *v.* Schlegel, 7 Penn. St. 241; Solliday *v.* Gruver, 7 Penn. St. 452; Bank of U. S. *v.* Beverly, 1 How. 134; Hallett *v.* Hallett, 2 Paige, 15; Owing's Case, 1 Bland, 290; Kemp *v.* McPherson, 7 H. & J. 320.

the legatee will not discharge the lien upon the land, if the legatee cannot collect a judgment on the note against the devisee.[1] This rule, however, would probably be confined to the original parties; for if, after the note and receipt, there should be a sale of the land, a purchaser would not probably be holden. So the statute of limitations will not bar the claim of the legatee or *cestui que trust* to receive his legacy from the devisee or trustee;[2] but the lapse of twenty years will create a presumption of payment.[3]

§ 577. In marriage and family settlements, whether by deed or will, provisions are sometimes inserted that the trustees shall raise portions for children at certain times or upon certain events, as upon their marriage or arrival at the age of twenty-one. In England, a term of years is generally carved out of the estate, and limited to the trustees to secure the payment of such portions as are directed to be raised. In the United States, it is more usual to direct the portions to be raised from the rents and profits of the estate, or by sale or mortgage of some part of it. These directions are in the nature of charges upon the real estate, and although there may be a covenant in the deed of settlement, that the settlor will pay the amount, yet the charge on the real estate is generally the *primary* fund, and the covenants of the settlor, or his personal estate are merely auxiliary to the charge upon the land.[4] If the charge or trust is created by will, it is of course to be executed precisely as created, and the land only is liable for the amount to be raised.[5]

§ 578. It sometimes happens, that trustees are directed to hold an estate for the life of parents, for their use, and to pay the parents the rents during their lives, or to permit them to use, occupy, and improve the same; and they are directed to raise portions for the children, to be paid them upon the happening of certain events, as their marriage, or arrival at twenty-one, which events frequently happen during the lifetime of the parents, or tenants for life.

[1] Terhune *v.* Colton, 2 Stockt. 21; Schanck *v.* Arrowsmith, 1 Stockt. 314.

[2] Watson *v.* Saul, 1 Gif. 188.

[3] Henderson *v.* Atkins, 28 L. J. Ch. (N. S.) 913. As to the duty of purchasers to look to the application of the purchase-money of lands sold for the payment of legacies, see chapter upon that subject.

[4] Lanoy *v.* Athol, 2 Atk. 444; Lechmere *v.* Charlton, 15 Ves. 193.

[5] Burgoyne *v.* Fox, 1 Atk. 576; Edwards *v.* Freeman, 2 P. Wms. 437; 1 Story, Eq. Jur. § 575.

Under such directions, very vexatious questions have arisen: whether the trustees are to raise the portions *immediately* on the happening of the event upon which the children are to be paid, or whether the raising of the money should be postponed to the end of the life-estate of the parents. A vast number of conflicting decisions have been made upon this question.[1] In one class of cases, it has been held that the portions should be raised, during the life-estate of the parents, by a sale or mortgage of the reversion;[2] in other cases, that the sale or mortgage should be postponed until the determination of the life-estate.[3] "The raising or not raising will depend upon the particular penning of the trust and the intention of the instrument;"[4] and the court will have no leaning one way or the other.[5]

§ 579. The general rule is now established, that where there is a direction to raise the portion by sale or mortgage, and to pay the same at a particular time or on the happening of a particular event, as on marriage, or at twenty-one, and there is nothing in the will or settlement to indicate a different intention, the portions must be raised by the trustees by an immediate sale or mortgage;[6] but if there are any expressions from which it may be inferred that the portions are not to be raised, during the continuance of the life-estate of the parents, effect will be given to such expressions. Thus where the parents were to appoint the portions, by deed or *will;*[7] or where the trustee was to raise the portions from and after the end of the

[1] 4 Kent, 149, 150; 2 Story, Eq. Jur. 1003.

[2] Hillier *v.* Jones, 1 Eq. Ca. Ab. 337; Smith *v.* Evans, Amb. 533; Mitchell *v.* Mitchell, 4 Beav. 549; Staniforth *v.* Staniforth, 2 Vern. 460; Hebblethwaite *v.* Cartwright, Forr. 30; Gerrard *v.* Gerrard, 2 Vern. 458; Sandys *v.* Sandys, 1 P. Wms. 707; Codrington *v.* Foley, 6 Ves. 364; Hall *v.* Carter, 2 Atk. 354; Smith *v.* Foley, 3 Y. & C. 142.

[3] Reresby *v.* Newland, 2 P. Wms. 94; 6 Bro. P. C. 75; Verney *v.* Verney, 2 Ed. 25; Stanley *v.* Stanley, 1 Atk. 545; Conway *v.* Conway, 3 Bro. Ch. 267; Clinton *v.* Seymour, 4 Ves. 440; Stevens *v.* Dethick, 3 Atk. 39; Wynter *v.* Bold, 1 S. & S. 507; Corbett *v.* Maydwell, 2 Vern. 640; Brome *v.* Berkley, 2 P. Wms. 484.

[4] Lord Talbot in Hebblethwaite *v.* Cartwright, Forr. 32, and Lord Eldon in Codrington *v.* Foley, 6 Ves. 379.

[5] Codrington *v.* Foley, 6 Ves. 380, contrary to Stanley *v.* Stanley, 1 Atk. 549, and Clinton *v.* Seymour, 4 Ves. 460, where it was said that the court would lean against the raising.

[6] Codrington *v.* Foley, 6 Ves. 380.

[7] Wynter *v.* Bold, 1 S. & S. 507. But see Gough *v.* Andrews, 1 Coll. 69.

life-estate,[1] it was held that these expressions were conclusive that the portions were not to be raised during the lifetime of the parents. The intention must be sought in the instrument only, and no extraneous evidence can be used.[2]

§ 580. At the present day, it is the usual practice to insert in settlements a clause to the effect that portions shall not be raised during the continuance of the life-estate, or during the lifetime of the parents.[3] Upon the happening of the event upon which the portion is payable, the child takes a vested interest in the portion; and, if he dies before it is paid, the right to the portion will vest in his representatives, to be paid when the portion is raised. Courts adopt this construction wherever it is possible to sustain it,[4] though they never do violence to the express words of the instrument in order to uphold it.[5] Thus, if it is manifest on the face of the instrument, that no child was intended to take a portion unless he survived his parents, the expressed intention will prevail.[5] So, in the case of a voluntary settlement, the children of a deceased child, for whom a portion was to be raised, will take such portion, and the consideration of love and affection extended to grandchildren will be a sufficient consideration to uphold the settlement, though voluntary, so far as the settlor has placed himself *in loco parentis*.[6] Therefore it is now the usual practice to insert a clause in the settlement to the effect, that such portion shall, or shall not, be payable to such child's representatives, in case he dies before his parents, or before the portion is payable to him.

§ 581. If the portions to be raised are effectually charged upon the land, the trustees will take, by implication, the power of selling

[1] Butler *v.* Duncomb, 1 P. Wms. 448.

[2] Corbett *v.* Maydwell, 2 Vern. 641.

[3] Hall *v.* Carter, 2 Atk. 356.

[4] Clayton *v.* Glengall, 1 Dr. & W. 1; Howgrave *v.* Cartier, 3 V. & B. 86; Coop. 66; Whatford *v.* Moore, 2 M. & C. 291; Emperor *v.* Rolfe, 1 Ves. 208; Powis *v.* Burdett, 9 Ves. 428; Frye *v.* Shelbourne, 3 Sim. 243; Combe *v.* Combe, 2 Atk. 185; Hope *v.* Clifden, 6 Ves. 499; Woodcock *v.* Dorset, 3 Bro. Ch. 569; King *v.* Hake, 9 Ves. 438.

[5] Whatford *v.* Moore, 7 Sim. 574; 3 M. & Cr. 274; Fitzgerald *v.* Field, 1 Russ. 430; Hotchkin *v.* Humphrey, 2 Mad. 65.

[6] Swallow *v.* Binns, 1 K. & J. 417; 19 Jur. 843; Henderson *v.* Kennicott, 12 Jur. 848; Jones *v.* Jones, 13 Sim. 568; Evans *v.* Scott, 1 Cl. & Fin. (N. S.) 57.

or mortgaging it for the purpose, although that power is not given to them in the instrument; for that is the most natural way of carrying out the intention of the parties in raising the portions.[1] Even where the trust is to raise the portion from rents and profits, if a *particular time* is named for the payment so near that it is impossible to raise the sum before the appointed time, it will be considered that it was inconsistent that the settlor intended that the whole sum should be raised from the *annual* rents and profits, and a mortgage or sale will be ordered.[2] So if the directions to the trustees are to raise the portions "as soon as conveniently may be," or "as soon as possible."[3] The rule has been carried to the extent, that where the trustees were directed to raise a gross sum for portions from the *rents and profits*, and there were no words restricting the authority to *annual* rents and profits, they have been held to be authorized to raise the required sum at once by sale or mortgage.[4] The intention of the settlor, however, must prevail, and if the portions are to be raised from *annual* rents and profits, or if any words are used implying such an intention, there can be no sale or mortgage.[5] In cases where the portions are to be raised from rents and profits, and a power of sale or mortgage is also given by implication or in express words, the rents and profits must first be applied so far as they will go, in order to sell as small a part of the estate as possible.[6] The trustees may also raise portions by selling the wood and timber upon an estate, or the minerals and mines may be worked for the raising of portions.[7]

§ 582. If a *gross* sum is directed to be raised for the portions of

[1] Backhouse *v.* Middleton, 1 Ch. Ca. 75; Sheldon *v.* Dormer, 2 Vern. 310; Ashton *v.* ———, 10 Mod. 401; Maynel *v.* Massey, 2 Vern. 1.

[2] Sheldon *v.* Dormer, 2 Vern. 310; Okeden *v.* Okeden, 1 Atk. 551; Backhouse *v.* Middleton, 1 Ch. Ca. 175; Allan *v.* Backhouse, 2 V. & B. 65.

[3] Trafford *v.* Ashton, 2 P. Wms. 416; Ashton *v.* ———, 10 Mod. 401.

[4] Ivy *v.* Gilbert, 2 P. Wms. 19; Baines *v.* Dixon, 1 Ves. 42; Green *v.* Belcher, 1 Atk. 505; Evelyn *v.* Evelyn, 2 P. Wms. 669; Shrewsbury *v.* Shrewsbury, 1 Ves. Jr. 234; Warburton *v.* Warburton, 2 Vern. 420; Mills *v.* Banks, 3 P. Wms. 7; Hall *v.* Carter, 2 Atk. 358; Anon., 1 Vern. 104; Schermerhorne *v.* Schermerhorne, 6 John. Ch. 70; 1 Story, Eq. Jur. 1063, *et seq.*

[5] Garmstone *v.* Gaunt, 9 Jur. 78.

[6] Okeden *v.* Okeden, 1 Atk. 552; Warter *v.* Hutchinson, 1 S. & S. 276; Hall *v.* Carter, 2 Atk. 358.

[7] Offley *v.* Offley, Pr. Ch. 27.

several children, to be paid at twenty-one or any other appointed time, and the shares of each are vested, though not payable, the gross sum should be raised as soon as the first portion becomes payable;[1] and the portions not then payable should be invested in the securities allowed by law, or in safe securities, where there are no investments pointed out by statutes or orders of court. It is not a proper administration to incumber an estate with as many different mortgages as there are portions, when one gross sum is directed to be raised.[1] But if *several distinct sums* are directed to be raised and paid at different times, the several portions cannot be raised until they become payable; and if the trustees raise them before, and lose or misapply the money, the land would still be liable to the charge, although some of the portions were payable.[2]

§ 583. Where trustees are directed to apply the rents and profits of an estate for a certain period to the maintenance and education of children or other persons, such direction will constitute a charge upon the estate in the hands of the trustees.[3] If the trustees are directed to raise a portion or portions out of the rents and profits, at or before a certain time, and they suffer the term to expire without raising the portions, the court can direct them to be raised out of the rents and profits on hand, or it can order those persons to whom such rents and profits have been distributed, to refund or contribute to the raising of the portions.[4]

§ 584. Interest is payable upon portions from and after the time named for their payment, although nothing is said in the settlement upon that subject.[5] If, however, there are any provisions in the will or settlement upon the subject of interest, or for the payment of any particular sum in place of interest, such provisions must be carried into effect.[6] So the directions of the settlement

[1] Gillbrand *v.* Goold, 5 Sim. 149.

[2] Dickenson *v.* Dickenson, 3 Bro. Ch. 19; Breedon *v.* Breedon, 1 R. & M. 413; Sowarsby *v.* Lacy, 4 Mad. 142; Lavender *v.* Stanton, 6 Mad. 46.

[3] Robinson *v.* Townshend, 3 G. & J. 413; Fox *v.* Phelps, 17 Wend. 393; 20 Wend. 437.

[4] Hawley *v.* James, 5 Paige, 318.

[5] Beal *v.* Beal, Pr. Ch. 405; Bagenal *v.* Bagenal, 6 Bro. P. C. 81; Roseberry *v.* Taylor, 6 Bro. P. C. 43; Hall *v.* Carter, 2 Atk. 358; Pomfret *v.* Winsor, 2 Ves. 472; Boycott *v.* Cotton, 1 Atk. 552; Leech *v.* Leech, 2 Dr. & W. 568, overruling Hays *v.* Bayley, 3 Sugd. V. & P. (10th ed.); Guillam *v.* Holland, 2 Atk. 343; Trimlestown *v.* Colt, 1 Ves. 277.

[6] Clayton *v.* Glengall, 1 Dr. & W. 1; Boycott *v.* Cotton, 1 Atk. 553; Mitchell *v.* Bower, 3 Ves. 286.

must be followed in relation to the expenses of raising the portions; but if there are no such directions, the expenses must be paid out of the estate.[1] Trusts for accumulations to raise portions for children are specially excepted from the operation of the Thelluson act,[2] so called, regulating trusts for accumulation; but such trusts are not excepted in the statutes of New York[3] and Pennsylvania[4] against acccumulations.

[1] Mitchell *v.* Mitchell, 4 Beav. 549.

[2] 39 & 40 Geo. III. c. 98; Edwards *v.* Tuck, 3 De G., M. & G. 40; Barrington *v.* Liddell, 2 De G., M. & G. 480; Jones *v.* Maggs, 9 Hare, 605; Evans *v.* Hellier, 5 Cl. & Fin. 114; Burt *v.* Sturt, 10 Hare, 415; Beech *v.* Vincent, 3 De G. & Sm. 678; 19 L. J. Ch. 131; Morgan *v.* Morgan, 20 L. J. Ch. 109; Halford *v.* Stains, 16 Sim. 488.

[3] R. S. pt. 2, tit. 2, c. 1, art. 1, § 37.

[4] Purd. L. 507; 1853, April 18, § 9.

CHAPTER XX.

TRUSTS UNDER ASSIGNMENTS FOR CREDITORS.

§ 585. A DEBTOR may convey or assign both his real and personal estate to trustees for the payment of his debts; and such trust may be limited to the payment of one particular debt due to the trustees or some third person,[1] or of several debts specified in the deed or schedule annexed to it.[2] This trust may be extended generally for the benefit of all the debtor's or grantor's creditors,[3] or to all who execute the deed or otherwise assent thereto.[4] The trust may be further limited to pay equally without distinction,[5] or

[1] Page *v.* Broom, 4 Russ. 6; De Wolf *v.* Chapin, 4 Pick. 59; Cooper *v.* Whitney, 3 Hill, 95.

[2] Boazman *v.* Johnson, 3 Sim. 377; Hamilton *v.* Houghton, 2 Bligh, 169; Garrard *v.* Lauderdale, 3 Sim. 1; Walwyn *v.* Coutts, 3 Mer. 707; 3 Sim. 14; Shirly *v.* Ferrers, 1 Bro. Ch. 41; Purefoy *v.* Purefoy, 1 Vern. 28.

[3] Carr *v.* Burlington, 1 P. Wms. 228; Boswell *v.* Parker, 2 Ves. 364; Hinde *v.* Blake, 3 Beav. 234; Acton *v.* Woodgate, 2 My. & K. 492.

[4] Dunch *v.* Kent, 1 Vern. 260; *Ex parte* Richardson, 14 Ves. 184; Spottiswoode *v.* Stockdale, Coop. 102; Hatch *v.* Smith, 5 Mass. 42.

[5] Carr *v.* Burlington, 1 P. Wms. 228.

at common law, it may be limited to make certain priorities and preferences in the payments.[1] The deed may direct the debts to be paid in full,[2] or a certain proportion or composition may be determined to be paid.[3] An arrangement of this kind fairly made by a contract with the creditors, or accepted or acted upon by them, is valid and binding upon all parties;[4] and courts will enjoin or restrain any act in violation of this trust by any of the parties.[5] Such a trust deed for the payment of debts is favorably regarded in equity; and it will be supported, if possible, without regard to the strict technicalities of the law;[6] as, where a party, with power of leasing in possession, made a lease to commence in the future, in trust for the payment of his debts, or where a party covenanted to stand seised of land to the use of another, in consideration of his paying the debts of the covenantor out of the profits of the land, the transactions were upheld in equity, as trusts for the payment of debts, though they would not have been good at law.[7]

§ 586. At common law, an insolvent debtor has the right to prefer any of his creditors. He may prefer one to all, or all to one, for the reason that it is not illegal to pay debts, and as creditors may sue and obtain judgment, and levy executions, each one for himself, and obtain as much advantage as possible by gaining priority of

[1] McColghan *v.* Hopkins, 17 Md. 395; Purefoy *v.* Purefoy, 1 Vern. 28; Cunningham *v.* Freeborn, 11 Wend. 241; Stevenson *v.* Agry, 7 Ham. (2d pt.) 247; Pearson *v.* Rockhill, 4 B. Mon. 296; Nivlon *v.* Douglass, 2 Hill, Ch. 443; Moffatt *v.* McDowall, 1 McCord, Ch. 434; Tompkins *v.* Wheeler, 16 Pet. 106; McCollough *v.* Sommerville, 8 Leigh, 415; Hickley *v.* Farmers' & Mech. Bank, 5 Gill & J. 377; Williams *v.* Brown, 4 John. Ch. 427; Brashear *v.* West, 7 Pet. 608; Spring *v.* South Carolina Ins. Co., 8 Wheat. 268; Hatch *v.* Smith, 5 Mass. 42; Stevens *v.* Bell, 6 Mass. 339; Lippincott *v.* Barker, 2 Binn. 174; Wilkes *v.* Ferris, 8 John. 335; Rankin *v.* Loder, 2 Ala. 380; How *v.* Camp, Walk. Ch. 427; Holbrook *v.* Allen, 4 Flor. 87.

[2] Ibid.

[3] Stephenson *v.* Hayward, Pr. Ch. 310; Tatlock *v.* Smith, 6 Bing. 339; Constantein *v.* Bleache, 1 Cox, 287; Vernon *v.* Morton, 8 Dana, 247.

[4] Small *v.* Marwood, 9 B. & Cr. 300.

[5] Spottiswoode *v.* Stockdale, Coop. 102; Mackenzie *v.* Mackenzie, 16 Ves. 372; *Ex parte* Sadler, 15 Ves. 52.

[6] Dunch *v.* Kent, 1 Vern. 260; Spottiswoode *v.* Stockdale, Coop. 102; Turner *v.* Jaycox, 40 Barb. 164.

[7] Pollard *v.* Greenville, 1 Ch. Ca. 10; Lord Paget's Case, 1 Leon. 194; 4 Cruise Dig. tit. 32, c. 9, §§ 25, 26.

time, so the debtor may voluntarily do what each one of his creditors may do by law, that is, obtain a preference.[1] But in many of the States, as Maine, New Hampshire, Massachusetts,[2] Connecticut, New Jersey, Pennsylvania, Ohio, Iowa, and Georgia, preferences are abolished by statute, and all debts owing to those who become parties to the assignment must be paid equally, and no preferences can be made except of those debts which, by the laws of the United States and of the State, must be paid in full.[3] In all those States which had a State system of insolvent or bankrupt laws, an assignment of all a debtor's property, giving preferences to some creditors, was an act of insolvency or bankruptcy, and was fraudulent and void. Under the bankrupt law of the United States now in force, all conveyances and assignments, made within six months of filing a petition of bankruptcy, which give a preference to any creditor, are fraudulent and void, if the debtor knows himself to be insolvent, and there is an intent to prefer.[4] Substantially the same provisions are enacted in the English statutes of bankruptcy.[5] In some of the States, preferences are prohibited, and an assignment containing a preference is fraudulent and void; but in others, as in Ohio and Pennsylvania, the assignment is not void; but the provision only containing the preference is void, and the assignment enures to all creditors equally in proportion to their demands;[6] but if the assignment is in trust for such creditors as release, no releasing creditors are excluded.[7] In States where preferences have not been prohibited by statute, courts lean strongly against them, and will not support them if they can be avoided for any good reason.[8] But these statutes against preferences apply only to general assignments, and not to *bona fide* sales to a creditor to pay a valid debt, or partial assignments for particular purposes.[9] While

[1] *Ante*, § 585, and case cited.

[2] Stat. 1836, c. 238, § 3.

[3] Thomas *v.* Jenkes, 1 Amer. Lead. Ca. 74.

[4] Stat. 1867, March 2, §§ 81, 82, 83.

[5] 24 & 25 Vict. c. 134.

[6] Law *v.* Mills, 18 Penn. St. 185; Wiener *v.* Davis, 18 Penn. St. 331; Hulls *v.* Jeffrey, 8 Ohio, 390; Harshman *v.* Lowe, 9 Ohio, 92; Wilcox *v.* Kellogg, 11 Ohio, 394; Mitchell *v.* Gazzam, 12 Ohio, 315.

[7] Lea's App., 9 Barr, 504.

[8] Boardman *v.* Halliday, 10 Paige, 224; Cram *v.* Mitchell, 1 Sand. 251; Webb *v.* Daggett, 2 Barb. 10; Nicholson *v.* Leavitt, 4 Sand. 279.

[9] McWhorter *v.* Wright, 5 Ga. 555; Bates *v.* Coe, 10 Conn. 281; Mer. Man. Co. *v.* Smith, 8 N. H. 347; Beard *v.* Kimball, 11 N. H. 471; Barker *v.* Hall, 13 N. H. 298; Henshaw *v.* Sumner, 23 Pick. 446.

the general bankrupt law is in force, assignments will be infrequent; but, as they may still be made, a general outline of the law only will be stated.

§ 587. If a debtor assigns his whole property, he becomes insolvent and bankrupt. The bankrupt laws require a bankrupt's estate to be under the control of commissioners or assignees appointed by, and amenable to a court of law, and not under the control of persons appointed by the debtor.[1] Therefore every general assignment is an act of bankruptcy; if there are preferences, it is a fraud upon the other creditors.[2] If it is an assignment for an equal distribution, it is a fraud upon the policy of the law.[3] Such deed will be fraudulent and an act of bankruptcy, although it contains a proviso that it shall be void if the trustees think fit, or a proviso that, if the creditor or creditors to a certain amount do not execute within a certain time a decree of bankruptcy shall be entered; or if the trustees did not accept the deed or intend to act, or if the trustees induced the debtor to execute the deed.[4] The same general principles prevail in the United States under the national bankrupt law. A general assignment for the benefit of creditors is an act of bankruptcy, and so is the sale or mortgage of a stock of goods or property out of the usual and ordinary course of the debtor's business.[5] But, in order to avoid the deed of assignment, there must be a debt due at the time of its execution;[6] and the deed, though voidable by creditors and assignees in bankruptcy, is good between the parties themselves.[7]

§ 588. A corporation has the same right as a natural person to make assignments for the benefit of its creditors;[8] and it may

[1] Dutton *v.* Morrison, 17 Ves. 199; Worsley *v.* Demattos, 1 Burr. 476; Simpson *v.* Sikes, 6 M. & S. 312.

[2] Wilson *v.* Day, 2 Burr. 827; Alderson *v.* Temple, 4 Burr. 2240; Lewin on Trusts, 375 (5th ed.).

[3] Kettle *v.* Hammond, 1 Cook's B. L. 108; Tappenden *v.* Burgess, 4 East, 239; Lewin on Trusts, 375.

[4] Tappenden *v.* Burgess, 4 East, 230; Back *v.* Gooch, 4 Camp. 232; Holt, 13; Dutton *v.* Morrison, 17 Ves. 193; Lewin on Trusts, 376.

[5] See Brightly's Annotated Bankrupt Law of the United States, pp. 72, 73, 74, 78, 79, 80, and the cases cited by him.

[6] *Ex parte* Taylor, 5 De G., M. & G. 392; *Ex parte* Louch, 1 De G. 612; Oswald *v.* Thompson, 2 Exch. 215.

[7] Bessey *v.* Windham, 6 Q. B. 166.

[8] Catlin *v.* Eagle Bank, 6 Conn. 233; Savings' Bank *v.* Bates, 6 Conn. 506; Dana *v.* Bank of the United States, 5 Watts & S. 224; Hopkins *v.* Gallatin

make preferences among its creditors,[1] though grave doubts have been raised whether it can do any thing but make an equal division of its property among its creditors in case of insolvency.[2] A general assignment by a corporation of all the property with which it does its business is a good cause for taking away its charter and ending its existence.[3]

§ 589. No formalities are required in an assignment in trust for creditors, if the instrument is so constructed that the intention of the parties can be inferred from it.[4] In those States where there are statutes regulating such assignments, the instrument must be substantially according to the statute: thus a lease reserving rent in trust for creditors may be an assignment;[5] and a power of attorney to collect money and pay it to creditors, in an order named, is an assignment;[6] and a letter sent to an absent creditor, assigning personal property for the benefit of himself and other creditors, is valid as an assignment.[7] But an assignment, directly to creditors to pay their own debts, does not come within the rules respecting assignments in trust, although the surplus may go to the debtor.[8] Nor is a judgment confessed to a creditor in trust an assignment;[9] nor is a mortgage in trust to pay debts, with or without a power of sale, an assignment.[10]

§ 590. A conveyance of all a debtor's property in trust, for the payment of all or any number of his creditors, is not within the

Turnpike, 4 Humph. 403; Tower *v.* Bank of River Raisin, 2 Doug. 530; App. 12; 6 Humph. 532; State of Maryland *v.* Bank of Maryland, 6 Gill & J. 205; Bank of U. S. *v.* Huth, 4 B. Mon. 423; *Ex parte* Conway, 4 Pike, 305; Ringo *v.* R. E. Bank, 13 Ark. 575; Arthur *v.* Commercial, &c., Bank of Vicksburg, 9 Sm. & M. 396; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. 119; 3 Comst. 238; Union Bank of Tennessee *v.* Ellicott, 6 Gill & J. 363. In New York, a corporation has no such right. Loring *v.* United States Co., 30 Barb. 644.

[1] Ibid.

[2] Robins *v.* Embry, 1 Sm. & M. Ch. 207; Montgomery *v.* Commercial Bank, 1 Sm. & M. Ch. 632.

[3] State *v.* Real Estate Bank, 5 Pike, 596.

[4] Harvey *v.* Mix, 24 Conn. 406.

[5] Lucas *v.* Sunbury and Erie R.R. Co., 32 Penn. St. 458; Bittenger *v.* R.R. Co., 40 Penn. St. 269.

[6] Watson *v.* Bagaley, 12 Penn. St. 164.

[7] Dargan *v.* Richardson, 1 Cheves, L. 197; Shubar *v.* Winding, 1 Chev. L. 218.

[8] Henderson's App., 31 Penn. St. 502; Chaffees *v.* Risk, 24 Penn. St. 432; Vallance *v.* Miners' Life Ins. Co. 42 Penn. St. 441.

[9] Guy *v.* McIlree, 26 Penn. St. 92; Lord *v.* Fisher, 19 Ind. 7.

[10] Barker *v.* Hall, 13 N. H. 298; Manuf. and Mech. Bank *v.* Bank of Penn., 7 Watts & S. 335; Harkrader *v.* Leiby, 4 Ohio St. 602.

statute of 13 Eliz. c. 5, or 29 Eliz. c. 5, which makes void all conveyances made to hinder, delay, or defraud creditors; although the assignment may operate to change the rights of a creditor, and may result in delaying him.[1] But all such assignments will be void if affected by *actual fraud:*[2] as if the purpose is to hinder, delay, and defraud the creditors;[3] or any one or more of them,[4] or if a fictitious debt is preferred;[5] or there is the reservation of a power of revoking the assignment, or the reservation of any other right and power which gives the debtor the control of the property;[6] or if a clause is introduced which exempts the assignees from the ordinary duties affixed by law to the office of assignee, as that the assignees shall not be liable for any loss not happening from their own gross negligence or misfeasance.[7] So the selection of a sick, weak, or incapable assignee, or of one at a distance from the locality, or of an insolvent person, or of one of such moral or pecuniary character as to evince a purpose on the part of the debtor to keep the control of the property, or to render it unprofitable to the creditors, will be strong evidence of fraud in fact, and will avoid the assignment.[8] The postponement, for an unreasonable length of time, of the sale of the property, and of the settlement of the accounts and payment of the creditors, by the trustees is evidence of fraud.[9]

[1] Meux *v.* Howell, 4 East, 9; Estwick *v.* Callaud, 5 T. R. 424; Wilt *v.* Franklin, 1 Binn. 514.

[2] Twyne's Ca., 3 R. 80 a; Dutton *v.* Morrison, 17 Ves. 197; Wilson *v.* Day, 2 Burr. 827; Hungerford *v.* Earle, 2 Vern. 261; Pickstock *v.* Lyster, 3 M. & S. 371; Tarback *v.* Marbury, 2 Vern. 510; Law *v.* Skinner, W. Black. 996; Stone *v.* Grantham, 2 Buls. 218; Worsley *v.* Demattos, 1 Burr. 467; Wilson *v.* Gray, 2 Stockt. 233; Jessup *v.* Hulse, 29 Barb. 539; Gazzam *v.* Poyntz, 4 Ala. 374.

[3] Sheldon *v.* Dodge, 4 Denio, 218; Bodley *v.* Goodrich, 7 How. 277; Hart *v.* McFarland, 1 Harris, 185.

[4] Knight *v.* Packer, 1 Beasley, 214.

[5] Waters *v.* Comly, 3 Harr. 117; Webb *v.* Daggett, 2 Barb. 10; Planck *v.* Schermerhorn, 3 Barb. Ch. 644; Irwin *v.* Keen, 3 Whar. 347. But if a creditor extinguishes his claim by fraud, his share goes into the residue for the other creditors. Hardcastle *v.* Fisher, 24 Mo. 70.

[6] Whallon *v.* Scott, 10 Watts, 237; Riggs *v.* Murray, 2 John. Ch. 565; 15 John. 571; Grover *v.* Wakeman, 11 Wend. 187.

[7] Litchfield *v.* White, 3 Sand. Ch. 547; Olmstead *v.* Herrick, 1 E. D. Smith, 310; Hutchinson *v.* Lord, 1 Wis. 286.

[8] Currie *v.* Hart, 2 Sand. Ch. 251; Reede *v.* Emery, 8 Paige, 417; Connah *v.* Sedgwick, 1 Barb. 211; Cram *v.* Mitchell, 1 Sand. 251; Hayes *v.* Doane, 3 Stock. 84.

[9] Adlum *v.* Yard, 1 Rawle, 163; Mitchell *v.* Beal, 8 Yerg. 134. Three years

So is the assignment of property which, on the face of the paper, the assignee is not authorized to distribute.[1] So any unusual powers given to the trustees, that may prejudice the claims of the creditors and favor the debtor, will render the settlement fraudulent; as a power given to the trustees to compound with the creditors, or a right reserved either to the grantor or trustee to make preferences or to alter them.[2] In some States, a power to sell on credit is considered evidence of fraud,[3] and so is a power to mortgage, or lease,

is an unreasonably long time. Adlum *v.* Yard, *ut supra.* The length of time which will be reasonable depends upon the nature and situation of the property. Hafner *v.* Irwin, 1 Ired. L. 490; Browning *v.* Hart, 6 Barb. 91; Hardy *v.* Skinner, 9 Ired. L. 191; Robins *v.* Embry, 1 Sm. & M. Ch. 205; Rundlett *v.* Dale, 10 N. H. 458; Hardy *v.* Simpson, 13 Ired. L. 138; Grover *v.* Wakeman, 11 Wend. 187; Bennett *v.* Union Bank, 5 Humph. 612; Farmers' Bank *v.* Douglass, 11 Sm. & M. 472; Arthur *v.* Com. & Railw. Bank of Vicksburg, 9 Sm. & M. 396; Henderson *v.* Downing, 24 Miss. 119. A year's suspension was deemed fraudulent in one case. Ward *v.* Trotter, 3 Mon. 1; Johnson *v.* Thweatt, 18 Ala. 745. In Pennsylvania a year was deemed a proper time, and a longer time was deemed fraudulent. Sheener *v.* Lautzerbeizer, 6 Watts, 543; Dana *v.* Bank of U. S., 5 Watts & S. 224; Abercrombie *v.* Bradford, 16 Ala. 560; Hodge *v.* Wyatt, 10 Ala. 271; Hindman *v.* Dill, 11 Ala. 689; Lockhart *v.* Wyatt, 10 Ala. 231. Three months in most cases would not be unreasonably long; Christopher *v.* Covington, 2 B. Mon. 357. But if the trustee may use his own discretion, it is void. D'Invernois *v.* Leavitt, 23 Barb. 63.

[1] Hooper *v.* Tuckerman, 3 Sand. 316.

[2] Wakeman *v.* Grover, 4 Paige, 24; 11 Wend. 187; Hudson *v.* Maze, 3 Scam. 579; Sheldon *v.* Dodge, 4 Denio, 218; Mitchell *v.* Stiles, 1 Harris, 306; Barnum *v.* Hampstead, 7 Paige, 569; Boardman *v.* Halliday, 10 Paige, 224; Strong *v.* Skinner, 4 Barb. 547; Averill *v.* Loucks, 6 Barb. 471; Gazzam *v.* Poyntz, 4 Ala. 374; D'Invernois *v.* Leavitt, 23 Barb. 63. But the assignees may compromise claims due to the debtor. White *v.* Monsarrat, 18 B. Mon. 809; Dow *v.* Platner, 16 N. Y. 562; Robins *v.* Embry, 1 Sm. & M. Ch. 207; Bellows *v.* Partridge, 19 Barb. 176; Meacham *v.* Sternes, 9 Paige, 398.

[3] Mussey *v.* Noyes, 26 Vt. 426; Sutton *v.* Hanford, 11 Mich. 513; Pierce *v.* Brewster, 32 Ill. 268; Page *v.* Olcott, 28 Vt. 465; Barney *v.* Griffin, 2 Comst. 366; Nicholson *v.* Leavitt, 2 Seld. 510, overruling 4 Sand. 366; Billings *v.* Billings, 1 Cal. 113; Swoyer's App., 5 Barr, 317; Estate of Davis, 5 Whart. 530; Kellogg *v.* Slauson, 1 Kern. 305; American Exch. Bank *v.* Inloes, 7 Md. 380; Porter *v.* Williams, 5 Seld. 142; Hutchinson *v.* Lord, 1 Wis. 286; Keep *v.* Sanderson, 2 Wis. 42; Booth *v.* McNair, 11 Mich. 19; Mower *v.* Hanford, 6 Min. 535. In other States a power to sell on credit is good. Grinell *v.* Adams, 11 Humph. 85; Shackleford *v.* Bank of Mobile, 2 Ala. 238; Abercrombie *v.* Bradford, 16 Ala. 560; Neally *v.* Ambrose, 21 Pick. 185; Hopkins *v.* Ray, 1 Met. 79. A power to convert the estate into money, in such convenient time as to the assignees should seem meet, is a power to sell on credit and void. Wood-

or incumber the estate.[1] The trust may be to sell at either public or private sale.[2]

§ 591. So the reservation of a use or benefit to the grantor will render a general assignment void. It is a settled principle that a reservation to the grantor or his family, or to any one not a creditor, of any trust, profit, or benefit out of the property, or of a credit on account of any part of it, is a fraud in law, and avoids the whole assignment.[3] So a stipulation that the grantor should retain the possession avoids the assignment.[4] But in many States the possession by the assignor of the property after the assignment is only evidence, more or less stringent, of fraud under the circumstances of each case, and may be explained.[5] A stipulation

burn *v.* Mosher, 9 Barb. 255; Murphy *v.* Bell, 8 How. Pr. Ca. 468. So a power to complete the manufacture of stock, in such manner as, in the judgment of the assignees, to obtain the most money, was void. Dunham *v.* Waterman, 17 N. Y. 9. But to sell for the best interest of the parties is not a power to sell on credit. Whitney *v.* Krows, 11 Barb. 200; Kellogg *v.* Slauson, 1 Kern. 302; Maennel *v.* Murdock, 13 Md. 164; Clark *v.* Fuller, 21 Barb. 128; Nichols *v.* McEwen, 21 Barb. 65; Ely *v.* Hair, 16 B. Mon. 230. If there is no power in the assignment to sell on credit, but the trustee sells on credit, the assignment is not void. Small *v.* Ludlow, 20 N. Y. 155.

[1] Planck *v.* Schermerhorn, 3 Barb. Ch. 644; Barnum *v.* Hempstead, 7 Paige, 568.

[2] Bellows *v.* Partridge, 19 Barb. 176.

[3] Thomas *v.* Jenks, 1 Amer. Lead. Ca. 69; Mackie *v.* Cairnes, 5 Cow. 549; Jackson *v.* Parker, 9 Cow. 73; Byrd *v.* Bradley, 2 B. Mon. 239; Kissam *v.* Edmundson, 1 Ired. Eq. 180; Goodrich *v.* Downs, 6 Hill, 438; Farmer *v.* Lesley, 6 Barr, 121; Shaffer *v.* Watkins, 7 Watts & S. 219; Leadman *v.* Harris, 3 Dev. 144; Mead *v.* Phillips, 1 Sand. 83; Anderson *v.* Fuller, 1 McMul. Eq. 27; McAllister *v.* Marshall, 6 Binn. 338; Peacock *v.* Tompkins, Meigs, 317; Austin *v.* Johnson, 7 Humph. 191.

[4] Twyne's Case, 3 R. 80 b; 1 Smith Lead. Ca. 1, and notes; Dewey *v.* Adams, 4 Edw. Ch. 21; Connah *v.* Sedgwick, 1 Barb. 210; Rogers *v.* Vail, 16 Vt. 329; Caldwell *v.* Williams, 1 Cart. 405.

[5] In Massachusetts, such stipulations are not fraudulent. Baxter *v.* Wheeler, 9 Pick. 21; Foster *v.* Saco Manuf. Co. 12 Pick. 451. If the assignment is good on its face, it is not void for an illegal act done afterwards, as the assignor's carrying away a bag of $5000 in gold, unless the assignment was executed with a fraudulent intent. Wilson *v.* Forsyth, 24 Barb. 105. Perhaps, in most States, the retention of the possession by the assignor is only evidence of fraud, and not in itself fraud. Brooks *v.* Marbury, 11 Wheat. 82; Vernon *v.* Morton, 8 Dana, 247; Pike *v.* Bacon, 8 Shep. 280; Osborne *v.* Fuller, 14 Conn. 530; Strong *v.* Carrier, 17 Conn. 239; Klapp *v.* Shurk, 13 Penn. St. 589; Fitler *v.* Maitland, 5 Watts & S. 307; Dallam *v.* Fitler, 6 Watts & S. 323; Dewey *v.*

for the maintenance of the grantor or his family, or that the grantor shall be employed to manage and dispose of the property at a fixed salary,[1] or the reservation of a fixed sum of money, or of so much a year, avoids the assignment.[2] An express reservation of the surplus to the grantor, upon a partial assignment for a portion of the creditors, renders the assignment void.[3] So it is said that an express reservation of the surplus, in a general assignment, renders it void.[4] On the other hand, it has been held that the reservation of the surplus, after paying all the creditors, is only what the law implies, and is therefore not void.[5] But all secret reservations are fraudulent.[6] If the assignor secretly, and without the knowledge

Littlejohn, 2 Ired. Eq. 495; Christopher *v.* Covington, 2 B. Mon. 357; Hardy *v.* Skinner, 9 Ired. L. 191; Ravisies *v.* Allston, 5 Ala. 297; Darwin *v.* Handley, 3 Yer. 502; Barker *v.* Hall, 13 N. H. 298; Shackleford *v.* Bank of Mobile, 22 Ala. 238; Lockhart *v.* Wyatt, 10 Ala. 231.

[1] Johnson *v.* Harvey, 2 Pen. & Watts, 82; McClug *v.* Lecky, 3 Pen. & Watts, 83; Henderson *v.* Downing, 24 Mis. 117.

[2] Mackie *v.* Cairns, 5 Cow. 549; Butler *v.* Van Wyck, 1 Hill, 463; Goodrich *v.* Downs, 6 Hill, 440, overruling Riggs *v.* Murray, 2 John. Ch. 565, 15 John. 571, and Austin *v.* Bell, 20 John. 442; Harris *v.* Sumner, 2 Pick. 129; Richards *v.* Hazzards, 1 Stew. & Por. 139. A reservation of so much as is allowed by law avoids the deed in Tennessee, Sugg *v.* Tillman, 2 Swan. 210; but not in Pennsylvania, Mulford *v.* Shurk, 28 Penn. St. 473. But the courts will be governed by circumstances, and the intent of the parties, in determining whether certain reservations are fraudulent, as if the sum is small and reasonable. Canal Bank *v.* Cox, 6 Me. 395; Skipwith *v.* Cunningham, 8 Leigh, 272; Kevan *v.* Branch, 1 Grat. 275. The trustees may employ the assignor, at reasonable compensation, to assist in disposing of the property. Shattuck *v.* Freeman, 1 Met. 10; Vernon *v.* Morton, 8 Dana, 247; Pearson *v.* Rockhill, 4 B. Mon. 296; Bank of Mobile *v.* Clark, 7 Ala. 765; Jones *v.* Whitbread, 11 C. B. 406; Fitler *v.* Maitland, 5 Watts & S. 307; Nickolson *v.* Leavitt, 4 Sand. 270; Mulford *v.* Shurk, 28 Penn. St. 473. So the trustees may employ other agents in managing the property. Hennessey *v.* Western Bank, 6 Watts & S. 300; Kelly *v.* Lank, 7 B. Mon. 220; Coates *v.* Williams, 7 Exch. 208; Peck *v.* Whiting, 21 Conn. 206. The trustee may act and convey by attorney. Blight *v.* Schenck, 10 Barr, 285; Maennel *v.* Murdock, 13 Md. 164; Gillespie *v.* Smith, 22 Ill. 473.

[3] Doremus *v.* Lewis, 8 Barb. 124; Suidam *v.* Martin, Wright, 698; Goodrich *v.* Downs, 6 Hill, 438; Strong *v.* Skinner, 4 Barb. 547; Cole *v.* Jessup, 4 Barb. 307; Griffin *v.* Barney, 2 Comst. 365; Leitch *v.* Hollister, 4 Comst. 214; Dana *v.* Lull, 17 Vt. 390.

[4] Ibid.

[5] Hall *v.* Denison, 17 Vt. 311; Ely *v.* Cook, 18 Barb. 612; Beatty *v.* Davis, 9 Gill, 213; Rahn *v.* McElrath, 6 Watts, 151; Hindman *v.* Dill, 11 Ala. 689; Austin *v.* Johnson, 7 Humph. 191.

[6] M'Cullock *v.* Hutchinson, 7 Watts, 434; Smith *v.* Lowell, 6 N. H. 67; Smith *v.* Smith, 11 N. H. 460.

of the general creditors, pays extra money, or gives a special advantage to some particular creditor to procure his assent to the assignment, or to secure his influence with the other creditors in gaining their assent or discharge, such assignment will be illegal and void, as a fraud upon the general creditors; and if the general creditors have signed a release of their claims, such release will be no bar to an action against the debtor.[1] If such creditor has taken notes or other securities from the debtor, as an extra consideration for assenting to such assignment, such notes and securities are void.[2]

§ 592. A condition in a deed of assignment, requiring the creditors to release the assignor from all claims before receiving any benefit under the deed, the surplus returning to the debtor, and not to the non-releasing creditors, renders the deed fraudulent and void; and such a stipulation, as a condition of preference, although the only effect is to postpone the non-releasing creditors to a share of the surplus, renders the assignment void. The principle is, that although preferences are allowed, yet the appropriation of the property to the creditors must be absolute and unconditional, and a trust which coerces the creditors into a relinquishment of part of their claims, in order to enjoy any benefit under the deed, is fraudulent and void, although no portion of the surplus may go to the grantor.[3] An assignment to a trustee of *part* of a debtor's prop-

[1] Mare *v.* Sandford, 1 Gif. 288; Case *v.* Gerrish, 15 Pick. 50; Ramsdell *v.* Edgarton, 8 Met. 227; Lothrop *v.* King, 8 Cush. 382; Partridge *v.* Messer, 14 Gray, 180.

[2] Ibid.

[3] Doe *v.* Scribner, 41 Me. 277; Owen *v.* Arvis, 2 Dutch. 23; Miller *v.* Conklin, 17 Ga. 430; Goddard *v.* Hapgood, 25 Vt. 351; Green *v.* Trieber, 3 Md. 13; Hyslop *v.* Clarke, 14 John. 458; Austin *v.* Bell, 20 John. 442; Wakeman *v.* Grover, 4 Paige, 24; 11 Wend. 187; Goodrich *v.* Downs, 6 Hill, 438; Hafner *v.* Irwin, 1 Ired. L. 490; Robins *v.* Embry, 1 Sm. & M. Ch. 208; Whallon *v.* Scott, 10 Watts, 237; Hastings *v.* Belknap, 1 Denio, 197; Atkinson *v.* Jordan, 5 Ham. 293; Woolsey *v.* Verner, Wright, 606; Barrett *v.* Reids, Wright, 701; Brown *v.* Knox, 6 Mo. 302; Drake *v.* Rogers, 6 Mo. 317; Ingraham *v.* Wheeler, 6 Conn. 277; Howell *v.* Edgar, 3 Scam. 417; Ramsdell *v.* Sigerson, 2 Gill, 78; Swearingin *v.* Slicer, 5 Mo. 241; The Watchman, Ware, 232; Todd *v.* Buckman, 2 Fairf. 41; Pearson *v.* Crosby, 23 Me. 261; Hurd *v.* Silsbee, 10 N. H. 108; Nivlon *v.* Douglass, 2 Hill, Ch. 443; Jacot *v.* Corbett, 1 Cheves, Ch. 71; Grimshaw *v.* Walker, 12 Ala. 101; Brown *v.* Lyon, 17 Ala. 659; West *v.* Snodgrass, 17 Ala. 549; Fox *v.* Adams, 5 Me. 245; Ashurst *v.* Martin, 9 Porter, 567; McCall *v.* Hinkley, 4 Gill, 129. In the early cases in Alabama, such a condition was held not to vitiate the assignment. Gazzam *v.* Poyntz, 4 Ala. 374;

erty, on condition of a full release, is fraudulent everywhere.[1] A void assignment may be remedied by an additional assignment,[2] but it cannot be helped by parol evidence.[3]

§ 593. In England, a voluntary assignment to a trustee for creditors, not communicated to them, and they not being parties thereto and privy to its execution, conveys a mere power or agency to the trustees, which may be altered or revoked at the will of the assignor. The creditors, though named in the deed, cannot enforce the trust against the assignor or trustee;[4] but it is said that the communication of the trust by the trustees to the creditors takes away the power to revoke it,[5] and if the trustees have made payments or advances, they are entitled to possession of the property until they are reimbursed.[6] If the deed declares that it

Wiswall *v.* Ticknor, 6 Ala. 179. In Pennsylvania, Virginia, South Carolina, Massachusetts, and Rhode Island, such conditions have been held to be good, and not to vitiate the deeds of assignments. Lippincott *v.* Barker, 2 Binn. 174; Livingston *v.* Ball, 3 Watts, 198; Bayne *v.* Wylie, 10 Watts, 309; Mechanics' Bank *v.* Gorman, 8 W. & S. 304; Peirpont *v.* Graham, 4 Wash. 232; Skipwith *v.* Cunningham, 8 Leigh, 272; Kevan *v.* Branch, 1 Grat. 275; Nivlon *v.* Douglass, 2 Hill, Ch. 443; Le Prince *v.* Guillemont, 1 Rich. Eq. 187; Brashear *v.* West, 7 Pet. 609; Dana *v.* Bank of U. S., 5 W. & Sar. 224; Borden *v.* Sumner, 4 Pick. 265; Andrew *v.* Ludlow, 5 Pick. 28; Nostrand *v.* Atwood, 19 Pick. 281; Canal Bank *v.* Cox, 6 Me. 395; Curtis *v.* Leavitt, 15 N. Y. 9; Halsey *v.* Whitney, 4 Mason, 207. A release by a separate deed, not part of the assignment, does not avoid the assignment. Renard *v.* Graydon, 39 Barb. 548; Nightingale *v.* Harris, 6 R. I. 321; Livermore *v.* Jenckes, 21 How. 126.

[1] Seaving *v.* Brinkerhoff, 5 John. Ch. 329; Skipwith *v.* Cunningham, 8 Leigh, 272; Le Prince *v.* Guillemont, 1 Rich. Eq. 187; Jacot *v.* Corbet, 1 Cheeves, Ch. 71. This question was left open in Nostrand *v.* Atwood, 19 Pick. 284; Fassit *v.* Phillips, 4 Wharton, 399; Thomas *v.* Jenks, 5 Rawle, 221; 1 Amer. Lead. Ca. 70; Hennessey *v.* Western Bank, 6 Watts & Ser. 301; Sangston *v.* Gaither, 3 Md. 41; Green *v.* Trieber, 3 Md. 11.

[2] Merrill *v.* Englesby, 2 Vt. 150.

[3] Inloes *v.* American Ex. Bank, 11 Ind. 173; Groschen *v.* Page, 6 Cal. 138; Hampstead *v.* Johnston, 18 Ark. 123.

[4] Walwyn *v.* Coutts, 3 Mer. 707; 3 Sim. 14; Page *v.* Broom, 4 Russ. 6; Garrard *v.* Lauderdale, 3 Sim. 1; 2 R. & M. 451; Bill *v.* Cureton, 2 M. & K. 511; Simmonds *v.* Palles, 2 Jo. & La. 489; Griffiths *v.* Ricketts, 7 Hare, 307; Siggers *v.* Evans, 22 Eng. L. & Eq. 139; Nicholson *v.* Tutin, 2 K. & J. 18; Wilding *v.* Richards, 1 Coll. 659; Kirwan *v.* Daniel, 5 Hare, 499; Evans *v.* Bagwell, 2 Con. & Law. 616; Brown *v.* Cavendish, 1 Jo. & La. 635; Synnot *v.* Simpson, 5 H. L. Ca. 141.

[5] Acton *v.* Woodgate, 2 M. & K. 495.

[6] Hind *v.* Blake, 3 Beav. 234.

shall be void unless executed by all the creditors within a certain time, yet it is not void in equity if the creditors accept and act under it, though it is not signed by them.[1] And even though one of the trustees does not sign the deed, it is good at law as well as in equity.[2] If the deed itself declares that it is made for those *only* who *become parties* to it, only those who become parties can claim any thing under it;[3] though it has been held that they need not sign it, if they perform all its conditions, and take no step inconsistent with it.[4] In the United States the rule is different. If an assignment, not fraudulent, is made to trustees for the benefit of creditors, their assent is not necessary; or their assent will be presumed in all cases, if it is for their benefit, and contains no unusual clauses or restrictions.[5] A debtor cannot revoke the assignment

[1] Spotteswood *v.* Stockdale, Coop. 104; Dunch *v.* Kent, 1 Vern. 260. The creditor must put himself in the same relation as if he had signed the deed, Forbes *v.* Limmond, 4 De G., M. & G. 298, and within the time fixed, if there is a limit of time within which he must execute the assignment, or assent thereto. Halsey *v.* Whitney, 4 Mason, 206; Aston *v.* Woodgate, 2 M. & R. 492; Phœnix Bank *v.* Sullivan, 9 Pick. 410; De Caters *v.* Chaumont, 9 Paige, 490. The creditors are not necessarily excluded if they do not come in within the prescribed time, as they may show reasons why they should not be excluded. See cases before cited. Tennant *v.* Stoney, 1 Rich. Eq. 222; Hosack *v.* Rogers, 6 Paige, 415; Nicholson *v.* Tutin, 2 K. & J. 18; Watson *v.* Knight, 19 Beav. 369; Pierpont *v.* Graham, 4 Wash. C. C. 232; Stoddart *v.* Allen, 1 Rawle, 258; Dedham Bank *v.* Richards, 2 Met. 105. But if the time within which creditors are to come in is unreasonably short, the assignment will be fraudulent and void. Brashear *v.* West, 7 Pet. 609; Vaughn *v.* Evans, 1 Hill, Ch. 414; Vernon *v.* Moreton, 8 Dana, 447; Skipwith *v.* Cunningham, 8 Leigh, 272; Biron *v.* Mount, 24 Beav. 642; Lancaster *v.* Elce, 31 Beav. 325. If a *third party* conveys property in trust for a debtor's liabilities, only those creditors can avail themselves of the fund who come strictly within the terms of the trust, and execute the assignment and comply with all its conditions. Williams *v.* Moslyn, 33 L. J. Ch. 54.

[2] Small *v.* Marwood, 9 B. & Cr. 360; Good *v.* Cheesman, 2 B. & Ad. 328.

[3] Garrard *v.* Lauderdale, 3 Sim. 1; Balfour *v.* Welland, 16 Ves. 151.

[4] Field *v.* Donoughmore, 1 Dr. & War. 227.

[5] Nicoll *v.* Mumford, 4 John. Ch. 523; Cunningham *v.* Freeborn, 11 Wend. 241; Houston *v.* Nowland, 7 Gill & J. 480; Bank of U. S. *v.* Huth, 4 B. Mon. 423; Smith *v.* Leavitt, 10 Ala. 93; Kinnard *v.* Thompson, 12 Ala. 487; Governor, &c., *v.* Campbell, 17 Ala. 566; Rankin *v.* Duryer, 21 Ala. 392; Klapp *v.* Shurk, 1 Harris, 539; Harland *v.* Binks, 15 Adol. & El. (N. S.) 721; Brooks *v.* Marbury, 11 Wheat. 78; Brown *v.* Minturn, 2 Galli. 557; Wheeler *v.* Sumner, 4 Mason, 183; Halsey *v.* Whitney, 4 Mason, 206; New England Bank *v.* Lewis, 8 Pick. 113; Ward *v.* Lewis, 4 Pick. 518; North *v.* Turner, 9 Ser. & R. 244; Wiley *v.* Collins, 2 Fairf. 193; Wilt *v.* Franklin, 1 Binn. 502; Reinhard *v.* Bank

where the property has vested in the trustees, or the creditors have had notice of it, or any of the trusts have been performed.[1] The English rule prevailed in Massachusetts before the court had jurisdiction in equity over such assignments;[2] but after the Act of 1836, c. 238, the assent of creditors was not necessary.[3] If the conveyance is made *directly to the creditors*, in consideration of the debts due them, their assent to the conveyance is necessary; but it may be presumed under some circumstances.[4] If the assignment is made to a trustee not present, his assent will be presumed; and the deed will take effect from its delivery, subject to be defeated by the refusal of the trustee.[5] But if there is any doubt concerning the trustee's acceptance, all liens put upon the property during such delay, and before the trustee actually accepts, will take preference of the deed of assignment.[6]

§ 594. As soon as an assignee accepts a general assignment for the payment of debts to creditors, either directly or by implication, he becomes a trustee for them; and, as soon as they have notice, they may compel the execution of the trust in a court of equity.[7] In bringing a bill to seek the benefit of such an assignment, all the creditors must join in the suit, or one may sue in behalf of the others, who may come in and join him. Such bill

of Kentucky, 6 B. Mon. 252; Moses *v.* Murgatroyd, 1 John. Ch. 129; Neilson *v.* Blight, 1 John. Ca. 205; Weston *v.* Barker, 12 John. 281; 4 Kent, 307; Marigny *v.* Remy, 15 Martin, La. 607; Gray *v.* Hill, 10 Serg. & R. 436; De Forrest *v.* Bacon, 2 Conn. 633; Rankin *v.* Lodor, 21 Ala. 380; Stewart *v.* Hall, 3 B. Mon. 218.

[1] Robertson *v.* Sublett, 6 Humph. 313; Lawrence *v.* Davis, 3 McLean, 177; Petriken *v.* Davis, 1 Morris, 296.

[2] Russell *v.* Woodward, 10 Pick. 408; Stephens *v.* Bell, 6 Mass. 339; Widgery *v.* Haskell, 5 Mass. 144.

[3] Shattuck *v.* Freeman, 1 Met. 10.

[4] Thompkins *v.* Wheeler, 16 Pet. 106; Nicoll *v.* Mumford, 4 John. Ch. 522.

[5] Wilt *v.* Franklin, 1 Binn. 502; McKinney *v.* Rhoades, 5 Watts, 343; Skipwith *v.* Cunningham, 8 Leigh, 272; Merrill *v.* Swift, 18 Conn. 257; Ward *v.* Lewis, 4 Pick. 518; Moore *v.* Collins, 3 Dev. 126; Read *v.* Robinson, 6 Watts & S. 329; Dargan *v.* Richardson, 1 Cheves, L. 197; Shubar *v.* Winding, 1 Cheves, L. 218.

[6] Crosby *v.* Hillyer, 24 Wend. 280.

[7] Moses *v.* Murgatroyd, 1 John. Ch. 119; Shepherd *v.* McEvers, 4 John. 136; Hulse *v.* Wright, Wright, 61; Pingree *v.* Comstock, 18 Pick. 46; Weir *v.* Tannehill, 2 Yerg. 57; Nicoll *v.* Mumford, 4 John. Ch. 523; Ward *v.* Lewis, 4 Pick. 518; New Eng. Bank *v.* Lewis, 8 Pick. 113; Robertson *v.* Sublett, 6 Humph. 313; Pearson *v.* Rockhill, 4 Mon. 296.

must be brought for the enforcement of the trust generally, and for a sale of the property, the settlement of the accounts, and the payment of all the debts: a decree for the payment of a single debt would be erroneous.[1] But if the bill is to set aside the assignment for any reason, a single creditor may maintain it.[2] As a general rule, if the assignment is set aside and a receiver appointed, or the court orders the estate to be settled, claims will be paid *pari passu;* but some creditors may have obtained legal preferences at law, and in such case the court will order them to be paid according to their priority.[3]

§ 595. In a suit to enforce the trust under an assignment, the trustee must be brought before the court; and a proceeding without notice to him would be erroneous.[4] If the assignment is unconditional, the assignor, his heirs or representatives, need not be made parties;[5] but if there is an express stipulation that the surplus shall be paid to the assignor, he or his representatives must be parties.[6] So if the trust to pay debts is created under a will, the heir of the testator must be made a party to a suit.[7]

§ 596. As a matter of course, mortgagees, judgment creditors, and all others, having a lien upon the trust property prior to the assignment, are not affected by it. Their rights remain as before the assignment; and an attachment or any lien that is fastened upon the property after the assignment is made, but before it

[1] Atherton *v.* Worth, 1 Dick. 375; McDougald *v.* Dougherty, 11 Ga. 570; Wakeman *v.* Grover, 4 Paige, 24; Bryant *v.* Russell, 23 Pick. 523; Edmeston *v.* Lyde, 1 Paige, 637; Hamilton *v.* Houghton, 2 Bligh, P. C. 169; Reynolds *v.* Bank of Va., 6 Grat. 174; Fisher *v.* Worth, 1 Busb. Eq. 63. But where one creditor filed a bill when no claim had been made for twenty years, and the trustee had stated that all the other creditors had been satisfied, he was allowed to maintain his bill. Mumford *v.* Murray, 6 John. Ch. 1.

[2] Russell *v.* Lasher, 4 Barb. 233; Wakeman *v.* Grover, 4 Paige, 24; Stout *v.* Higbee, 4 J. J. Marsh. 632. In Ohio, the creditor that procures the assignment to be set aside obtains a priority in the distribution of the assets. Atkinson *v.* Jordan, Wright, 247. The Rev. Statutes of N. Y. are to the same effect. Corning *v.* White, 2 Paige, 567; Burrall *v.* Leslie, 6 Paige, 445; Lucas *v.* Atwood, 2 Stew. 378.

[3] Gracey *v.* Davis, 3 Strob. Eq. 58; Austin *v.* Bell, 20 John. 442; McDermutt *v.* Strong, 4 John. Ch. 687; McMeekin *v.* Edmonds, 1 Hill, Eq. 293; Codwise *v.* Gilson, 10 John. 519; LePrince *v.* Guillemont, 1 Rich. Eq. 220.

[4] Hamilton *v.* Houghton, 2 Bligh, 169; Routh *v.* Kinder, 3 Swans. 144, n.

[5] Hobart *v.* Andrews, 21 Pick. 532.

[6] Houghton *v.* Davis, 23 Me. 28.

[7] Harris *v.* Ingledew, 3 P. Wms. 93.

is accepted by the trustee, takes preference of the assignment.[1] A creditor as one of the *cestuis que trust* may be a trustee;[2] in such case he has no power to prefer his own claim, but must take equally with the others, unless by the terms of the deed a preference is given him.[3] By accepting the trust according to its terms, a creditor trustee waives all claims and liens upon the property inconsistent with the deed.[4] But it is said, that the rule which prohibits a trustee from acquiring an interest adverse to his *cestui que trust* does not apply to a *bona fide* creditor who has become trustee; and that such trustee may purchase a judgment against his *cestui que trust.*[5] But the fact that the trustee is a *bona fide* creditor, ignorant of any fraud, will not prevent the assignment from being declared void, if it is fraudulent upon any legal grounds.[6] So creditors who accept the benefits conferred under such deed, and receive dividends or other advantages thereby, cannot set up rights inconsistent with the deed; nor can they, after receiving such advantages, impeach it, and procure it to be set aside, but they must comply with its provisions.[7] The assignee of an insolvent affirms a fraudulent sale made by his assignor by suing the fraudulent purchaser for the price.[8] A creditor, before he can commence process to set aside a fraudulent assignment or conveyance, must first obtain judgment on his claim.[9]

§ 597. When an assignment is made and executed, and all parties assent that the estate shall be managed and settled by trustees, the deed that vests the estate in the trustees, for the payment of the debts, may prescribe the manner of carrying the trust into

[1] Crosby *v.* Hillyer, 24 Wend. 280; Codwise *v.* Gilston, 10 John. 517; Hays *v.* Heidelberg, 9 Barr, 203.

[2] Balfour *v.* Welland, 16 Ves. 151; Boazman *v.* Johnson, 3 Sim. 377; Acton *v.* Woodgate, 2 M. & K. 49; Siggers *v.* Evans, 32 Eng. L. & Eq. 139.

[3] Boazman *v.* Johnson, 3 Sim. 382; Anon., 2 Ch. Ca. 54; Child *v.* Stephens, 1 Eq. Ca. Ab. 141; 1 Vern. 102; Garrard *v.* Lauderdale, 3 Sim. 1; Miles *v.* Bacon, 4 J. J. Marsh. 468; Harrison *v.* Mock, 10 Ala. 185.

[4] Harrison *v.* Mock, 10 Ala. 185.

[5] Prevost *v.* Gratz, Peters, C. C. 373.

[6] Rathburn *v.* Platner, 18 Barb. 272.

[7] Adlum *v.* Yard, 1 Rawle, 163; Gutzwiller *v.* Lackman, 23 Mis. 168; Pratt *v.* Adams, 7 Paige, 615; Burrows *v.* Alter, 7 Miss. 424; Jewett *v.* Woodward, 1 Edw. Ch. 195; Lanahan *v.* Latrobe, 7 Md. 268.

[8] Butler *v.* Hildreth, 5 Met. 49.

[9] Neustadt *v.* Joel, 2 Duer, 532.

execution, and paying the debts.[1] These directions may be contrary to law, and may be set aside on proceedings had for that purpose, yet if all parties proceed under the deed, the trustees must find their power in the deed of assignment or settlement, and they must proceed in accordance with it in selling the property and in paying the debts; if preferences are made, the trustees must pay them;[2] if all are to be paid equally, the trustees must pay in that manner.[3] If the trust is to pay only a certain class of debts, or a certain number of debts named, the trustees must confine themselves to their power.[4] The principle on which this rests is, that the assignor was the owner of the property, and he could give such directions as to the disposal of it as he pleased; and, so long as the law does not interfere to set aside the assignment, the assignee must follow the only power given to him, to wit, the deed of assignment. In England, the deed generally specifies the mode of raising the money for the purpose of the trust, by directing a sale or mortgage. In the absence of such direction, the intention is to be gathered from the scope of the whole deed, whether a sale or mortgage was intended; for the intention is to govern.[5] If the property is conveyed in trust to pay debts generally, the trustees can make a good title to the purchaser, either in fee or in mortgage, and the purchaser is not bound to see whether there are debts, or whether a sale is necessary, or to see to the application of the purchase-money: the creditors must look to the trustees.[6]

[1] Boazman v. Johnston, 3 Sim. 381; Carr v. Burlington, 1 P. Wms. 229.

[2] Garrard v. Lauderdale, 3 Sim. 1; Douglass v. Allen, 2 Dr. & War. 213; Pearce v. Slocombe, 3 Yo. & Col. 84.

[3] Ibid.; Anon., 3 Ch. Ca. 54; Child v. Stevens, 1 Vern. 102; Wolestoncraft v. Long, 1 Ch. Ca. 32; Hamilton v. Houghton, 2 Bligh, 169.

[4] Purefoy v. Purefoy, 1 Vern. 28; Loddington v. Kime, 3 Lew. 433; Pratt v. Adams, 7 Paige, 615; Stoddart v. Allen, 1 Rawle, 258; Brainard v. Dunning, 30 N. Y. 211.

[5] Spalding v. Shalmer, 1 Vern. 301; Ball v. Harris, 8 Sim. 485; Sheldon v. Dormer, 2 Vern. 310; Shrewsbury v. Shrewsbury, 1 Ves. Jr. 234; Ivy v. Gilbert, 2 P. Wms. 13; Mills v. Banks, 3 P. Wms. 1; Allen v. Backhouse, 2 V. & B. 65; Wilson v. Halliley, 1 R. & M. 590; 1 Sugd. Pow. 116; Stroughill v. Anstey, 1 De G., M. & G. 635.

[6] Johnson v. Kennett, 3 M. & K. 631; Shaw v. Borrer, 1 Keen, 559; Eland v. Eland, 4 M. & Cr. 428; Forbes v. Peacock, 11 Sim. 152; Page v. Adam, 4 Beav. 269; Culpepper v. Aston, 2 Ch. Ca. 115; Anon., Salk. 153; Dunch v. Kent, 1 Vern. 260; Jenkins v. Hiles, 6 Ves. 654, n.; Williamson v. Curtis, 3 Bro. Ch. 96; Doran v. Wiltshire, 3 Swans. 699; Jones v. Price, 11 Sim. 558;

But if the trust is to pay one particular debt, or debts named in a schedule, the purchaser must see to the necessity of the sale, and to the application of the purchase-money,[1] unless the trustees are authorized to give receipts, or there is a clause in the trust deed, discharging the purchaser from such obligations.[2]

§ 598. In the United States, a deed of assignment to pay debts necessarily implies a power to sell; and if it is an insolvent estate, a power to mortgage contained in the deed would render it fraudulent and void;[3] therefore all deeds of assignment for the payment of debts generally, without any limitations or directions, confer upon the trustees a right to sell.[4] But if there are special directions given as to the time, manner, and conditions of sale, they must be followed as given.[5] Thus, a conveyance of land in trust to pay out of the rents and profits the grantor's debts, and to support the grantor, his wife and children, and at his death to divide it among his children, gave no right to sell for payment of debts, or for any purpose.[6] An unsealed writing, purporting to convey land in trust to pay one debt, does not confer a power of sale, but creates a simple lien to be enforced in equity.[7] If a trustee sells, however, without power, and all parties are present, acquiescing in the sale, they are estopped in equity to deny the title of the purchaser.[8] An assignment that does not purport to convey land in trust will not give the trustees power to sell.[9] If the trustee has power to sell land to pay debts generally, it is impossible for the purchaser to know what the debts are, or whether there is a necessity for the sale. This is a part of the trust and

Glyn *v.* Locke, 3 Dr. & War. 11; 2 Sugd. V. & P. 32; Doe *v.* Hughes, 6 Exch. 223; Lock *v.* Lomas, 21 L. J. Ch. 503; Robinson *v.* Lowater, 17 Beav. 601; 5 De G., M. & G. 277.

[1] Doran *v.* Wiltshire, 3 Swans. 701; Elliott *v.* Merriman, Barn. 78; 1 Keen. 573; 2 Atk. 41; Spalding *v.* Shalmer, 1 Vern. 301; Lloyd *v.* Baldwin, 1 Ves. 73; Balfour *v.* Welland, 16 Ves. 151.

[2] Binks *v.* Rokeby, 2 Mad. 227; Roper *v.* Hallifax, 2 Sugd. Pow. 501, App. 3; Jones *v.* Price, 11 Sim. 557; Culpepper *v.* Aston, 2 Ch. Ca. 115; Spalding *v.* Shalmer, 1 Vern. 301; Braybroke *v.* Inskip, 1 Ves. 417.

[3] Planck *v.* Schermerhorn, 3 Barb. Ch. 644.

[4] Goodrich *v.* Proctor, 1 Gray, 567; Purdie *v.* Whitney, 20 Pick. 25; Gould *v.* Lamb, 11 Met. 84; Williams *v.* Otey, 8 Humph. 563.

[5] Walker *v.* Brungard, 13 Sm. & M. 723.

[6] Mundy *v.* Vawter, 3 Grat. 518.

[7] Linton *v.* Boly, 12 Mo. 567.

[8] Spencer *v.* Hawkins, 4 Ired. Eq. 288.

[9] Baker *v.* Crookshank, 1 Whart. Dig. (6th ed.) Debt. & Cred. pl. 370.

duty confided in the trustee, and a purchaser is not obliged to look to the application of the purchase-money.[1] The English rules upon this subject are not favored in this country, and they will not be applied if any circumstance can be found to take the case out of their operation. But if the trust is to pay a particular debt, or certain debts named in a schedule, the purchaser must see to the necessity of the sale, and to the application of the purchase-money, unless there is some circumstance or power to take the case out of the rule.[2] If there is collusion or fraud between the trustee and purchaser, or knowledge in the purchaser that there are no debts, or that the sale is unnecessary or not authorized, it is all void as fraudulent.[3] Although there is fraud, or a misapplication of the purchase-money with the knowledge of the purchaser, he will take a good *title at law;* but equity will convert him into a trustee, and make him accountable to the creditors or *cestuis que trust.*[4]

§ 599. As a general rule, the assets of a partnership are holden to pay partnership debts, and the separate property of each individual partner is holden, first to pay his private debts; so, if an insolvent partnership make an assignment, the trustee must apply the joint property to the joint debts, and the separate property to private debts.[5] So a partnership assignment that prefers private debts is void; and a general assignment by an indi-

[1] Goodrich *v.* Proctor, 1 Gray, 670; Andrews *v.* Sparhawk, 13 Pick. 393; Gardner *v.* Gardner, 3 Mason, 178; Williams *v.* Otey, 8 Humph. 568; Garnett *v.* Macon, 2 Brock. 185; 6 Call, 308; Grant *v.* Hook, 13 Ser. & R. 259; Bruch *v.* Lantz, 2 Rawle, 392; Coombs *v.* Jordan, 3 Bland, 284; Redheimer *v.* Pyron, Spears, Eq. 134; Cadbury *v.* Duval, 10 Barr, 267; Dalzell *v.* Crawford, 1 Pars. Eq. 57; Hannum *v.* Spear, 1 Yeates, 553; 2 Dall. 291; Hauser *v.* Shore, 5 Ired. Eq. 357; Sims *v.* Lively, 14 B. Mon. 433; Lining *v.* Peyton, 2 Des. 378; Wilson *v.* Davisson, 2 Rob. Va. 385; Nicholls *v.* Peak, 1 Beav. 69; Rutledge *v.* Smith, 1 Busb. Eq. 283.

[2] Gardner *v.* Gardner, 3 Mason, 178; Duffy *v.* Calvert, 6 Gill, 487; Wormley *v.* Wormley, 8 Wheat. 422; Cadbury *v.* Duval, 10 Barr, 267; Dalzell *v.* Crawford, 1 Pars. Eq. 57; Elliott *v.* Merryman, 1 Lead. Ca. Eq. 45, n.

[3] Potter *v.* Gardner, 12 Wheat. 498; Garnett *v.* Macon, 2 Brock. 185; Redheimer *v.* Pyron, Spears, Eq. 134.

[4] D'Oyley *v.* Loveland, 1 Strob. L. 46. A sale by a trustee holding the legal title, though unauthorized or collusive, will generally pass the legal title; but the grantee will take the estate charged with the same trusts that the original trustee was charged with.

[5] Pearce *v.* Slocombe, 3 Y. & Col. 84; Merrill *v.* Neill, 8 How. 414.

vidual partner, that preferred partnership debts would be void.[1] But where it is legal to make preferences, an assignment may probably prefer either class.[2] So it is said that provisions in a partnership assignment that do not go beyond the provisions of the law will not avoid it, though releases are stipulated for.[3] But a partnership assignment, that provides for a release, must convey all the property, joint and separate, held by the firm; [4] and the deed must be signed and sealed by all the members of the firm; for a general assignment by one partner will not pass the partnership assets; [5] nor will a general assignment by a single member of a limited partnership pass the property of the firm.[6] By statutes in nearly all the States, all preferences by limited partnerships are forbidden.[7]

§ 600. If by the terms of an assignment no debts are to be paid until they have been examined by the trustees, a creditor can claim no benefit under the deed, until he has submitted his claim to the trustees.[8] If the trustees are clothed with absolute power to allow or reject all claims, the court cannot interfere with their discretion; [9] but such a power in a general assignment by an insolvent debtor would render the assignment void. So a power given to the trustees to prefer such debts as they please would render the assignment void.[10] A general power to pay debts will not justify the trustees in paying fictitious debts; [11] nor will it include debts founded upon a usurious consideration: [12] but, where such debts are specially named and directed to be paid, the trustee cannot refuse to pay them, deducting the usurious

[1] Jackson *v.* Cornell, 1 Sand. Ch. 348.

[2] Kirby *v.* Schoonmaker, 3 Barb. Ch. 46.

[3] Andress *v.* Miller, 15 Penn. St. 318.

[4] Henessey *v.* Western Bank, 6 Watts & S. 300.

[5] Ibid.; Moddewell *v.* Keever, 8 Watts & S. 63.

[6] Merritt *v.* Wilson, 29 Me. 58.

[7] Mills *v.* Argall, 6 Paige, 577.

[8] Wain *v.* Egmont, 3 M. & K. 445; Drever *v.* Mawdesley, 16 Sim. 511; Nunn *v.* Wilsmore, 8 T. R. 521; Cosser *v.* Radford, 1 De G., J. & Sm. 585.

[9] Ibid.

[10] Wakeman *v.* Grover, 4 Paige, 24; 11 Wend. 187; Hudson *v.* Maze, 3 Scam. 579. But a power given to the trustees to compromise claims due to the estate does not avoid it. Bellows *v.* Partridge, 19 Barb. 178.

[11] Irwin *v.* Keen, 3 Whart. 347; Webb *v.* Daggett, 2 Barb. 10; Hardcastle *v.* Fisher, 24 Mo. 70.

[12] Pratt *v.* Adams, 7 Paige, 617; Beach *v.* Fulton Bank, 3 Wend. 584.

excess.[1] If a debt is specially directed to be paid, and afterwards a bill is sustained to set aside such debt as illegal or fraudulent, the trustees cannot pay it.[2] So a general direction in a will to pay debts applies only to legal debts, due upon good consideration, and enforceable against the testator's estate.[3] A trust to pay debts named in the schedule does not convert such debts into interest-bearing debts if they did not bear interest before. Even if the direction is to pay certain debts with interest, debts that do not bear interest will not be thus converted into interest-bearing debts.[4] But debts that bear interest, by the contract proving them, must be paid with interest.[5] If interest is realized by trustees upon funds in their hands, interest must be paid.[6] If the trustees permit a creditor to sign the deed for a specified sum, they cannot afterwards contest the debt.[7] But if there is gross fraud, they can apply to the court to set it aside.[8] If a creditor repudiates the deed and sues the debtor, the trustee cannot allow him to retrace his steps and sign the deed; and if he should allow it to be done, the other creditors may procure it to be set aside.[9]

[1] Green *v.* Morse, 4 Barb. 332; Pratt *v.* Adams, 7 Paige, 641.

[2] Morse *v.* Crofoot, 4 Comst. 114.

[3] Rogers *v.* Rogers, 3 Wend. 503; Chandler *v.* Hill, 2 Henn. & M. 124. Chancellor Kent in an opinion, printed 6 Humph. 532, advised that a preference given by a bank to pay notes illegally issued for borrowed money was valid, and that the trustees should pay them. The bank should be liable for money had and received, though the issuing of its bills was illegal. It had had the consideration and ought to pay, though it had done such acts as to forfeit its charter.

[4] Carr *v.* Burlington, 1 P. Wms. 229; Bothomly *v.* Fairfax, 1 P. Wms. 334; Maxwell *v.* Wettenhall, 2 P. Wms. 27; Lloyd *v.* Williams, 2 Atk. 111; Barwell *v.* Parker, 2 Ves. 364; Stewart *v.* Noble, Vern. & Scriv. 528; Creuze *v.* Hunter, 2 Ves. Jr. 157; 4 Bro. Ch. 316; Tait *v.* Northwick, 4 Ves. 618; Shirley *v.* Ferrers, 1 Bro. Ch. 41; Hamilton *v.* Houghton, 2 Bligh, 169.

[5] Hamilton *v.* Houghton, 2 Bligh, 187; Tait *v.* Northwick, 4 Ves. 618; Bath *v.* Bradford, 2 Ves. 588; Stewart *v.* Noble, Vern. & Scriv. 536; Anon., 1 Salk. 154; Burke *v.* Jones, 2 V. & B. 284; Hughes *v.* Wynne, 1 M. & K. 20; Pearce *v.* Slocombe, 3 Y. & Col. 84; Bryant *v.* Russell, 23 Pick. 508; Winslow *v.* Ancrum, 1 McCord, Ch. 100. But it has been held, that, in cases of preferred debts, the preference applied only to the principal debt, and that the interest was to be paid *pro rata* with the unpreferred debts. Morris's App., 1 Amer. Law Reg. 631.

[6] Pearce *v.* Slocombe, 3 Y. & Col. 84.

[7] Lancaster *v.* Elce, 31 Beav. 335.

[8] Ibid.

[9] Field *v.* Donoughmore, 1 Dr. & War. 227, reversing 2 Dru. & Walsh, 630.

§ 601. It has been held in some cases that a devise for the payment of debts will prevent the statute of limitations from running against such debts as are not barred at the time of the testator's death; but it will not revive a debt already barred,[1] upon the principle that, as soon as a trust is created for the payment of a debt, the statute of limitations ceases to apply, as it does not run against trusts generally. Mr. Hill inclines to the opinion, that the same principle would apply to trusts under deeds for the payment of debts;[2] but it is held in the United States, that an assignment by deed for the benefit of creditors, or an assignment in insolvency, does not prevent the statute from running, and it would be a good plea in bar at law, although the debts were specially named in the deeds or schedules.[3] But the creditors may enforce their claims in equity against the assets in the hands of the trustees.[4]

§ 602. In settling an estate under an assignment, the preferred debts will first be paid. The remainder is then distributed to the unpreferred debts due at the date of the assignment, *pro rata*, if there is a deficiency of assets.[5] If there is a residue, after paying all the creditors who come in under the deed, it results to the assignor.[6] If there are non-assenting creditors who have no rights under the deed, they can reach the surplus in the hands of the trustee, by the process of foreign attachment, garnishment, or trustee process.[7]

[1] Fergus *v.* Gore, 1 Sch. & L. 107; Hughes *v.* Wynne, T. & R. 307; Crallan *v.* Oughton, 3 Beav. 1; Burke *v.* Jones, 2 V. & B. 275; Hargreaves *v.* Mitchell, 6 Mad. 326; Harcourt *v.* Harcourt, 28 Beav. 303; Jones *v.* Scott, 1 R. & M. 225; 4 Cl. & Fin. 382; O'Connor *v.* Haslam, 5 H. L. Ca. 177.

[2] Hill on Trus. 341.

[3] Reed *v.* Johnson, 1 R. I. 81; Christy *v.* Flemington, 10 Barr, 129.

[4] Gary *v.* May, 16 Ohio, 66. And this must be upon the principle of Mr. Hill's opinion above cited. As soon as a trust is created for the payment of a debt, and the relation of trustee and *cestui que trust* is established, the statute of limitations does not run so long as the relation exists, but that does not prevent the statute from running at law against the original debtor; though how far the execution of the deeds or schedules naming a debt would be a memorandum in writing acknowledging the debt, and thus taking it out of the statute, is not very well settled.

[5] Purefoy *v.* Purefoy, 1 Vern. 28.

[6] 3 P. Wms. 251, n.; Poole *v.* Pass, 1 Beav. 600; Dubose *v.* Dubose, 7 Ala. 235; Hale *v.* Denison, 1 Vt. 311; Rahn *v.* McElrath, 6 Watts, 151.

[7] Hastings *v.* Baldwin, 17 Mass. 558; Hearn *v.* Crutcher, 4 Yerg. 461; Wright *v.* Henderson, 7 How. (Miss.) 539; Todd *v.* Bucknam, 2 Fairf. 41; Dubose *v.* Dubose, 7 Ala. 235; Vernon *v.* Morton, 8 Dana, 247.

CHAPTER XXI.

TRUSTEES FOR INFANTS.

§ 603. The special care of courts of equity over infants.
§ 604. Investments for infants.
§§ 605, 606. Power to convert an infant's personal property into real estate.
§ 607. Conversion in cases of necessity.
§ 608. Leases of infants' lands.
§ 609. Power to convert real estate into personal property.
§ 610. Powers of courts of equity to decree a conversion of an infant's property.
§ 611. The rights of an infant will remain the same whether his property is converted or not.
§ 612. Duty of a father to maintain his infant children, — duty of trustees as to maintenance.
§ 613. Power of the court to order maintenance.
§ 614. Will direct an inquiry as to the ability of the father and the rank and circumcumstances of the family.
§ 615. In what manner infants are to be maintained.
§ 616. When maintenance will not be decreed.
§ 617. Proceedings to obtain decrees of maintenance.
§ 618. Trustees must not expend the principal of an infant's estate without the sanction of the court.
§ 619. Whether the court can authorize the expenditure of part of the principal of an infant's property.
§ 620. Where the settlement or will contains directions as to maintenance.
§ 621. An infant *cestui que trust* has the same rights and remedies as other *cestuis que trust.*
§ 622. Trustees for infants must account. When.
§ 623. Infants may be maintained out of the jurisdiction of the court.
§ 624. To whom a trustee may pay money for an infant.

§ 603. INFANTS and their property are, in an especial manner, under the protection of courts of equity. The court has an inherent jurisdiction, which extends to the care of the persons of infants, so far as it is necessary for their protection and education, and also of their property real and personal, and its due management, preservation, and proper application to their maintenance. The court is their general guardian, and upon the institution of proceedings therein, involving their personal or pecuniary rights, they are regarded as wards of the court, and under its special cognizance and protection, and no act can be done affecting either their per-

sons, property, or condition, except under the express or implied direction of the court itself; and every thing done without such direction is treated as a violation of the authority of the court, and the offending party is deemed guilty of a contempt and treated accordingly.[1]

§ 604. In England, it is a settled rule of the court that money in trust for an infant must be laid out in three per cent consols; and the court will not even refer it to a master to inquire whether it would be for the benefit of the infant that the trustee should invest the sum in real or any other security, unless there is something very special in the case to induce the court to relax the rule.[2] In the United States, there is no such general rule, and there are no statutes directing how trustees shall invest the trust funds; but in some States there are statutes directing how savings-banks shall invest money deposited with them, and courts have sometimes directed trustees to invest the trust funds in those securities that have been legalized for savings-banks.

§ 605. In England, trustees or guardians are not ordinarily permitted to change the nature of the infant's property, by converting personalty into realty, or *vice versa;*[3] as, where the trustees of an infant had saved £3,000 out of the profits of real estate, and laid it out in lands adjoining the infant's estate, with the consent of the guardian, and the infant died under age, the trustees were held not justified in making such an investment, and were ordered to account to the infant's executors.[4] The rule originated in the fact that formerly an infant at seventeen might make a will of personalty, and to convert his personalty into real estate took away a power that the law gave him; on the other hand, to convert his real estate into personalty gave him a power contrary to the pol-

[1] Per Nelson, J., Williamson *v.* Berry, 8 How. 531; 2 Story, Eq. Juris. §§ 1341, 1352, 1353; Smith *v.* Smith, 3 Atk. 304; Eyre *v.* Shaftesbury, 2 P. Wms. 103; Gilb. 172; 2 Eq. Ca. Ab. 710, pl. 3; 755, pl. 4; 3 Lead. Ca. Eq. 538–610; Aymar *v.* Roff, 3 John. Ch. 49; In Matter of Whittaker, 4 John. Ch. 378; Garr *v.* Drake, 2 John. Ch. 542; Van Duzer *v.* Van Duzer, 6 Paige, 366; De Manneville *v.* De Manneville, 10 Ves. 52.

[2] Norbury *v.* Norbury, 4 Mod. 191.

[3] 1 Mad. Ch. Pr. 269; 2 Story, Eq. Jur. 1357; *Ex parte* Phillips, 19 Ves. 122; Witter *v.* Witter, 3 P. Wms. 101; Rook *v.* Worth, 1 Ves. 461; Tullett *v.* Tullett, Amb. 370.

[4] Winchelsea *v.* Norcliffe, 1 Vern. 341; Gibson *v.* Scudmore, 1 Dick. 45.

icy of the law.[1] This reason ceased with the statute of wills, which takes away the right of infants to make wills, either of real or personal estate, before they are twenty-one. Lord Eldon seemed to think, that the rule was established for the protection of the relative interests of the real and personal representatives of the infant;[2] but it is now established that the court will not regard the interests of an infant's representatives, nor interfere to protect them, but will look only to the best interest of the infant.[3] There seems now to be no principle at the bottom of the rule, and therefore it has been said in some cases, that where the advantage or convenience of the infants called for a change in the nature of the property, the court would order it.[4] In other and later cases, the jurisdiction and power of the court to change the nature of an infant's property have been denied; and it seems now to be the established rule, that such change cannot be made even for the advantage of the infant.[5]

§ 606. In the United States, a guardian or trustee cannot convert an infant's personalty into real estate.[6] If such conversion is made, the wards, on coming of age, may elect to receive their personal property, and the trustee or guardian must account and pay it over to them;[7] or they may acquiesce in the purchase after becoming of age, and if they so acquiesce for a long time, they cannot afterwards claim the money, although the

[1] Ware *v.* Polhill, 11 Ves. 278; *Ex parte* Phillips, 19 Ves. 122; Ashburton *v.* Ashburton, 6 Ves. 6; Sergeson *v.* Sealey, 2 Atk. 413; Rook *v.* Worth, 1 Ves. 461; Witter *v.* Witter, 3 P. Wms. 99; Inwood *v.* Twyne, 2 Eden, 152; *Ex parte* Bromfield, 1 Ves. Jr. 461; Pierson *v.* Shore, 1 Atk. 480; *Ex parte* Grimstone, Amb. 708.

[2] Ware *v.* Polhill, 11 Ves. 278.

[3] Pierson *v.* Shore, 1 Atk. 480; Oxenden *v.* Compton, 2 Ves. Jr. 69; 4 Bro. Ch. 201; *Ex parte* Grimstone, Amb. 706; 4 Bro. Ch. 235, n.; In Matter of Salisbury, 3 John. Ch. 347; Lloyd *v.* Hart, 2 Barr, 477.

[4] Inwood *v.* Twyne, Amb. 419; 2 Ed. 147; Terry *v.* Terry, Ch. Pr. 273.

[5] Taylor *v.* Phillips, 2 Ves. 23; Simpson *v.* Jones, 2 R. & M. 365; Calvert *v.* Godfrey, 6 Beav. 97; Peto *v.* Gardner, 12 L. J. (N. S.) Ch. 371; 2 Y. & C. Ch. 312; Garmstone *v.* Gaunt, 1 Coll. 577.

[6] Eckford *v.* De Kay, 8 Paige, 80; Rogers *v.* Paterson, 4 Paige, 109; *Ex parte* Crutchfield, 3 Yerg. 335; Moore *v.* Moore, 12 B. Mon. 190; Royer's App., 11 Penn. St. 36; Bonsall's App., 1 Rawle, 273; Wolf *v.* Eichelberger, 2 Penn. 346.

[7] Eckford *v.* De Kay, 8 Paige, 8; Rogers *v.* Paterson, 4 Paige, 109.

original conversion into real estate was wrongful.[1] So to use any part of the ward's personal property, in making permanent improvements upon his real estate, is a conversion of personalty into real estate, and is unauthorized, and will not be allowed to the trustee or guardian.[2] Where a guardian used his own money in constructing buildings upon the ward's land, it was held that he could not recover the money back from the infant.[3] But where the enlargement of a tenement upon the ward's land greatly increased the rents, the trustee was allowed a credit for the expenditure.[4] In one case, it was referred to a master to report whether it was for the interest of the infant to spend money in repairs upon real estate of which he was tenant in tail in expectancy;[5] and in another case it was said, that an allowance for permanent improvements may be made where it is obviously for the ward's interest.[6] But a trustee or guardian should not venture to expend the ward's personalty in that manner without first obtaining the sanction of the court; for if an unauthorized act is first done, the court will not sanction it, though in the particular case it might be proper if first sanctioned by the court; for the principle is, that trustees and guardians of infants should take no important step without leave of the court, and the court will punish such action taken on their own responsibility, by refusing to sanction the expenditures.[7]

§ 607. It is said, that, in case of necessity, the guardian or trustee may purchase land with the personalty of an infant.[8] No rules can be laid down to govern the conduct of the guardian or trustee as to such necessity, and the safest course is to apply to the court having jurisdiction of the ward's estate. In a proceeding to divide an estate, in which the infant owned a third, it was held that a guardian might purchase the interest of other heirs to prevent

[1] Moore *v.* Moore, 12 B. Mon. 190.

[2] Hassard *v.* Rowe, 11 Barb. 22; Bellinger *v.* Shafer, 2 Sand. Ch. 297; Mil-

[3] Hassard *v.* Rowe, 11 Barb. 22.

[4] Miller's Estate, 1 Penn. St. 326.

ler's Estate, 1 Penn. St. 326; Alexander *v.* Alexander, 8 Ala. 796.

[5] Hood *v.* Bridport, 11 Eng. L. & Eq. 271.

[6] Jackson *v.* Jackson, 1 Grat. 143.

[7] Worth *v.* Curtis, 3 Shep. 228; Miller's Estate, 1 Penn. St. 326; Mason *v.* Wait, 4 Scam. 127.

[8] Bonsall's App., 1 Rawle, 273; Royer's App., 11 Penn. St. 36; Billington's App., 3 Rawle, 55.

a sacrifice of the estate and the ward's property.[1] A guardian may relieve his ward's real estate from an elegit, extent, mortgage, or lien, which, if left unredeemed, would probably destroy the ward's interest.[2] If a guardian purchases real estate for his ward, he cannot convey it again without the leave and sanction of the court; as where a guardian purchased real estate in trust for his wards, and upon their marriage he conveyed it to their husbands, the fee was held to be still in the wards.[3]

§ 608. There can be no doubt, that it is the duty of the trustees or guardians of infants to lease the lands of their wards, as the wards are incapable of acting for themselves; and they must collect the rents and account for them:[4] but they cannot execute leases extending beyond the majority of the infants; if they do, the infants, on coming of age, can disaffirm the lease and take the possession.[5]

§ 609. Reference thus far has been made only to the power of trustees or guardians to convert their ward's personalty into real estate, for the reason, that under no circumstances can a trustee or guardian of an infant convert the ward's real estate into personalty by a sale, without the order, decree, or license of a court. If such sale is already made, and an application is made to have it sanctioned, the court will refuse.[6]

§ 610. Whether a court of general equity powers has an inherent jurisdiction, without some enabling statute, to decree a conversion of an infant's property is a matter of doubt and much conflict of opinion. The jurisdiction to decree such conversion has been sustained in some cases,[7] and denied in others.[8] The reasoning of the

[1] Bowman's App., 3 Watts, 369. This was held not to be a conversion of personalty into real estate, but simply the expenditure of such money as was necessary to preserve the estate.

[2] Ronald *v.* Buckley, 1 Brock. 356.

[3] Kauffman *v.* Crawford, 9 Watts & Ser. 131; Robinson *v.* Robinson, 22 Iowa, 427.

[4] Field *v.* Schieffelin, 7 John. Ch. 150; Byrne *v.* Van Hoesen, 5 John. 66; Ross *v.* Gill, 4 Call, 250; Genet *v.* Talmadge, 1 John. Ch. 561.

[5] Ross *v.* Gill, 4 Call, 250.

[6] Worth *v.* Curtis, 3 Shep. 228; Miller's Estate, 1 Penn. St. 326; Mason *v.* Wait, 4 Scam. 127.

[7] William's Case, 3 Bland, 186; *Ex parte* Jewett, 16 Ala. 409; Troy *v.* Troy, 1 Busb. Eq. 87; Williams *v.* Harrington, 11 Mod. 616; Huger *v.* Huger, 3 Des. 18; Stapleton *v.* Langstaff, 3 Des. 22; Matter of Salisbury, 3 John. Ch. *Ex parte* Jewett, 16 Ala. 409.

[8] In Baker *v.* Lorillard, 4 Comst. 257, the court said that it had no jurisdic-

cases where the jurisdiction is denied is, that where statutes have been enacted, giving power to surrogates or probate courts to authorize the sale of lands belonging to infants and minors by their guardians, trustees, or other persons, such statutes are to be followed; that they give an exclusive jurisdiction, and prescribe all the rules of the sale, and enact what securities shall be taken for the protection of the ward; and that courts of equity can have no jurisdiction where such formal proceedings, and such adequate remedies are given by statute. Nearly all the States have statutes giving guardians, or other persons appointed by the court, power to sell the real estate of infants, on applying in due form, and showing that it will be advantageous to the infant to convert his real estate into some other kind of property. The authority or license, given by the court to the guardian, trustee, or other person who may be appointed to sell and convey the estate, confers upon them the same power that is given to executors and administrators to sell the real estate of a deceased person for payment of debts.[1] Legislatures, in the absence of general statutes authorizing courts to act, may authorize the sale and conversion of an infant's real estate, and such legislation in particular cases, or generally in enabling courts to grant authority, is constitutional.[2] In addition to these statutes, there are statutes in several of the States authorizing trustees to apply to the court by petition or bill, for license to sell real estate held in trust, whether for infants or adults, although

tion to order a sale of an infant's real estate, except by the statute giving it that power. Rogers *v.* Dill, 6 Hill, 415, decided that a title taken under a decree of sale by a court of equity, contrary to the testator's will, was bad. Forman *v.* Marsh, 1 Kern. 547, was the exercise of the jurisdiction under the statute. Nelson, J., denied the jurisdiction in Williamson *v.* Berry, 8 How. 531; 3 Lead. Ca. in Eq. 269 (3d Amer. ed.).

[1] Field *v.* Schieffelin, 7 John. Ch. 150; Bank of Va. *v.* Clegg, 6 Leigh, 399; Garland *v.* Loring, 6 Rand. 396; Matter of Wilson, 2 Paige, 412; Pope *v.* Jackson, 11 Pick. 113; Talley *v.* Starke, 6 Grat. 339; Duckett *v.* Skinner, 11 Ired. 431; Brown's Case, 8 Humph. 200; Peyton *v.* Alcorn, 7 J. J. Marsh. 500; Dow's Pet. Walk. Ch. 145; Young *v.* Keogh, 11 Ill. 642; Harding *v.* Larned, 4 Allen, 426; Dalrymple *v.* Taneyhill, 4 Md. Ch. 171; Joor *v.* Williams, 9 George, 546; *Ex parte* Jewett, 16 Ala. 409; Morris *v.* Morris, 2 McCarter, 239; Beal *v.* Harman, 38 Mo. 435.

[2] Snowhill *v.* Snowhill, 2 Green, Ch. 20; Norris *v.* Clymer, 2 Barr, 277; Davis *v.* Johannot, 7 Met. 388; Spotswood *v.* Pendleton, 4 Call, 514; Dorsey *v.* Gilbert, 11 G. & J. 87; Powers *v.* Bergen, 2 Seld. 358; Nelson *v.* Lee, 10 B. Mon. 495.

there may be interests that may devolve upon persons not yet in being. The statutes authorize the courts to appoint some one to appear for and represent minors and persons not in being; and if, upon the hearing of all parties interested, it appears to be for the interest of all that the real estate should be sold, a sale is decreed, and the trustees are ordered to invest the proceeds in safe securities upon the same trusts.[1] If, however, there is any particular privilege conferred upon an infant, of which he would be deprived by a sale of the estate, a sale will be denied; as where a testator gave his mansion-house and farm to a son for life, and his mansion-house and a portion of his farm to such one of his grandsons, by this or another son, in remainder as should elect the mansion-house and land as his share. Upon a petition setting forth that it was for the interest of all parties that the estate should be sold, the court held that it was a specific devise to such grandson in remainder, as should elect to take the mansion-house; that to decree a sale would defeat the intention of the testator; that if the mansion-house was going to decay and the income was insufficient to repair it, so that the devise over would be substantially defeated, a sale might be ordered, but, no such case appearing, a sale was denied.[2] If, however, a power of conversion is given in the instrument of trust, the trustee may exercise all the powers of conversion given him.[3] In such cases, the trustee for an infant may exercise even larger powers than a trustee for a person *sui generis;* for such person's signature to receipts may be required,[4] but as an infant can do no valid act, a trustee for sale of his property takes by implication the power to sign receipts and receive the purchase-money.[5]

§ 611. If an infant's lands are sold by order of the court, the proceeds remain real estate, so far as the guardian and infant are concerned, until he is of age;[6] but if he dies after coming of age

[1] Stat. Mass. 1864, Ch. 168.

[2] Davis's Pet., 14 Allen, 24. In Rogers *v.* Dill, 6 Hill, 415, the court went further, and declared that a purchaser, under a decree of sale that ought not to have been made by the court, took no title.

[3] Ashburton *v.* Ashburton, 6 Ves. 6; Terry *v.* Terry, Pr. Ch. 273; Rogers *v.* Dill, 6 Hill, 415.

[4] 2 Sugd. V. & P. 45.

[5] Lavender *v.* Stanton, 2 Mad. 46; Sowarsby *v.* Lacy, 4 Mad. 142; Breedon *v.* Breedon, 1 R. & M. 413.

[6] Genet *v.* Talmadge, 1 John. Ch. 564; Snowhill *v.* Snowhill, 2 Green, Ch. 20; Lloyd *v.* Hart, 2 Penn. St. 473; March *v.* Berrier, 6 Ired. Eq. 524; Shum-

the proceeds are treated as personalty.[1] Timber cut upon an infant's estate, and the proceeds and the accumulation of the proceeds, remain real estate, if the infant is tenant in fee;[2] but if he is tenant in tail, they are considered personalty to prevent them from going to the remainder-man.[3] If an infant's personal property is used to pay off incumbrances on the estate, it is still looked upon as part of the personalty.[4] But necessary expenses for keeping up the estate, as ordinary repairs, are thrown upon the personalty;[5] and so where an estate was devised to an infant, in consideration of his paying off the original cost, such payment was held to be a necessary expense and to fall upon the personalty.[6] Generally, the proceeds of an estate, as timber, go with the estate;[7] but in a late case, an infant dying under age, the proceeds of timber cut during his life was held to be personalty.[8] These distinctions are quite immaterial in the United States, as in most of them, if not all, both real and personal estate descends to the same persons as heirs, and both real and personal estates are equally liable for debts.

§ 612. A father is bound to maintain his infant children, if he has sufficient ability; therefore a trustee cannot apply any part of the income of an infant's estate to its maintenance.[9] If the father

way *v.* Cooper, 16 Barb. 556; Sweezy *v.* Thayer, 1 Duer, 286; Forman *v.* Marsh, 1 Ker. 544.

[1] Snowhill *v.* Snowhill, 2 Green, Ch. 20.

[2] Tullet *v.* Tullet, 1 Dick. 352; Amb. 370; Mason *v.* Mason, cited Amb. 371; *Ex parte* Phillips, 19 Ves. 124; Rook *v.* Worth, 1 Ves. 461; *Ex parte* Broomfield, 1 Bro. Ch. 516.

[3] Ibid.; Dyer *v.* Dyer, 34 Beav. 304.

[4] Ibid.; Seys *v.* Price, 9 Mod. 220; Dowling *v.* Belton, 1 Flan. & Kelly, 462; 2 Freem. 114, 126; *Ex parte* Grimstone, Amb. 708; Palmes *v.* Danby, Pr. Ch. 137; Zoach *v.* Lloyd, cited Awdley *v.* Awdley, 2 Vern. 192; Dennis *v.* Badd, see Winchelsea *v.* Norcliffe, 1 Vern. 436; Mason *v.* Dry, Pr. Ch. 319; Pierson *v.* Shore, 1 Atk. 480.

[5] *Ex parte* Grimstone, cited Oxenden *v.* Compton, 4 Bro. Ch. 235, n.; Amb. 708.

[6] Vernon *v.* Vernon, cited *Ex parte* Bromfield, 1 Ves. Jr. 456.

[7] Field *v.* Brown, 27 Beav. 90.

[8] Dyer *v.* Dyer, 34 Beav. 504.

[9] Fawkner *v.* Watts, 1 Atk. 408; Jackson *v.* Jackson, 1 Atk. 513; Butler *v.* Butler, 3 Atk. 60; Darley *v.* Darley, 3 Atk. 399; Stocken *v.* Stocken, 4 My. & Cr. 98; Cruger *v.* Heyward, 2 Des. 94; Matter of Kane, 2 Barb. Ch. 375; Bethea *v.* McColl, 5 Ala. 312; Sparhawk *v.* Buell, 9 Vt. 41; Walker *v.* Crowder, 2 Ired. Eq. 478; Chaplin *v.* Moore, 7 Mon. 173; Dupont *v.* Johnson, 1 Bail. Eq. 279; Myers *v.* Myers, 2 McCord, Ch. 214.

has the means to maintain his children, the trustee cannot apply income to their support, although there is a provision for their maintenance in the instrument of trust.[1] But if there is an agreement in a marriage settlement, that the father shall have maintenance out of the trust property, the trustee must apply the income to the support of the children, without reference to the father's ability to support them.[2] If, however, the trustees have a discretionary power in that respect, the father cannot compel them to exercise it in his favor.[3] But where the income is expressly given to the father for the maintenance of his children, these rules do not apply; for such gift is in some sort a gift to the father.[4] If income is directed to be paid to a parent "for" or "towards" the maintenance of children, and, in case of their death under twenty-one, the share of each with all accumulations is to go to the survivors, the father having maintained the children is entitled to the income without an account.[5] Where the income of a life-estate, under a marriage settlement, was given to parents for the support of their children, and they became bankrupt, the court ordered the whole income to be applied to the support of the children.[6] But where there is a provision to parents for the maintenance of their children, and a third person voluntarily supports one of the children, the parents being ready to render such support, they cannot be called upon to reimburse such third person, nor can the fund be charged.[7] Where a testatrix devised her property, in trust to apply the income to the maintenance of the children of her daughter M., who at that time had four children, and who afterwards married again and had

[1] Mundy *v.* Howe, 4 Bro. Ch. 224; Hughes *v.* Hughes, 1 Bro. Ch. 387; Andrews *v.* Partington, 3 Bro. Ch. 60; 2 Cox, 223; Hamley *v.* Gilbert, Jac. 354; Thompson *v.* Griffin, 1 Cr. & Ph. 317. To apply the income of an infant's property in the hands of a trustee to the maintenance of the infant is to convert it into a gift to the father, which the donor does not generally intend. Addison *v.* Bowie, 2 Bland, 606; Spear *v.* Spear, 9 Rich. Eq. 188.

[2] Mundy *v.* Howe, 4 Bro. Ch. 224; Meachey *v.* Young, 2 My. & K. 490; Stocken *v.* Stocken, 4 My. & Cr. 95; 4 Sim. 152; Stephens *v.* Lawry, 2 N. C. C. 87; White *v.* Grane, 18 Beav. 571.

[3] Thompson *v.* Griffin, Cr. & Ph. 322.

[4] Brown *v.* Casamajor, 4 Ves. 498; Hammond *v.* Neame, 1 Swanst. 35; Byrne *v.* Blackburn, 26 Beav. 41.

[5] Browne *v.* Paull, 1 Sim. (N. S.) 92; 15 Jur. 5; Hadow *v.* Hadow, 9 Sim. 438; Rainsford *v.* Rainsford, Rice, Eq. 343.

[6] Dalton's Settlement, 1 De G., M. & G. 265.

[7] Crawford *v.* Patterson, 11 Grat. 364.

five other children, it was held that the maintenance must be applied to the support of all the children, and that it commenced with their birth, and continued during their minority, or until the females were married.[1]

§ 613. A stepfather is not compelled to maintain his wife's children, and he will be entitled to receive maintenance out of the income, if the trustee can pay it for that purpose;[2] but if the support of the infant costs the stepfather nothing, though the ward lives with him, he will not be allowed any thing.[3] So a mother is not legally obliged to support her children, whether she is living with the husband by whom she had the children, or is a widow, or is married to a second husband; therefore she is entitled to maintenance out of the income of the trust fund.[4] If a father makes application for maintenance out of the income of his children, in the hands of trustees, it will be referred to a master to inquire and report respecting the father's ability to support them.[5] But no inquiry is made when the mother makes application for maintenance, as her ability is immaterial, she not being obliged to maintain her children.[6] If the fact of the poverty of the father is apparent, the court will not send the matter for inquiry,[7] nor if the property is small,[8] or no allowance is asked for.[9] If the children are taken from the custody of a father on account of his misconduct, the court must order maintenance for them out of the income in the

[1] Connor *v.* Ogle, 4 Md. Ch. 425.

[2] Freto *v.* Brown, 4 Mass. 675; Gay *v.* Ballou, 4 Wend. 403.

[3] Booth *v.* Sineath, 2 Strob. Eq. 31.

[4] Haley *v.* Bannister, 4 Mod. 275; Hodgson *v.* Hodgson, 4 Cl. & Fin. 323; 11 Bligh (N. S.), 62; Ll. & Goo. Sugd. 259; Ll. & Goo. Plunk. 137; Lanoy *v.* Athol, 2 Atk. 447; *Ex parte* Petre, 7 Ves. 403; Beasley *v.* Magrath, 2 Sch. & L. 35; Greenwell *v.* Greenwell, 5 Ves. 194; Douglas *v.* Andrews, 12 Beav. 310; Heyward *v.* Cuthbert, 4 Des. 445; Matter of Bostwick, 4 John. Ch. 100; Whipple *v.* Dow, 2 Mass. 415; Dawes *v.* Howard, 4 Mass. 97; Bruin *v.* Knott, 1 Phil. 573; Anderton *v.* Yates, 5 De G. & Sm. 202; Smee *v.* Martin, 1 Bunb. 131.

[5] Hughes *v.* Hughes, 1 Bro. Ch. 386; Lucknow *v.* Brown, 12 Jur. 1017.

[6] Billingsley *v.* Critchett, 1 Bro. Ch. 268; Douglass *v.* Andrews, 12 Beav. 311, n.

[7] *Ex parte* Mountfort, 15 Ves. 449; *In re* England, 1 R. & M. 499; Payne *v.* Low, 1 R. & M. 223.

[8] Walker *v.* Shore, 15 Ves. 122; *Ex parte* Swift, 1 R. & M. 575; Payne *v.* Low, 1 R. & M. 223; *Ex parte* Dudley, 1 J. & W. 254, n.

[9] *In re* Neale, 15 Beav. 250.

hands of trustees, as there is no principle upon which a court can take children from a father, and then order him to support them from his own means, in a manner dictated by the court.[1]

§ 614. In inquiring into the ability of a father to support his children, no account will be made of the fortune of his wife settled to her own use, as the property of the wife is in no way bound for the maintenance of the children.[2] In making the inquiry, reference will be had to the position of the children in society, their expectations, and the relative style and expense in which they ought to live; as where a father had £6000 per year, maintenance was allowed to enable him to educate his children properly for the position which they would probably fill.[3] In all these matters, the best interests of the children are consulted, rather than mere pecuniary considerations;[4] as where two infant daughters were entitled to a large fortune on coming of age, and had an income of $4000 per year, their father not being able to keep a house in accordance with their expectations and future prospects, an allowance of $2500 per year was made to him, that he might keep up an establishment proper for his daughters, and educate them at home, although the expense of sending them to a boarding-school would not have been more than $1200 per year.[4] Such an allowance will be made, that the wards may have the means of bestowing charity, where the fortune is ample, and such an expenditure reasonable.[5] Regard will be had to all the circumstances of the family, as where there were a large number of young children, and all were destitute, a liberal allowance was made for the maintenance of an older boy, in order that the younger children might be better maintained and educated.[6] So a liberal maintenance will be allowed to relieve the distress of the parents,[7] even where the indigence arises from their own misconduct.[8]

[1] Wellesley *v.* Beaufort, 2 Russ. 29.

[2] *Ante*, § 613.

[3] Jervoise *v.* Silk, 1 Geo. Cooper, 52; *Ex parte* Williams, 2 Coll. 740.

[4] *Ex parte* Burke, 4 Sand. Ch. 617; Owens *v.* Walker, 2 Strob. Eq. 289.

[5] Langton *v.* Brackenburgh, 2 Coll. 446.

[6] Pierpont *v.* Cheney, 1 P. Wms. 493; Harvey *v.* Harvey, 2 P. Wms. 22; Lanoy *v.* Athol, 2 Atk. 447; *Ex parte* Petre, 7 Ves. 403; Tweddell *v.* Tweddell, T. & R. 13; *Ex parte* Williams, 2 Coll. 740; Petre *v.* Petre, 3 Atk. 511; Bradshaw *v.* Bradshaw, 1 J. & W. 647.

[7] Roach *v.* Gavan, 1 Ves. 160; Hill *v.* Chapman, 2 Bro. Ch. 231; Heysham *v.* Heysham, 1 Cox, 179.

[8] Allen *v.* Coster, 1 Beav. 202.

§ 615. Upon these principles, courts will order maintenance for infants out of their income, where the father is unable to support them. This inability does not mean absolute poverty, but an inability to give the child an education suitable to his fortune and expectations.[1] The allowance will be made, although the settlement contains no direction for maintenance, and although there is a direction to accumulate the income.[2] Generally, application should be made to the court for leave to apply the income in that way, but the trustees may apply the income for maintenance without an express decree, taking the risk of having it disallowed by the court.[3] There is a difference between past expenses, and an allowance for future maintenance. If a trustee takes the risk of supporting the infant, he will be allowed only for actual expenses;[4] but if an application is made for future maintenance, a liberal allowance is made according to the circumstances of the case.[5] In England, a father cannot have an allowance for past expenses, except under peculiar circumstances.[6] And the court may disallow all the payments for maintenance, if they were made improperly and without leave first obtained.[7] If, however, the circumstances are such that the court would have made the allowance if asked, they will be allowed.[8] If the annual amount to be paid for the infant's support is named in the instrument of trust, the trustee of his own motion cannot exceed that amount,[9] unless he is

[1] Buckworth *v.* Buckworth, 1 Cox, 80; Jervoise *v.* Silk, Coop. 52; Matter of Burke, 4 Sand. Ch. 617; Rice *v.* Tonnele, 4 Sand. Ch. 568; Heyward *v.* Cuthbert, 4 Des. 445; Wilkes *v.* Rogers, 6 John. 566.

[2] Ibid.; Greenwell *v.* Greenwell, 5 Ves. 194, 195, n.; 197, n.; Evans *v.* Massey, 1 Y. & J. 196; Stretch *v.* Watkins, 1 Mad. 253.

[3] Rice *v.* Tonnele, 4 Sand. Ch. 568; Bethea *v.* McColl, 5 Ala. 312; Corbin *v.* Wilson, 2 Ash. 178; Newport *v.* Cook, 2 Ash. 337.

[4] Bruin *v.* Knott, 1 Phil. 572, overruling 12 Sim. 436; *Ex parte* Bond, 2 My. & K. 439; Stephens *v.* Lawry, 2 Y. & Col. Ch. 87; Corbin *v.* Wilson, 2 Ash. 178; Newport *v.* Cook, 2 Ash. 337; Matter of Bostwick, 4 John. Ch. 100.

[5] Ibid.

[6] Reeves *v.* Brymer, 6 Ves. 425; Sherwood *v.* Smith, 6 Ves. 454; Presley *v.* Davis, 7 Rich. Eq. 109. See Carmichael *v.* Hughes, 20 L. J. Ch. 396.

[7] Andrews *v.* Partington, 3 Bro. Ch. 60; Cotham *v.* West, 1 Beav. 381; Bridge *v.* Brown, 2 N. C. C. 187.

[8] Lee *v.* Brown, 4 Ves. 369; Barlow *v.* Grant, 1 Vern. 255; Franklin *v.* Greene, 2 Vern. 137; 1 Rop. Leg. 768; 2 Wms. Ex'rs; Sisson *v.* Shaw, 9 Ves. 288; Maberly *v.* Turton, 14 Ves. 499; *Ex parte* Darlington, 1 B. & B, 241.

[9] Hearle *v.* Greenbank, 2 Atk. 697, 716; Long *v.* Long, 3 Ves. 286, n.

clothed with a discretion;[1] but if the fund goes absolutely to the infant, the *court* can increase the amount if the circumstances require it.[2] If the exigencies are very pressing, the court will increase the amount, although there is a direction for accumulation, and the infant's interest is contingent.[3] If there are two funds from which maintenance may be ordered, it will be ordered from that fund from which it will be most beneficial for the infant to take it.[4] If maintenance is directed for the infant until twenty-one, its marriage does not determine the maintenance;[5] and if the maintenance is directed during the life of A., the allowance will continue during the life of A., although the children are more than twenty-one years of age.[6] If maintenance is directed, but no time is limited, it will cease when the infants are of age.[7] In making the allowance, the trustee is not confined to the income of the year; but he may set off the gross amount of the maintenance against the gross amount of income.[8]

§ 616. A distinction is made between property coming to a child from a parent, or from a person in the place of a parent, and property given in trust for an infant by a stranger. When the gift comes from parents, or persons in the place of parents, whose duty it is to support the children, maintenance will be ordered where the subject of the trust is residuary personal estate, or a contingent interest only, although there was no power in the will, and there was an express direction for an accumulation, and although there was a gift over to other children, if the chance of survivorship is equal.[9] If the chance of survivorship is not

[1] Rawlins *v.* Goldfrap, 5 Ves. 440.

[2] Aynsworth *v.* Pratchett, 13 Ves. 321; Allen *v.* Coster, 1 Beav. 202; Josselyn *v.* Josselyn, 9 Sim. 63; Stretch *v.* Watkins, 1 Mad. 253; Newport *v.* Cook, 2 Ash. 332; Corbin *v.* Wilson, 2 Ash. 178; Evans *v.* Massey, 1 Y. & J. 196.

[3] Ibid.

[4] Bruin *v.* Knott, 1 Phil. 572; Lygon *v.* Lord, 14 Sim. 41; Rawlins *v.* Goldfrap, 5 Ves. 440; Foljambe *v.* Willoughby, 2 S. & S. 165; *Re* Ashley, 1 R. & M. 371; Winch *v.* Winch, 1 Cox, 433; Methold *v.* Turner, 20 L. J. Ch. 201; Chisolm *v.* Chisolm, 4 Rich. Eq. 266.

[5] Chambers *v.* Goldwin, 11 Ves. 1.

[6] Badham *v.* Mee, 1 R. & M. 631.

[7] Ibid.

[8] Carmichael *v.* Wilson, 3 Moll. 79; Edwards *v.* Grove, 2 De G., F. & J. 210.

[9] Aherley *v.* Vernon, 1 P. Wms. 783; Rogers *v.* Soutten, 2 Keen, 598; Incledon *v.* Northcote, 3 Atk. 433; Harvy *v.* Harvy, 2 P. Wms. 22; Lambert *v.* Parker, Coop. 143; Brown *v.* Temperly, 3 Russ. 263; Mills *v.* Robarts, 1 R. & M. 555; *Ex parte* Chambers, 1 R. & M. 577; Boddy *v.* Dawes, 1 Keen, 362;

equal, maintenance will not be allowed;[1] nor will it, if the interest is real estate and contingent or residuary.[2] But maintenance will be refused out of a contingent interest, or where the fund is given over; or where the gift proceeds from a stranger, or from a grandfather; or where the infant is a natural child not adopted by the father.[3]

§ 617. If the fund goes absolutely to the infant, and no conflicting interests can arise, the order for maintenance will be made on petition and without suit.[4] But if there are opposing and complicated interests, the court will not act without a regular suit and notice to all parties.[5]

§ 618. It is a settled rule, that trustees for infants should never, on their own authority, break in upon the capital of the trust fund for the maintenance, and seldom for the advancement of their ward. This is a rule for the protection of children, and if trustees break it, their accounts will be disallowed, although the particular case is a hardship; as it is better that a single individual should suffer a hardship which he might have avoided, than that the interests of all infants should be endangered.[6] Sir William Grant expressed a doubt, whether the court itself had power to authorize the expen-

Fairman *v.* Green, 10 Ves. 45; Lomax *v.* Lomax, 11 Ves. 48; Mole *v.* Mole, 1 Dick. 310; Greenwell *v.* Greenwell, 5 Ves. 194; Cavendish *v.* Mercer, 5 Ves. 195; Collin *v.* Blackburn, 9 Ves. 470; McDermot *v.* Kealy, 3 Russ. 264; Stretch *v.* Watkins, 1 Mad. 253; Seibert's App., 19 Penn. St. 49; Corbin *v.* Wilson, 2 Ash. 208; Newport *v.* Cook, 2 Ash. 342; Matter of Ryder, 11 Paige, 185; *Ex parte* Kebble, 11 Ves. 604; Turner *v.* Turner, 4 Sim. 434.

[1] Errat *v.* Barlow, 14 Ves. 202; Kime *v.* Welpitt, 3 Sim. 533; Turner *v.* Turner, 4 Sim. 430; Cannings *v.* Flower, 7 Sim. 523.

[2] Green *v.* Ekins, 2 Atk. 476; Bullock *v.* Stones, 2 Ves. 521; Leake *v.* Robinson, 2 Mer. 384.

[3] Errington *v.* Chapman, 12 Ves. 24; Lowndes *v.* Lowndes, 15 Ves. 301. But see Greenwell *v.* Greenwell, 5 Ves. 194. In Seibert's App., 19 Penn. St. 49, maintenance was allowed, though the gift came from a grandfather not *in loco parentis*. See Chisolm *v.* Chisolm, 4 Rich. Eq. 266, and Corbin *v.* Wilson, 2 Ash. 208.

[4] *Ex parte* Whitfield, 2 Atk. 315; *Ex parte* Kent, 3 Bro. Ch. 88; *Ex parte* Salter, 3 Bro. Ch. 500; *Ex parte* Mountfort, 15 Ves. 445; *Ex parte* Starkie, 3 Sim. 399; *Ex parte* Chambers, 1 R. & M. 577; *Ex parte* Green, 1 J. & W. 253; *Ex parte* Myercough, 1 J. & W. 253; *Ex parte* Hayes, 13 Jur. 765; 3 De G. & Sm. 485; Matter of Bostwick, 4 John. Ch. 100; Rice *v.* Tonnele, 4 Sand. Ch. 571; Cross *v.* Bevan, 2 Sim. (N. S.) 53.

[5] Fairman *v.* Green, 10 Ves. 45.

[6] Per Sir R. P. Arden, Walker *v.* Wetherell, 6 Ves. 473; Davies *v.* Austen, 1

diture of the trust fund for the infant's support and advancement.[1] It is now, however, well established, that the court has such power, and will exercise it with caution in a proper case.[2] But if the trustee exercises the power by breaking in upon the trust fund for mere maintenance, without leave of the court, he will be compelled to replace it.[3] It has been said, that a trustee may pay from the capital fund upon his own authority in case of necessity;[4] but it would not be safe to follow this. The burden would be on the trustee to prove a case of necessity, and that it was impossible to apply to a court for direction; for courts look with disfavor upon the assumption of such authority by guardians and trustees.[5] When such a case can be made, the trustee will be allowed the amount paid out, in his accounts.[6] Courts are much more willing to authorize an expenditure of the capital fund of the trust to

Ves. Jr. 247; Lee v. Brown, 4 Ves. 362; Anon., Moseley, 41; Davis v. Harkness, 1 Gilm. 173; Prince v. Logan, Spears, Eq. 29; MacDowell v. Caldwell, 2 McCord, Ch. 43; Davis v. Roberts, 1 Sm. & M. Ch. 543; Hester v. Wilkinson, 6 Humph. 219; Frelick v. Turner, 26 Miss. 393; Martin's App., 23 Penn. St. 438; Petit's App., 39 Penn. St. 324; Villard v. Chovin, 2 Strob. Eq. 40; Bybee v. Thorp, 4 B. Mon. 313; Carter v. Rolland, 11 Humph. 339; Cornwise v. Bourgum, 2 Ga. Dec. 15; Haygood v. Welles, 1 Hill, Eq. 59; Swinnock v. Crisp, Freem. 78.

[1] Walker v. Wetherell, 6 Ves. 474.

[2] Barlow v. Grant, 1 Vern. 255; *Ex parte* Green, 1 J. & W. 253; *Ex parte* Chambers, 1 R. & M. 577; *Ex parte* Knott, 1 R. & M. 499; *Ex parte* Swift, 1 R. & M. 575; Evans v. Massey, 1 Y. & J. 196; Bridge v. Brown, 2 N. C. C. 181; Williams's Case, 3 Bland, 186; *Ex parte* Potts, 1 Ash. 340; *Ex parte* Bostwick, 4 John. Ch. 100; Long v. Norcom, 2 Ired. Eq. 354; Haygood v. Wells, 1 Hill, Eq. 79; Maupin v. Dulany, 5 Dana, 593; Worthington v. McCraer, 23 Beav. 81; Prince v. Hine, 26 Beav. 634; *Ex parte* Hayes, 3 De G. & Sm. 485; 13 Jur. 762; *Ex parte* Allen, 3 De G. & Sm. 485; Withers v. Hickman, 6 B. Mon. 293; Prince v. Logan, 1 Spears, Eq. 29; Teague v. Dendy, 2 McCord, Ch. 207.

[3] Davies v. Austen, 3 Bro. Ch. 178; Lee v. Brown, 4 Ves. 362; Walker v. Wetherell, 6 Ves. 473.

[4] Davies v. Austen, 3 Bro. Ch. 78; Barlow v. Grant, 1 Vern. 255; Carmichael v. Wilson, 3 Moll. 79; Bridge v. Brown, 2 Y. & Col. Ch. 181.

[5] Prince v. Logan, Spears, Eq. 29; Teague v. Dendy, 2 McCord, Ch. 207; McDowell v. Caldwell, 2 McCord, Ch. 43; Davis v. Roberts, 1 Sm. & M. Ch. 543; Myers v. Wade, 6 Rand. 444; Davis v. Harkness, 1 Gilm. 173; Holmes v. Joslin, 5 Strob. 31; Downey v. Bullock, 7 Ired. Eq. 102; Villard v. Chovin, 2 Strob. Eq. 40.

[6] Long v. Norcom, 2 Ired. Eq. 354; Sparhawk v. Buell, 9 Vt. 41; Withers v. Hickman, 6 B. Mon. 203; Matter of Bostwick, 4 John. Ch. 100.

establish the minor in life, or to pay his entrance fee as an apprentice, or to educate him properly for business and life, than for mere maintenance. In such cases courts look upon the capital, not as consumed and extinguished, but as converted into another and useful form.[1] This allowance from the capital fund is confined to cases where the trust fund is small: if the capital consists of several thousand pounds, and the income is sufficient to educate and support the infant, the court will not allow nor justify any expenditure of the principal.[2]

§ 619. Where there is a limitation over to a stranger on the death of the infant, neither the trustee nor the court can expend any part of the capital fund for the maintenance or advancement of the ward. As where £100 were given to trustees to apply the income to the support and education of an infant, and to transfer the principal to him at twenty-one; but if he died under that age the said sum was to be paid over to other persons, the court refused leave to expend any part of the capital.[3] Where an infant, upon a certain contingency, was to lose certain rights, and the trustee made an advancement before the contingency happened, and it afterwards happened in the ward's favor, the advancement was allowed to the trustee.[4] So where a legacy is given to a class of children, with a limitation over to the others in case of the death of one before marriage or twenty-one, an allowance may be made, on the ground that all have an equal chance of surviving, before their particular proportions are vested so that they cannot be divested.[5] An advancement may be made if all the parties in re-

[1] Williams's Case, 3 Bland. 186; Hanson *v.* Chapman, 3 Bland, 198; Matter of Bostwick, 4 John. Ch. 100; Barlow *v.* Grant, 1 Vern. 255; Franklin *v.* Green, 2 Vern. 137; *In re* England, 1 R. & M. 499; *Ex parte* Chambers, 1 R. & M. 577; *Re* Welch, 23 L. J. Ch. 344; Nunn *v.* Harvey, 2 De G. & Sm. 301; *Re* Clarke, 17 Jur. 362; *Re* Lane, 17 Jur. 219; Worthington *v.* McCraer, 23 Beav. 81; *Ex parte* Swift, 1 R. & M. 575; *Ex parte* Green, 1 J. & W. 253; Bridge *v.* Brown, 2 Y. & Col. Ch. 181; Davies *v.* Davies, 2 De G., M. & G. 53; Walsh *v.* Walsh, 1 Drew. 64; *Ex parte* Hayes, 3 De G. & Sm. 485; Swinnock *v.* Crisp, Freem. 78; *Ex parte* McKey, 1 B. & B. 405; Sisson *v.* Shaw, 9 Ves. 285; Prince *v.* Hine, 26 Beav. 634.

[2] Barlow *v.* Grant, 1 Vern. 255; Davies *v.* Austen, 1 Ves. Jr. 247; 3 Bro. Ch. 178; Beasley *v.* Magrath, 2 Sch. & L. 35.

[3] Lee *v.* Brown, 4 Ves. 362; Van Vechten *v.* Van Vechten, 8 Paige, 104.

[4] Worthington *v.* McCraer, 23 Beav. 81.

[5] Franklin *v.* Green, 2 Vern. 137; Greenwell *v.* Greenwell, 5 Ves. 194, and

mainder are competent to consent, and do consent to the allowance.[1] But advancements cannot be made where the gift is to a class of children, though not absolutely to them, but in certain events to go over to a stranger.[2] If the limitation over is to the issue of a deceased child, such issue is a stranger, and no allowance can be made.[3] So where the children in being are not all the persons interested in the fund, as where another child may be born.[4] If a legacy is given to children when they become twenty-one, the court cannot anticipate the time and make an allowance,[5] as it may not come to them at all. If, however, there is a clear intention to be gathered from the whole will, that the children are to have a maintenance, the court will order it, although there is a gift over.[6]

§ 620. When a trust is created, and the trustees are directed to pay the income to a person for the support of his children, he will be entitled to receive the income so long as he continues to maintain them.[7] Where the income was directed to be paid by the trustees to M. H. H. for the maintenance of her children, the fund to be divided among her children at twenty-one, and, in default of issue, over to another person, it was held that the income was payable to M. H. H., although she had no child.[8] Where a widow was to receive the income from trustees for the support of herself and children, and she eloped, she was held entitled only to a part

notes; Brandon *v.* Aston, 2 Y. & Col. Ch. 30; Marshall *v.* Holloway, 2 Swanst. 436.

[1] Evans *v.* Massey, 1 Y. & J. 196; Cavendish *v.* Mercer, 5 Ves. 195, n.

[2] *Ex parte* Kebble, 11 Ves. 604, overruling Greenwell *v.* Greenwell, 6 Ves. 194; Errington *v.* Chapman, 12 Ves. 20.

[3] *Ex parte* Kebble, 11 Ves. 606; Turner *v.* Turner, 4 Sim. 430; Errington *v.* Chapman, 12 Ves. 20; *Ex parte* Whitehead, 2 Y. & J. 243; Fendall *v.* Nash, 5 Ves. 197, n., *contra*, but disapproved by Lord Eldon, 14 Ves. 203.

[4] *Ex parte* Kebble, 11 Ves. 604.

[5] Lomax *v.* Lomax, 11 Ves. 48. See Haley *v.* Bannister, 4 Mad. 275; Errat *v.* Barlow, 14 Ves. 202; Cannings *v.* Flower, 7 Sim. 253; Turner *v.* Turner, 4 Sim. 430.

[6] Lambert *v.* Parker, G. Coop. 143.

[7] Hadow *v.* Hadow, 9 Sim. 438; Jubber *v.* Jubber, 9 Sim. 503; Berkely *v.* Swinburne, 6 Sim. 613; Thurston *v.* Essington, Jac. 361, n.; Longmore *v.* Elcum, 2 Y. & C. Ch. 363; Leach *v.* Leach, 13 Sim. 304; Hart *v.* Tribe, 19 Beav. 149; Brown *v.* Paull, 1 Sim. (N. S.) 92; Hammond *v.* Nearne, 1 Swans. 35; Raikes *v.* Ward, 1 Hare, 445; Crockett *v.* Crockett, 2 Phil. 553; Chase *v.* Chase, 2 Allen, 104; Loring *v.* Loring, 100 Mass. 340.

[8] Hammond *v.* Nearne, 1 Swans. 35; Loring *v.* Loring, 100 Mass. 340.

of the income.[1] So where a trustee was to pay the income to the testator's son for the support of himself and children, and the son misapplied the income, the court said that he took the income as a subtrustee for his wife and children, and that the court had power to regulate and control it, by directions to the original trustee, in such manner as to accomplish the purpose for which it was given.[2] The fund is in some sort payable to the father, but the trustee will be held accountable for its proper application.[3] In paying the income for maintenance, the trustee must exercise a sound discretion. He may apply it himself, or he may place it in the hands of parents or guardians; but he must not place it in the hands of a beneficiary, who mentally or morally is incapable of using it properly or profitably; and he must not allow the income to be thrown away, or perverted from its purpose.[4]

§ 621. In most respects, the relation between the trustee and an infant *cestui que trust* is the same as between trustees and other *cestuis que trust*. An infant has the same remedies for a breach of trust as if of full age. If a trustee employs the infant's money in his own business, the infant has an election to take the profits or the interest;[5] or, if an improper investment is made by the trustee, the infant can enforce compensation for the loss.[6] If, by any neglect or violation of duty by a trustee, a loss happens to the infant, the trustee must make it up; as if a trustee should allow the statute of limitations to run without suit on a claim in favor of an infant, the trustee would be held to account for the loss.[7] So

[1] Castle *v.* Castle, 3 Jur. (N. S.) 723; 1 De G. & J. 352; Loring *v.* Loring, 100 Mass. 340.

[2] Chase *v.* Chase, 2 Allen, 104; Loring *v.* Loring, 100 Mass. 340.

[3] Andrews *v.* Partington, 2 Cox, 223; Robinson *v.* Tickell, 8 Ves. 142; Woods *v.* Woods, 1 My. & Cr. 409; Raikes *v.* Ward, 1 Hare, 445; Crockett *v.* Crockett, 2 Phil. 553; Webb *v.* Wool, 2 Sim. (N. S.) 267; Joddrell *v.* Joddrell, 14 Beav. 397; Biddles *v.* Biddles, 16 Sim. 1; Wetherell *v.* Wetherell, 1 Keen, 80; Brown *v.* Casamajor, 4 Ves. 498; Hamley *v.* Gilbert, Jac. 354; Collier *v.* Collier, 3 Ves. 33.

[4] Mason *v.* Jones, 2 Barb. S. C. 248; Gott *v.* Cook, 7 Paige, 538; Van Vechten *v.* Van Vechten, 8 Paige, 104.

[5] Anon., 2 Ves. 630.

[6] Holmes *v.* Dring, 2 Cox, 1; Terry *v.* Terry, Pr. Ch. 273.

[7] Williams *v.* Otey, 8 Humph. 563; Smilie *v.* Biffle, 2 Barr, 52; Wyck *v.* East India Co., 3 P. Wms. 309; Wooldredge *v.* Planters' Bank, 1 Sneed, 297; Worthy *v.* Johnson, 10 Ga. 358; Long *v.* Cason, 4 Rich. Eq. 60; Blake *v.* Allman, 5 Jon. Eq. 407.

if he should suffer five years to elapse without claim, after a stranger had entered upon the infant's estate and levied a fine.[1] In all such cases, the trustees will be responsible for all the loss that occurs from their negligence or mismanagement.

§ 622. It is the duty of trustees to accumulate all the income of a trust for infants, which is not employed in maintenance and education as before stated, whether a direction for such accumulation is contained in the instrument of trust or not. This rule applies where the subject of the trust is a *residue* of the testator's personal estate, and the interest of the infant is *contingent*, as where the trust is for a child, "if" or "when" it becomes twenty-one.[2] But the rule will not apply where a *sum certain* is to be paid to the infant when twenty-one;[3] nor to the income of real estate where such estate is given to the infant if he shall reach twenty-one;[4] unless there is a direction that the income in the mean time shall be used for the infant's benefit.[5] Without such direction, the income in the first case would fall into the residue,[6] and in the second case it would go to the heirs-at-law.[7] If the infant takes a vested interest in the trust fund, and the payment only is postponed, and an accumulation is directed until he is twenty-four, he is absolutely entitled to the fund at twenty-one, and will be entitled to receive the income at that time, and the *corpus* of the trust at the time fixed, so that accumulation will cease at twenty-one.[8]

§ 623. The court has power to apply the income in support of the infant although he is abroad, or out of the jurisdiction of the court. In such cases, the court may require a guardian[9] or attorney[10] to be appointed within the jurisdiction to receive the income; or the court

[1] Huntington *v.* Huntington, 3 P. Wms. 310, n.; Allen *v.* Sayer, 2 Vern. 368, is the other way, but it is not considered the true exposition of the law. Pentland *v.* Stokes, 2 B. & B. 75.

[2] Green *v.* Ekins, 2 Atk. 473; Studholme *v.* Hodgson, 3 P. Wms. 299; Trevanion *v.* Vivian, 2 Ves. 430; Bullock *v.* Stone, 2 Ves. 430.

[3] Leake *v.* Robinson, 2 Mer. 384.

[4] Green *v.* Ekins, 2 Atk. 473; Studholme *v.* Hodgson, 3 P. Wms. 299; Bullock *v.* Stones, 2 Ves. 521.

[5] Bullock *v.* Stones, 2 Ves. 430. [6] Ibid. [7] Ibid.

[8] Saunders *v.* Vautier, 4 Beav. 115; Cr. & Ph. 240.

[9] Logan *v.* Fairlee, Jac. 193.

[10] De Weever *v.* Rockport, 6 Beav. 391; *In re* Morrison, 16 Sim. 42; Hart *v.* Tribe, 19 Beav. 149.

may appoint a guardian who resides in the same jurisdiction with the infant, and who has been appointed guardian by the courts in that jurisdiction.[1] In some instances where the fund was small, the court has ordered not only the income, but the whole *corpus* of the trust to be paid to the parents residing abroad,[2] or who were about emigrating.[3] If the trustee is within the jurisdiction, the court can take administration of the trust fund, and compel a proper application of the income to the purposes for which it was given;[4] and it may use its power to compel the parents residing abroad to bring the infants within the jurisdiction, by refusing any allowance from the income for maintenance.[5]

§ 624. If a trustee holds in his hands a sum of money to be paid absolutely to an infant, he must not pay it to the infant, nor to his father or other person, without the sanction of the court.[6] Should he do so, he may be compelled to pay it again to the infant when he comes of age.[7] Even a receipt or release taken from the infant under age is worthless;[8] but an infant, after coming of age, can confirm such payments by acts clearly intended to sanction and confirm them.[9] If the infant fraudulently represents himself to be of age, and thus procures payments from the trustees, he will be estopped to claim the fund again.[10] In the United States, guardians are appointed by probate courts to take charge of infants' estates. Such guardians are required to give bonds for the security of such estates, and payments may safely be made to them.[11] In some instances where the sums are small, courts have directed them to be paid directly to the persons maintaining the children to

1 Daniel *v.* Newton, 8 Beav. 485.

2 Volans *v.* Carr, 2 De G. & Sm. 242.

3 Walsh *v.* Walsh, 1 Drew. 64; *Ex parte* Hayes, 3 De G. & Sm. 485.

4 Chase *v.* Chase, 2 Allen, 101.

5 Lockwood *v.* Fenton, 1 Sm. & G. 73.

6 Furman *v.* Coe, 1 Caine's Cases, 96; Sparhawk *v.* Buell, 9 Vt. 41.

7 Dagley *v.* Tolferry, 1 P. Wms. 285; Phillips *v.* Paget, 2 Atk. 80; Davies *v.* Austen, 3 Bro. Ch. 178; Lee *v.* Brown, 1 Ves. 369.

8 Overton *v.* Bannister, 3 Hare, 503; 8 Jur. 996.

9 Dagley *v.* Tolferry, 1 P. Wms. 285; Lee *v.* Brown, 4 Ves. 362; Cooper *v.* Thornton, 3 Bro. Ch. 97; Cory *v.* Gertcken, 2 Mad. 40.

10 Cory *v.* Gertcken, 2 Mad. 40; Overton *v.* Bannister, 3 Hare, 503.

11 Furman *v.* Coe, 1 Caine's Ca. 96; Sparhawk *v.* Buell, 9 Vt. 41; Hoyt *v.* Hilton, 2 Edw. Ch. 202.

save the expenses of obtaining guardianship.[1] Where the instrument of trust directs the manner of paying over the money, the trustee will be safe in following the directions.[2]

[1] Farrance *v.* Viley, 21 L. J. Ch. 313; Ker *v.* Buxton, 16 Jur. 491.

[2] 2 Wms. Ex'rs, 866; 1 Rop. Leg. 771; Cooper *v.* Thornton, 3 Bro. Ch. 96, 186; Robinson *v.* Tickell, 8 Ves. 142.

CHAPTER XXII.

TRUSTEES FOR MARRIED WOMEN.

§§ 625, 626. Rights of married women to property at common law and in equity.
§ 627. Right of a married woman to a settlement out of her equitable property.
§ 628. When proceedings must be taken to obtain a settlement.
§ 629. How the proceedings may be taken.
§ 630. A trustee may decline to pay to the husband before a settlement is made.
§ 631. In case of the marriage of a ward of court.
§ 632. Against whom the equity of a settlement will be enforced.
§§ 633, 634. To what property a wife's right to a settlement extends.
§ 635. Where a wife is entitled to a second settlement.
§ 636. What amount will be settled on a wife.
§ 637. Where a husband refuses to make a settlement.
§ 638. Distinction between survivorship and the right to a settlement.
§ 639. Whether a husband has reduced a wife's *choses in action* to possession.
§§ 640–642. What is and what is not a reduction to possession.
§ 643. Effect of a reduction to possession by the husband.
§ 644. Husband entitled to joint property.
§ 645. A settlement extends to children, when.
§ 646. The right of a married woman to hold property to her separate use.
§ 647. How a trust for her separate use may be created.
§ 648. The words that create a separate use.
§ 649. Words that do not create a separate use.
§ 650. State of the authorities, and the general rule as to her separate use.
§ 651. Must be for the separate use of the wife alone.
§ 652. Changeable rights of a woman to property settled to her separate use.
§ 653. To what marriages the separate use extends.
§ 654. How a married woman may deal with her separate property.
§ 655. General rule as to the right of a married woman to deal with her separate estate.
§ 656. As to real estate.
§ 657. Power to contract debts.
§§ 658, 659. How far her contracts bind her separate estate.
§§ 660, 661. Rules in England and the various States.
§ 662. Married woman not personally bound by her contracts.
§ 663. The principles that apply to a wife's separate estate.
§ 664. Savings and accumulations out of her separate estate.
§ 665. Rights of the wife against her husband's estate where he receives the income of her separate estate.
§ 666. If a husband receives her separate estate, he becomes a trustee.
§ 667. Right of a married woman to the possession of her separate estate.
§ 668. Disposition of a wife's separate estate by will, descent, or otherwise.
§ 669. Where a breach of trust is committed by a married woman or by her procurement.
§ 670, 671. Restraints upon anticipation or alienation by a married woman.
§ 672, 673. Deeds of separation between husband and wife.
§ 674. Rights of the wife under deeds of separation.
§ 675. Statutes of various States in relation to the rights of married women to property.

§ 625. At common law, a husband became entitled to receive the rents and profits of his wife's real estate during their joint lives, and he became absolutely entitled to all her personal property in possession, and to all her *choses in action* if he reduced them to possession during his life. If he did not reduce them to possession, and survived her, he was entitled to be her administrator, and he thus took all her *choses in action*. He also was entitled to all her chattels real, and had full power to sell and convey them. But if the husband died without having aliened her chattels real, or without having reduced her *choses in action* to possession, she as survivor continued to hold them as if she had never been married. The principle was this: by the marriage the husband became bound to pay all debts due from the wife before marriage; he also became bound to support and maintain the wife and her children in a proper manner. In consideration of these obligations, and to enable him to perform these duties, the law gave him the property of the wife as before stated. But the common law had this defect; the husband could sell and dispose of all the rights of property which he thus received from his wife, or he might become bankrupt the day after his marriage, and all these rights would go to his assignees or strangers, and he might be left entirely unable to perform the obligations and duties which were imposed upon him by marriage, and in consideration of which he received his wife's property. The common law had no power or machinery by which to afford a wife any protection or remedy under such circumstances. But in courts of equity remedies were devised whereby the property of a wife, or some portion of it, might be withdrawn from the operation of the rules of the common law, and preserved

for her maintenance, in case her husband was improvident or unfortunate. This improvement in the law was effected through a system of trusts. It is apparent that trusts for women may be of two kinds: (1.) Trusts for a woman generally, as for any other individual or individuals in the community; (2.) Special trusts for a woman, with special provisions as to the ownership and enjoyment of the property or its income, and special directions as to the rights of any present or future husband over it. Growing out of this last class of trusts, there have been statutes passed changing the common law, and determining the rights of married women in and to property that they may possess at the time of their marriage, or that may come to them during marriage. It is the purpose of this chapter: (1.) To discuss general trusts for women, and the rights and duties of trustees under them; (2.) To consider special trusts for women, or trusts for their sole and separate use of their property, and the rights and duties of trustees; and (3.) To notice the legislation of the several States respecting the property of married women.

§ 626. If a sum of money is given to trustees to pay either the principal or the income to a woman, and such woman is married at the time, or is married subsequently, the husband is entitled to receive the principal or the income, as the case may be. In law the husband has the same right to his wife's equitable property that he has to her legal property. All personal property held in trust for a wife belongs to the husband.[1] But this right of the husband over his wife's *choses in action* is perfected only by his reducing them to possession during his life; and the same rule applies to her equitable *choses in action.*[2] If such property is not reduced to possession during the life of the husband, the wife takes it, as survivor, as if she had never been married. If a wife dies before her *choses in action* have been reduced to possession by her husband, he may take administration of her estate, and thus entitle himself to receive all the personal property, legal and equitable, that came to her. But nothing short of actual reduction to pos-

[1] Murray *v.* Elibank, 10 Ves. 90; Glaister *v.* Hewer, 8 Ves. 206; Dunkley *v.* Dunkley, 2 De G., M. & G. 390; Napier *v.* Napier, 1 Dr. & W. 410; Mumford *v.* Murray, 1 Paige, 620; Shaw *v.* Mitchell, Davies, 216; Crook *v.* Turpin, 10 B. Mon. 244; *Ex parte* Blagden, 2 Rose, 251; Oswell *v.* Probert, 2 Ves. Jr. 680; Sturgis *v.* Champneys, 5 M. & C. 103.

[2] Murphy *v.* Grice, 2 Dev. & Bat. Eq. 199; Tidd *v.* Lister, 5 Mad. 432.

session during his life, will give a husband such right to the property as will defeat the wife's title, if she survives him. If, therefore, it cannot be reduced to possession during his life, as if it is a *reversion* only during the whole of his life, he can have no possession, and it will remain to her, if she survives him.[1] So where the interest of the wife is partly possessory, and partly reversionary, the husband cannot bind the property beyond the duration of his own life.[2] So if a husband assigns his wife's reversionary interest, and subsequently and during his life it becomes possessory, but is never reduced to actual possession, it survives to the wife.[3]

§ 627. A trustee may pay over a wife's equitable property to the husband if he pleases, and such payment will discharge the responsibility of the trustee. But if the trustee refuses to deliver the possession to the husband, and the husband, in order to reach the funds in the hands of the trustee and reduce them to possession, commences proceedings in equity, the court, on the maxim that he who seeks equity must do equity, may order a proper settlement to be made upon the wife out of her equitable property in the hands of the trustee. This is called the wife's equity to a settlement.[4] It is an equitable right which a married woman has to a

[1] Purdew *v.* Jackson, 1 Russ. 1; Honner *v.* Morton, 3 Russ. 65; Stanton *v.* Hall, 2 Russ. & My. 175; Elliott *v.* Cordell, 5 Mad. 149; Tidd *v.* Lister, 17 Eng. L. & Eq. 567; 3 De G., M. & G. 857.

[2] Stiffe *v.* Everitt, 1 M. & Cr. 37; Harley *v.* Harley, 10 Hare, 335.

[3] Ellison *v.* Elwin, 13 Sim. 309; Ashby *v.* Ashby, 1 Col. 553; Baldwin *v.* Baldwin, 5 De G. & Sm. 319; Hamilton *v.* Mills, 29 Beav. 193.

[4] Murray *v.* Elibank, 13 Ves. 1; 1 Lead. Ca. Eq. 360; Bosvil *v.* Branden, 1 P. Wms. 458; Browne *v.* Elton, 3 P. Wms. 202; Wallace *v.* Auldjo, 2 Dr. & Sm. 216; Osborn *v.* Morgan, 9 Hare, 432; Ward *v.* Amory, 1 Curtis, 432; Davis *v.* Newton, 6 Met. 537; Gassett *v.* Grout, 4 Met. 486; Carter *v.* Carter, 14 Sm. & M. 59; Stevenson *v.* Brown, 3 Green, Ch. 503; Tucker *v.* Andrews, 13 Me. 124; Chase *v.* Palmer, 25 Me. 342; Short *v.* Moore, 10 Vt. 446; Wilks *v.* Fitzpatrick, 1 Humph. 54; Page *v.* Estes, 19 Pick. 269; Barron *v.* Barron, 24 Vt. 375; Andrews *v.* Jones, 1) Ala. 401; Guild *v.* Guild, 16 Ala. 122; Wiles *v.* Wiles, 3 Md. 1; James *v.* Gibbs, 1 Pat. & Heath. 277; Carleton *v.* Banks, 7 Ala. 34; Van Duzer *v.* Van Duzer, 6 Paige, 368; Whitesides *v.* Dorris, 7 Dana, 107; Thomas *v.* Shepperd, 2 McCord, Ch. 36; Crook *v.* Turpin, 10 B. Mon. 243; Wardlaw *v.* Gray, 2 Hill, Ch. 651; Moore *v.* Moore, 14 B. Mon. 259; Wright *v.* Arnold, 14 B. Mon. 642; Poindexter *v.* Jeffries, 15 Grat. 363; Van Epps *v.* Van Deusen, 4 Paige, 64; Dumond *v.* Magee, 4 John. Ch. 315; Corley *v.* Corley, 22 Ga. 178; Dearin *v.* Fitzpatrick, Meigs, 551; Lay *v.* Brown, 15 B. Mon. 295; Gallego *v.* Gallego, 2 Brock. 286; Browning *v.* Headley, 2 Rob. Va. 342;

provision out of her own fortune, before her husband reduces it to possession, and it stands upon a peculiar doctrine of courts of equity. The extent of the doctrine cannot be ascertained from any general reasoning. It is the creation of courts of equity, and, to ascertain its extent or its limitations, recourse must be had to the practice of the courts. Whenever the fortune of a married woman is within the jurisdiction of the court, either by having been paid into court, or by a suit concerning its possession, the court always directs an inquiry whether a settlement has been made; and the constant habit is to direct a settlement, not only upon the wife, but upon the children also. The wife cannot say that she claims a settlement for herself, and not for the children. She has the option to have no settlement; but if a settlement is made, it must be upon the wife and children. The wife is examined in open court, whether she wishes a settlement or not: if she does not desire one, the possession of the property is delivered over to her husband.[1]

§ 628. The steps for a settlement must be taken before the husband has obtained the actual possession; for courts will not compel a husband who has possession to refund the property, in order that a settlement may be made,[2] unless such possession was ob-

Durr *v.* Bowyer, 2 McCord, Ch. 368; Helms *v.* Franciscus, 2 Bland, 545; Bell *v.* Bell, 1 Kelly, 637; Howard *v.* Moffatt, 2 John. Ch. 206; Glen *v.* Fisher, 6 John. Ch. 33; Duvall *v.* Farmers' Bank, 4 Gill & J. 283; Groverman *v.* Diffenderffer, 11 Gill & J. 15; Myers *v.* Myers, 1 Bail. Eq. 24; Yeldell *v.* Quarles, Dudl. Eq. 56; Hill *v.* Hill, 1 Strob. Eq. 2; Bennett *v.* Dillingham, 2 Dana, 436; Thomas *v.* Kennedy, 4 B. Mon. 235; Napier *v.* Howard, 3 Kelly, 193; Smith *v.* Kane, 2 Paige, 303; Abernethy *v.* Abernethy, 8 Fla. 243; Haviland *v.* Bloom, 6 John. Ch. 178. In North Carolina, this equity of the wife to a settlement is not allowed. Bryan *v.* Bryan, 1 Dev. Eq. 47; Lassiter *v.* Dawson, 2 Dev. Eq. 383. In Pennsylvania, this equity is enforced in the courts of law, by imposing terms upon the husband's right to recover his wife's *choses in action.* Rees *v.* Waters, 9 Watts, 90.

[1] Ibid.

[2] 1 Rop. Husb. and Wife, 270; Carter *v.* Carter, 14 Sm. & M. 59; Carleton *v.* Banks, 7 Ala. 34; Van Duzer *v.* Van Duzer, 6 Paige, 368; Wiles *v.* Wiles, 3 Md. 1; Whitesides *v.* Dorris, 7 Dana, 107; Rees *v.* Waters, 9 Watts, 90; Thomas *v.* Shepperd, 2 McCord, Ch. 36; Van Epps *v.* Van Deusen, 4 Paige, 64; Wickes *v.* Clarke, 8 Paige, 161; Heath *v.* Heath, 2 Hill, Ch. 100; Perryclear *v.* Jacobs, 2 Hill, Ch. 504; Mitchell *v.* Sevier, 9 Humph. 146; Udall *v.* Kenny, 3 Cow. 591; Dold *v.* Geiger, 2 Grat. 98; State *v.* Krebs, 6 Har. & J. 31; Glaister *v.* Hewer, 8 Ves. 205; Pool *v.* Morris, 29 Ga. 374.

tained by fraud,[1] or the property came to the husband's hands after suits for its possession or for a settlement had been instituted,[2] or unless the payment to him was in some way wrongful,[3] in which case equity will follow the property, and order a settlement; and where a husband had once reduced his wife's property to possession, and afterwards settled it upon her in the hands of a trustee, by an invalid deed of separation, and brought a suit to recover back the possession, the court ordered a settlement.[4] If the husband has the money in hand in another right, as trustee for the wife, a settlement may be ordered.[5]

§ 629. If a suit is already pending for the possession, or if the property is in court, the wife may intervene by petition.[6] It was for some time thought, that a wife could not proceed by original bill; but it is now well established that a wife may bring a bill for a settlement,[7] and that she may have an injunction against her husband from proceeding in the ecclesiastical or probate courts to recover the property.[8] In America, some cases have gone so far as to compel a settlement when the suits to recover the property were in the common-law courts.[9] But the better opinion is, that where a husband, or a creditor or assignee, is pursuing a strictly legal or statutory right in a court of law, a court of equity cannot interfere for the purpose of enforcing a settlement. As where a wife was entitled to a distributive share in an estate, and her husband became a bankrupt, whereby his right to receive his wife's distributive share vested in his assignee, the court held that the assignee had the absolute legal right to collect the wife's distribu-

[1] Colmer *v.* Colmer, 2 Atk. 98; Moseley, 113; Watkyns *v.* Watkyns, 2 Atk. 96; 2 Spence, Eq. Jur. 488.

[2] Crook *v.* Turpin, 10 B. Mon. 243.

[3] Wardlaw *v.* Gray, 2 Hill, Ch. 651.

[4] Carter *v.* Carter, 14 Sm. & M. 59.

[5] Barron *v.* Barron, 24 Vt. 375; Gray's Estate, 1 Barr, 329; Goochenaur's Est., 11 Harris, 460.

[6] Greeley *v.* Lavender, 13 Beav. 62; Scott *v.* Spashett, 3 Mac. & G. 599.

[7] Elibank *v.* Montalieu, 5 Ves. 737; Duncombe *v.* Greenacre, 6 Jur. (N. S.) 987; 7 Jur. (N. S.) 175; 1 Lead. Ca. Eq. 362; 2 Story, Eq. Jur. § 1414; Wiles *v.* Wiles, 3 Md. 1; Moore *v.* Moore, 14 B. Mon. 259; Wright *v.* Arnold, 14 B. Mon. 642; Poindexter *v.* Jeffries, 15 Grat. 363.

[8] Jewson *v.* Moulson, 2 Atk. 419; Dumond *v.* Magee, 4 John. Ch. 318; Gardner *v.* Walker, 1 Strange, 503.

[9] Van Epps *v.* Van Deusen, 4 Paige, 64; Corley *v.* Corley, 22 Ga. 178; Dearin *v.* Fitzpatrick, Meigs, 551; Dewall *v.* Covenhoven, 5 Paige, 581; Fry *v.* Fry, 7 Paige, 461; Martin *v.* Martin, 1 Hoff. 462.

tive share; but inasmuch as the court had equity jurisdiction over the distribution of the assets of the bankrupt, it had jurisdiction to order a settlement upon the wife, before the assignee distributed the assets among the husband's creditors.[1] In cases where the court would have no jurisdiction of the assets, as where a wife's distributive share was trusteed for a husband's debt, the court could not interfere.[2]

§ 630. A trustee may refuse to pay over the wife's equitable property to her husband, if he thinks there should be a settlement; and the husband and wife and trustee can arrange a settlement for the wife, and by such agreement the trustee can pay the whole or part of the equitable assets into the hands of a trustee under an existing settlement; and such arrangement will be as valid a settlement as if made by order of court.[3] The trustee is always justified in bringing the fund into court, although the wife may desire it to be paid to her husband;[4] for the wife cannot consent out of court that no settlement shall be made if the fund is in court, but she must be examined in open court.[4] If suit is commenced, neither the trustee nor executor, holding the equitable interests of the wife, can pay them over to the husband, until it is finally determined whether a settlement shall be made.[5]

§ 631. In practice courts of equity proceed upon principles

[1] Davis *v.* Newton, 6 Met. 537.

[2] Holbrook *v.* Waters, 19 Pick. 354; Wheeler *v.* Bowen, 20 Pick. 563; Sturgis *v.* Champneys, 5 M. & C. 105; Jewson *v.* Moulson, 2 Atk. 419; Parsons *v.* Parsons, 9 N. H. 309; Wiles *v.* Wiles, 3 Md. 1; Barron *v.* Barron, 24 Vt. 375; Allen *v.* Allen, 6 Ired. Eq. 293.

[3] Montefiore *v.* Behrens, L. R. 1 Eq. 171.

[4] *Re* Swan, 2 Hem. & Mil. 34; Campbell *v.* French, 3 Ves. 323; Tasburgh's Case, 1 V. & B. 507; Minet *v.* Hyde, 2 Bro. Ch. 663; Parsons *v.* Dunne, Belt's Supp. Ves. 276. An infant cannot consent. Stubbs *v.* Gargan, 2 Beav. 596; Abraham *v.* Newcombe, 12 Sim. 566, overruling Gullin *v.* Gullin, 7 Sim. 236; Udall *v.* Kenney, 3 Cow. 590; Phillips *v.* Hessell, 10 Humph. 197; *Ex parte* Warfield, 11 Gill & J. 23. Nor can the consent be given until the amount of the fund is known. Edmunds *v.* Townshend, 1 Anst. 93; Jernegan *v.* Baxter, 6 Mad. 32; Sperling *v.* Rochfort, 8 Ves. 180; Packer *v.* Packer, 1 Coll. 92; Watson *v.* Marshall, 17 Beav. 363; *In re* Bendyshe, 3 Jur. (N. S.) 727. But if a married woman stands by and assents to a sale by her husband, she will be estopped to claim a settlement. Wright *v.* Arnold, 14 B. Mon. 638; Smith *v.* Atwood, 14 Ga. 402. The wife cannot consent to the transfer of any interest in reversion or remainder until they become possessory. Socket *v.* Wray, 2 Atk. 6 n.

[5] Macaulay *v.* Phillips, 4 Ves. 18; Murray *v.* Elibank, 10 Ves. 90; Delagarde *v.* Lampriere, 6 Beav. 344; Crook *v.* Turpin, 10 B. Mon. 243.

of their own, and settle all the property of a ward of the court upon herself, if a man marries her without permission, and thereby commits a contempt of the court. In such cases the husband, and his creditors and assignees, will be restrained from interfering with the property, either at law or in equity.[1] So if a husband has abandoned his wife, or maltreats and abuses her, the court may interfere and settle all the wife's *choses in action*, not reduced to possession, upon her for her support; although no suit is pending concerning it, and it is not in court, and although it may not even be within the jurisdiction of the court.[2] It is said further, that if the husband is entirely insolvent, and the wife is without means of support, she may maintain a bill against him, and his creditors and assignees, to restrain them from getting possession of her *choses in action* in a suit at law, until she can obtain an adequate provision for herself out of her property.[3] The court can give relief if the parties are within its jurisdiction, although the property may be in another jurisdiction.[4]

§ 632. This equity of a settlement may be enforced against the husband, and all persons claiming under him, as his assignees in bankruptcy, or under a general assignment for creditors.[5] Even if the husband makes an assignment for a valuable consideration, the

[1] Eyre *v.* Shaftsbury, 2 P. Wms. 108, 121, 124; Kenney *v.* Udall, 5 John. Ch. 464; 3 Cow. 591; Van Duzer *v.* Van Duzer, 6 Paige, 366; Helmes *v.* Franciscus, 2 Bland, 545; Chambers *v.* Perry, 17 Ala. 726; Van Epps *v.* Van Deusen, 4 Paige, 65; Layton *v.* Layton, 1 Sm. & Gif. 179.

[2] Ibid.; Renwick *v.* Renwick, 10 Paige, 421; Martin *v.* Martin, 1 Hoff. 462; Haviland *v.* Myers, 6 John. Ch. 25, 178; Rees *v.* Waters, 9 Watts, 90.

[3] Ibid.; Bell *v.* Bell, 1 Kelly, 627; Guild *v.* Guild, 16 Ala. 122.

[4] Guild *v.* Guild, 16 Ala. 122.

[5] Jewson *v.* Moulson, 2 Atk. 420; Burdon *v.* Dean, 2 Ves. Jr. 607; Pryor *v.* Hill, 4 Bro. Ch. 138; Oswell *v.* Probert, 2 Ves. Jr. 680; Sturgis *v.* Champneys, 5 M. & Cr. 97; Gassett *v.* Grout, 4 Met. 486; Davis *v.* Newton, 6 Met. 537; Page *v.* Estes, 19 Pick. 269; Kenney *v.* Udall, 5 John. Ch. 464; 3 Cow. 591; Haviland *v.* Myers, 6 John. Ch. 25; Mumford *v.* Murray, 1 Paige, 620; Van Epps *v.* Van Deusen, 4 Paige, 65; Phillips *v.* Hassell, 10 Humph. 197; Moore *v.* Moore, 14 B. Mon. 259; Elliott *v.* Waring, 5 Mon. 338; Bennett *v.* Dillingham, 2 Dana, 436; Thomas *v.* Kennedy, 4 B. Mon. 235; Bowling *v.* Winslow, 5 B. Mon. 29; Hord *v.* Hord, 5 B. Mon. 81; Athey *v.* Knotts, 6 B. Mon. 24; Bowling *v.* Bowling, 6 B. Mon. 31; Bell *v.* Bell, 1 Kelly, 637; Napier *v.* Howard, 1 Kelly, 193; Andrew *v.* Jones, 10 Ala. 401; Browning *v.* Headley, 2 Rob. Va. 342; Sherrard *v.* Carlisle, 1 Pat. & Heath. 12; Durr *v.* Bowyer, 2 McCord, Ch. 368; Heath *v.* Heath, 2 Hill, Ch. 100; Perryclear *v.* Jacobs, 2 Hill, Ch. 504; Riley, Ch. 47; Duvall *v.* Farmers' Bank, 4 Gill & J. 283; State *v.* Reigart,

equity of the wife will prevail over it.[1] The wife's equity is paramount to all rights of set-off against the husband.[2]

§ 633. The wife's right to a settlement extends to all her property, legal or equitable, where it is necessary for her husband, or those claiming under him, to come into court for its recovery;[3] and to all her interests, whether absolute and in fee, or for life,[4] or whether legal or equitable;[5] or to a trust for a term,[6] or to the estate of the wife as tenant in tail in possession,[7] or to the wife's interest as a mortgagee,[8] or to an equity of redemption,[9] or to her interests in chattels real, whether legal or equitable,[10] or to her contingent interests.[11]

1 Gill, 3; Dunkley v. Dunkley, 2 De G., M. & G. 390; Napier v. Napier, 1 Dr. & W. 410; Crook v. Turpin, 10 B. Mon. 244; Ball v. Montgomery, 4 Bro. Ch. 338; Brown v. Clark, 3 Ves. 166; Freeman v. Parsley, 3 Ves. 421.

[1] Macauley v. Phillips, 4 Ves. 19; Scott v. Spashett, 3 Mac. & G. 599; Marshal v. Gibbings, 4 Ir. Ch. 276.

[2] Hall v. Hill, 1 Dr. & W. 109; Carr v. Taylor, 10 Ves. 574; *Ex parte* Blagden, 2 Rose, 294; *Ex parte* O'Farrall, 1 G. & J. 347; McMahon v. Burchall, 3 Hare, 97; 5 Hare, 335; Reeve v. Rocher, 1 De G. & S. 626; Lee v. Egremont, 5 De G. & Sm. 348; McCormick v. Garnett, 2 Sm. & Gif. 37.

[3] Milner v. Colmer, 2 P. Wms. 639; Sturgis v. Champneys, 5 M. & C. 97; Bosvill v. Brander, 1 P. Wms. 458; Oswell v. Probert, 2 Ves. Jr. 680; Brown v. Clark, 3 Ves. 106; Freeman v. Parsley, 3 Ves. 421; Mitford v. Mitford, 9 Ves. 87.

[4] Ibid.; Burdon v. Dean, 2 Ves. Jr. 607; Ball v. Montgomery, 4 Bro. Ch. 338; Wright v. Morley, 11 Ves. 12; Pryor v. Hill, 4 Bro. Ch. 139.

[5] Ibid.; Wortham v. Pemberton, 1 De G. & Sm. 644.

[6] Macauley v. Phillips, 4 Ves. 19; Turner's Case, 1 Ch. Ca. 307; 1 Vern. 7; Sanders v. Page, 3 Ch. R. 223; Hanson v. Keating, 4 Hare, 1; Pitt v. Hunt, 1 Vern. 18; Jewson v. Moulson, 2 Atk. 417; Wortham v. Pemberton, 1 De G. & Sm. 644; Durham v. Crackles, 8 Jur. (N. S.) 1174; Gleaves v. Paine, 1 De G., J. & Sm. 87; Smith v. Matthews, 3 De G., F. & J. 139.

[7] Wortham v. Pemberton, 1 De G. & Sm. 644.

[8] Ibid.; Bates v. Dandy, 2 Atk. 207; Packer v. Wyndham, Pr. Ch. 418; Walter v. Saunders, 1 Eq. Ca. Ab. 58; Incledon v. Northcote, 3 Atk. 335; Mitford v. Mitford, 9 Ves. 99; Hore v. Becher, 12 Sim. 465; Jones v. Gibbons, 9 Ves. 407; Rees v. Keith, 11 Sim. 338; Duncombe v. Greenacre, 6 Jur. (N. S.) 987; 7 Jur. (N. S.) 178.

[9] Clark v. Cook, 3 De G. & Sm. 333; Hatchell v. Eggleso, 1 Ir. Ch. 215; Hill v. Edmonds, 5 De G. & Sm. 603.

[10] Roupe v. Atkinson, Bunb. 162; Mitford v. Mitford, 9 Ves. 99; Packer v. Wyndham, Pr. Ch. 418; Franco v. Franco, 4 Ves. 528; Bullock v. Knight, 1 Ch. Ca. 266; Sanders v. Page, 3 Ch. R. 223; Macauley v. Phillips, 4 Ves. 19; Wike's Case, Lane, 54; Roll. Ab. 343; Jewson v. Moulson, 2 Atk. 421; Incle-

[11] Donne v. Hart, 2 R. & M. 360.

She is also entitled to a settlement in estates that come to her after marriage, as well as before.[1] But she cannot have a settlement out of her interests in remainder or in reversion, until they fall into possession or become possessory.[2] The amount of the property is not material,[3] though it was once said that the court would not make a settlement of property of less value than £200.[4] Nor will her living separate from her husband defeat her right to a settlement.[5]

§ 634. If a husband is solvent, and is living with his wife and maintaining her as well as he can, he is entitled to the income of her

don *v.* Northcote, 3 Atk. 435; Clark *v.* Burgh, 2 Coll. 221; Sturgis *v.* Champneys, 5 M. & C. 97; Duberly *v.* Day, 16 Beav. 33; Hanson *v.* Keating, 4 Hare, 1; Wortham *v.* Pemberton, 1 De G. & Sm. 644; Robertson *v.* Norris, 11 Q. B. 916.

[1] Barrow *v.* Barrow, 18 Beav. 529.

[2] Socket *v.* Wray, 2 Atk. 6 n.; Frazer *v.* Bailie, 1 Bro. Ch. 518; Richards *v.* Chambers, 10 Ves. 508; Woollands *v.* Crowcher, 12 Ves. 175; Ritchie *v.* Broadbent, 2 J. & W. 456; Packard *v.* Roberts, 3 Mad. 384; Whittle *v.* Henning, 2 Phil. 731; Greedy *v.* Lavender, 13 Beav. 62; Osborn *v.* Morgan, 9 Hare, 432; 8 Eng. L. & Eq. 192; Taylor *v.* Austen, 9 Dr. 459; Marshall *v.* Fowler, 15 Eng. L. & Eq. 430; Duberly *v.* Day, 16 Beav. 33; Cunningham *v.* Antrobus, 16 Sim. 436; Brandon *v.* Woodthorpe, 10 Beav. 463; Rogers *v.* Acaster, 14 Beav. 445, overruling Hall *v.* Hugonin, 14 Sim. 595; Browning *v.* Headley, 2 Rob. Va. 340; Moore *v.* Thornton, 7 Grat. 99; Terry *v.* Brunson, 1 Rich. Eq. 78; Reese *v.* Holmes, 5 Rich. Eq. 531; Sale *v.* Saunders, 24 Miss. 24; Goodwin *v.* Moore, 4 Humph. 221; Caplinger *v.* Sullivan, 2 Humph. 548. In Pennsylvania, Kentucky, and North Carolina, however, the English rule is not followed; but a husband may assign and convey vested remainders and reversions to his wife. Knight *v.* Leak, 2 Dev. & Bat. 133; Howell *v.* Howell, 3 Ired. Eq. 528; Weeks *v.* Weeks, 5 Ired. Eq. 111; Merriweather *v.* Booker, 5 Lit. 254; Davenport *v.* Prewett, 9 B. Mon. 95; Jackson *v.* Sublett, 10 B. Mon. 469; Turner *v.* Davis, 1 B. Mon. 151; Siter's Case, 4 Rawle, 461; Smilie's Est., 22 Penn. St. 130; Woelper's App., 2 Barr, 71; Webb's App., 21 Penn. St. 248. And see Scott *v.* James, 3 How. (Miss.) 307.

[3] *In re* Kinciad's Trusts, 17 Eng. L. & Eq. 396; 1 Dr. 326; Cutler's Trusts, 14 Beav. 224; *Re* Morriman's Trust, 10 Weekly Rep. 334; Roberts *v.* Collett, 6 Sm. & Gif. 138.

[4] Foden *v.* Finney, 4 Russ. 428; March *v.* Head, 3 Atk. 721; Bourdillon *v.* Adair, 3 Bro. Ch. 237; Elworthy *v.* Wickstead, 1 J. & W. 69.

[5] Edes *v.* Edes, 11 Sim. 569; Greedy *v.* Lavender, 13 Beav. 62; Carter *v.* Carter, 14 Sm. & Mar. 59. But see Carr *v.* Eastabrooke, 4 Ves. 146; Ball *v.* Montgomery, 2 Ves. Jr. 191; Watkyns *v.* Watkyns, 2 Atk. 97; *In re* Lewin's Trusts, 20 Beav. 378; Ball *v.* Coutts, 1 V. & B. 302; *In re* Walker, Ll. & Goo. Sugd. 299.

life-estates, and no settlement can be made.[1] If, however, he deserts her, or she is divorced for his misconduct, she may receive the whole or a part of the income of her life-estates for her support.[2] So if the husband is a bankrupt, and the wife is without means the court will enforce a settlement out of the income of a *life*-estate as against the assignee.[3] If a husband, while living with and maintaining his wife, assigns the income of her *life*-estates for a valuable consideration, she can have no settlement, as the assignment may have been made to enable him to support her.[4] But a fraudulent conveyance will not defeat her right.[5] If the wife already has an adequate provision, a settlement will not be made out of her *life*-estate;[6] nor will it be made if she is living in adultery,[7] or refuses to accompany her husband when he removes from place to place, in the performance of the duties of his profession or occupation.[8] If she fraudulently induce a purchaser to advance his money upon a purchase of her interests, a settlement will not be made.[9]

§ 635. If, however, a husband has already made a settlement upon his wife, he will not be required to make another on coming into court to reduce her property to possession.[10] A settlement, however, will apply *prima facie* only to the property then belonging to the wife,

[1] Bullock *v.* Menzies, 4 Ves. 798; *Re* Duffy's Trust, 28 Beav. 386; Vaughan *v.* Buck, 13 Sim. 404.

[2] Barrow *v.* Barrow, 5 De G., M. & G. 782; Tidd *v.* Lester, 3 De G., M. & G. 870; Wright *v.* Morley, 11 Ves. 12; Allerton *v.* Knowell, 4 Ves. 799; Oxenden *v.* Oxenden, 2 Vern. 493; Williams *v.* Callow, 2 Vern. 572; Atherton *v.* Mowell, 1 Cox, 229; Eedes *v.* Eedes, 11 Sim. 569.

[3] Vaughan *v.* Buck, 1 Sim. (N. S.) 284; Squires *v.* Ashford, 23 Beav. 132, Barnes *v.* Robinson, 1 N. R. 257; Elliott *v.* Cordell, 5 Mad. 149; Lumb *v.* Milnes, 5 Ves. 517; Brown *v.* Clark, 3 Ves. 166; Jacob *v.* Amyatt, 1 Mad 376 n.; Sturgis *v.* Champneys, 5 M. & Cr. 97; Gilchrist *v.* Cator, 1 De G. & Sm. 188; Koeber *v.* Sturgis, 22 Beav. 588.

[4] Tidd *v.* Lister, 10 Hare, 140; 3 De G., M. & G. 857; Duffy's Trust, 28 Beav. 386.

[5] Colmer *v.* Colmer, Mose. 113.

[6] Aquilar *v.* Aquilar, 5 Mad. 414.

[7] Ball *v.* Montgomery, 2 Ves. Jr. 191; Duncan *v.* Campbell, 12 Sim. 616; Alexander *v.* McCulloch, 2 Ves. Jr. 192.

[8] Bullock *v.* Menzies, 4 Ves. 798.

[9] Lush's Trusts, L. R. 4 Eq. 591; Sharpe *v.* Toy, L. R. 4 Eq. 35.

[10] Druce *v.* Denison, 6 Ves. 395; Carr *v.* Taylor, 10 Ves. 579; Garforth *v.* Bradley, 2 Ves. 677; Mitford *v.* Mitford, 9 Ves. 96; Martin *v.* Martin, 1 Comst. 473.

unless by the terms of the instrument it embraces her subsequently acquired property.[1] If in terms it does not embrace subsequent property, he will be required to make an additional settlement.[2] If a settlement in terms states, that it is in consideration of his wife's fortune, it will entitle him to her present fortune, however inadequate the settlement may be, if made before marriage;[3] but if it is inadequate, it will be an additional reason for requiring another settlement, upon the accession of additional property to her.[4] But even an adequate settlement, made after marriage, will not bar her equity to an additional settlement.[5] It is not important that the settlement should refer to the present fortune of the wife: it will be presumed to embrace it.[6] If the settlement is made in consideration of a part of the wife's equitable property, it will not be extended beyond its express terms.[7] By these settlements, the husband becomes the purchaser of so much of the wife's property as they embrace; but they simply give him the power to reduce the equitable and legal *choses in action* to possession: if he dies without doing so, she takes them by survivorship.[8]

§ 636. The amount that will be settled upon the wife is subject to the sound discretion of the court, acting upon all the circumstances, such as the solvency or insolvency of the husband, the amount of the wife's property he has already received, the amount that remains, their position in society, and the fact whether a settlement has already been made upon the wife, the conduct of the husband, and whether he lives with her and maintains her as well as he can. There is no general rule. In some cases one-half the property

[1] Ibid.; Barrow *v.* Barrow, 18 Beav. 529; Matter of Beresford, 1 Des. 263. The fact that a woman lives separate from her husband will not entitle her to an additional settlement, if the first settlement in terms embraced her future fortune. *Re* Erskine's Trusts, 1 K. & J. 302.

[2] Ibid.

[3] Lanoy *v.* Athol, 2 Atk. 448; 3 P. Wms. 199 n.; Adams *v.* Cole, 2 Atk. 449 n.; Forr. 168; Brett *v.* Forcer, 3 Atk. 405.

[4] March *v.* Head, 3 Atk. 720; Tomkyns *v.* Ladbroke, 2 Ves. 595; Stackpole *v.* Beaumont, 3 Ves. 98; Elibank *v.* Montolieu, 5 Ves. 737.

[5] Dunkley *v.* Dunkley, 2 De G., M. & G. 390; Matter of Beresford, 1 Des. 263.

[6] Blois *v.* Hereford, 2 Vern. 502; and see Salway *v.* Salway, Amb. 602.

[7] Cleland *v.* Cleland, Pr. Ch. 63; Burdon *v.* Dean, 2 Ves. Jr. 607.

[8] Rudyard *v.* Neirin, Pr. Ch. 209; Lister *v.* Lister, 2 Vern. 68; Mitford *v.* Mitford, 9 Ves. 96; Salway *v.* Salway, Am . 692; Heaton *v.* Hassell, 4 Vin. Ab. 40.

has been settled on her, and the other half allowed to go to his assignees. In other cases, and especially where there has been misconduct on the part of the husband, the whole sum has been settled; and the court will be inclined to do this, if the husband has already expended a large part of his wife's fortune, or if the sum remaining is barely sufficient to support the wife and children,[1] or if the husband has married a ward of the court without permission.[2]

§ 637. If a husband refuses to make a settlement upon his wife, the court will give him no aid in reducing her *choses in action*, whether legal or equitable, to possession; and the court will retain the capital, if within its jurisdiction, so that the wife may take the same by survivorship. But his marital rights will not be otherwise taken away, and he will be allowed to receive the income, so long as he lives with and maintains her.[3] Where, however, a husband has deserted his wife and left her unprovided for;[4] or where he has received a large part of her fortune, and refuses to make any set-

[1] Jewson *v.* Moulson, 2 Atk. 423; Worrall *v.* Marlar, 1 Cox, 153; 1 Dick. 647; Brown *v.* Clark, 3 Ves. 166; Bagshaw *v.* Winter, 5 De G. & Sm. 466; Dunkley *v.* Dunkley, 2 De G., M. & G. 396; Green *v.* Otte, 1 S. & S. 250; Napier *v.* Napier, 1 Dr. & W. 407; Aubrey *v.* Brown, 4 W. Rob. 425; Coster *v.* Coster, 9 Sim. 597; *Ex parte* Pugh, 1 Dr. 202; Vaughan *v.* Buck, 1 Sim. (N. S.) 284; Beresford *v.* Hobson, 1 Mad. 362; Jacobs *v.* Amyatt, 1 Mad. 376; Brett *v.* Greenwell, 3 Y. & Col. Ex. 230; Gardner *v.* Marshall, 14 Sim. 575; Francis *v.* Brooking, 19 Beav. 347; Scott *v.* Spashett, 3 Mac. & G. 599; Marshall *v.* Fowler, 16 Beav. 249; *Re* Kinciad's Trusts, 1 Dr. 326; *In re* Cutler, 14 Beav. 220; Gent *v.* Harris, 10 Hare, 383; Layton *v.* Layton, 1 Sm. & Gif. 179; Walker *v.* Drury, 17 Beav. 482; Helms *v.* Franciscus, 2 Bland, 545; Kenney *v.* Udall, 5 John. Ch. 464; 3 Cow. 591; Napier *v.* Howard, 3 Kelly, 205; Bowling *v.* Winslow, 5 B. Mon. 31; Browning *v.* Headley, 2 Rob. Va. 340; Hall *v.* Hall, Md. Ch. 283; McVey *v.* Boggs, 3 Md. Ch. 94; Barron *v.* Barron, 24 Vt. 375; Benett *v.* Oliver, 7 Gill & J. 191.

[2] *Ante*, § 631; Stackpole *v.* Beaumont, 3 Ves. 89; Stevens *v.* Savage, 1 Ves. Jr. 154; Chassaing *v.* Parsonage, 5 Ves. 15; Millett *v.* Rowse, 7 Ves. 419; Bathurst *v.* Murray, 8 Ves. 74; Wells *v.* Price, 5 Ves. 398; Winch *v.* James, 4 Ves. 386; Priestly *v.* Lamb, 6 Ves. 421; Halsey *v.* Halsey, 9 Ves. 471; Pearce *v.* Crutchfield, 16 Ves. 48; *In re* Healey, 1 C. & L. 393; *In re* Walker, Ll. & G. Sugd. 325; Hodgens *v.* Hodgens, 11 Bligh (N. S.), 52; 4 C. & F. 323; Birkett *v.* Hibbert, 3 My. & Cr. 227; Like *v.* Beresford, 3 Ves. 506; Ball *v.* Coutts, 1 V. & B. 305. See Bennett *v.* Biddles, 10 Jur. 534.

[3] Sleech *v.* Thorrington, 2 Ves. 562; Oxenden *v.* Oxenden, 2 Ves. 493; Williams *v.* Callow, 2 Vern. 751; Atcheson *v.* Atcheson, 11 Beav. 485; Att'y-Gen. *v.* Bacchus, 9 Price, 30; 11 Price, 547; Grute *v.* Locroft, Cro. Eliz. 287.

[4] Ibid.; Watkins *v.* Watkins, 2 Atk. 96; Peters *v.* Grote, 7 Sim. 238; Rishton *v.* Cobb, 9 Sim. 620.

tlement;[1] or where he is a lunatic,[2] and incapable of taking care of her; or where he is a bankrupt or totally insolvent,[3]— the court will order the income to be paid to her.

§ 638. The right to a settlement and the survivorship of the wife are two different things; although they both depend upon the fact whether the husband has reduced the wife's *choses in action* to possession. A settlement is ordered by the court for the present benefit of the wife, where the husband has not actually received the property. Survivorship of the wife is her right to her *choses in action* at the death of her husband, in case he has not already reduced them to possession: the one is the act of the court; the other is operation of law.

§ 639. It frequently becomes a question whether a wife's *choses in action*, legal or equitable, have been so dealt with by her husband as to be reduced to his legal possession, in such manner as to bar her right to a settlement, or to destroy her right of survivorship in the property in case he dies. There is no difference in the rule between legal and equitable property.[4] If the husband has not done some act to vest the legal property in himself, the wife can claim a settlement, or will take it as survivor.[5] An actual payment or delivery by the legal holder to the husband himself, or to

[1] Bond *v.* Simmonds, 3 Atk. 21.

[2] Stead *v.* Culley, 2 My. & K. 52.

[3] *Ante*, §§ 634–636.

[4] Twisden *v.* Wise, 1 Vern. 161; Hornsby *v.* Lee, 2 Mad. 16; Purdew *v.* Jackson, 1 Russ. 1; Honner *v.* Morton, 3 Russ. 65.

[5] Pike *v.* Collins, 33 Me. 43; Parsons *v.* Parsons, 9 N. H. 309; Poor *v.* Hazleton, 15 N. H. 568; Legg *v.* Legg, 8 Mass. 99; Stanwood *v.* Stanwood, 17 Mass. 57; Hayward *v.* Hayward, 20 Pick. 517; Dum *v.* Sargeant, 101 Mass. 336; Schuyler *v.* Hoyle, 5 John. Ch. 196; Searing *v.* Searing, 9 Paige, 283; Snowhill *v.* Snowhill, 1 Green, Ch. 30; Dare *v.* Allen, 1 Green, Ch. 419; Krumbaar *v.* Burt, 2 Wash. C. C. 406; Lodge *v.* Hamilton, 2 S. & R. 491; Bohn *v.* Headly, 7 H. & J. 257; Browning *v.* Headley, 2 Rob. Va. 340; Revel *v.* Revel, 2 Dev. & B. 272; Pickett *v.* Everett, 11 Mo. 568; Clarke *v.* McCreary, 12 Sm. & M. 347; Rice *v.* Thompson, 14 B. Mon. 379; Killar *v.* Beclor, 5 B. Mon. 573; Whitehurst *v.* Harker, 2 Ired. Eq. 292; Poindexter *v.* Blackburn, 1 Ired. Eq. 286; Terry *v.* Brunson, 1 Rich. Eq. 78: Sayre *v.* Flournoy, 3 Kelly, 541; Bibb *v.* McKinley, 9 Port. 636. *Choses in action* in Connecticut, accruing to a wife during coverture, vest immediately in the husband, and do not survive to the wife if the husband dies, even though he has done nothing to reduce them to possession. Griswold *v.* Penniman, 2 Conn. 564, although this is now altered by statute. Edwards *v.* Sheridan, 24 Conn. 165; Jennings *v.* Davis, 31 Conn. 134; Blound *v.* Bestland, 5 Ves. 515; Macauley *v.* Phillips, 4 Ves. 17; Fort *v.* Fort, Forrest, 171.

his assignee, or other person appointed or authorized to receive the fund, will be a reduction to possession;[1] but if the assignee has not actually received the property, there is no possession that affects the rights of the wife.[2] The husband must, in all cases, do some *act* to reduce the wife's *choses* to possession. The mere manual possession of them as an administrator, executor, or trustee, will not be enough, unless accompanied by some act manifesting an intention to make them his own,[3] as if he charges a legacy as paid to him, and the account is allowed,[4] or if he expends the money in his own business,[5] or sells the property, or takes notes in his own name.[6] A mere suit in the name of himself and wife is not a reduction to possession,[7] nor is a bill in equity for a division,[8] nor a suit for a distribution;[9] nor is a judgment or decree in such joint suits enough.[10] There must be an execution, and the actual delivery of the property to the husband or his agent.[11] A joint receipt is not sufficient;[12] so a joint recognizance for a wife's legacy is not enough.[13] Mere

[1] Dashell *v.* Earle, 12 Ves. 473; Ryland *v.* Smith, 1 M. & Cr. 53; Glaister *v.* Hewer, 8 Ves. 207; Johnson *v.* Johnson, 1 J. & W. 472; Hanson *v.* Miller, 8 Jur. 209.

[2] Ibid.; Browning *v.* Headley, 2 Rob. Va. 340; Mathews *v.* Guess, 2 Hill, Eq. 63; George *v.* Goldsby, 23 Ala. 333; Arrington *v.* Yarborough, 1 Jones, Eq. 72; Bugg *v.* Franklin, 4 Sneed, 129; Lynn *v.* Bradley, 1 Met. Ky. 232; Smith *v.* Atwood, 13 Ga. 420; State *v.* Robertson, 5 Harrington, 201; Needles *v.* Needles, 7 Ohio St. 432; Ryan *v.* Spruill, 4 Jones, Eq. 27.

[3] Wallace *v.* Taliaferro, 2 Call, 376; Mayfield *v.* Clifton, 3 Stew. 375; Elms *v.* Hughes, 3 Des. 155; Ross *v.* Morton, 10 Yerg. 190; Kintzinger Est., 2 Ash. 455; Miller's Est., 2 Ash. 223; Gochenaur Est., 23 Penn. St. 460.

[4] Pierce *v.* Thompson, 17 Pick. 391.

[5] Ellis *v.* Baldwin, 1 W. & S. 253.

[6] Wardlaw *v.* Gray, 2 Hill, Eq. 644.

[7] Pike *v.* Collins, 33 Me. 43; Thompson *v.* Ellsworth, 1 Barb. Ch. 624; Arnold *v.* Ruggles, 1 R. I. 165; Bell *v.* Bell, 1 Kelly, 637; Knight *v.* Brawneer, 14 Md. 1; Hall *v.* McLain, 11 Humph. 425; 3 Sneed, 536; Pierce *v.* Thornley, 2 Sim. 167.

[8] Gregory *v.* Marks, 1 Rand. 355.

[9] Bennett *v.* Dillingham, 2 Dana, 436; Short *v.* Moore, 10 Vt. 446; Probate Court *v.* Niles, 32 Vt. 775; Lewis *v.* Price, 3 Rich. Eq. 172.

[10] Pike *v.* Collins, 33 Me. 43; Mason *v.* McNeill, 23 Ala. 201; Nanney *v.* Martin, 1 Eq. Ca. Ab. 68; 3 Atk. 726; Forbes *v.* Phillips, 1 Ed. 502; Nightingale *v.* Lockman, Fitzgib. 148; Hore *v.* Woufle, 2 B. & B. 424; Adams *v.* Lavender, 1 McCl. & Y. 41; *Re* Jenkins, 5 Russ. 183.

[11] Ibid.; Alexander *v.* Crittenden, 4 Allen, 342.

[12] McDowell *v.* Potter, 8 Barr, 191; Timbers *v.* Katz, 6 W. & S. 290.

[13] Lodge *v.* Hamilton, 2 S. & R. 491; Hake *v.* Fink, 9 Watts, 336.

possession of notes, bonds, and mortgages, is not enough;[1] if the money is received by virtue of agreements inconsistent with his receiving it in his *marital* right, the rights of the wife will not be barred.[2] Where a husband sold his wife's *choses in action*, and invested the proceeds in other securities, which he inclosed in an envelop and marked as his own to dispose of, it was held to be a perfect reduction to possession.[3] Where the *act* depends upon the husband's intention at the time, it may be shown, by his declarations and other circumstances, that it was not his intention to reduce the property to possession.[4] If, however, the husband wishes to qualify his acts, and show that he did not reduce the *choses* to possession, the evidence must be demonstrative.[5] If the *choses* are once reduced to possession, no words of the husband can revive the rights of the wife, or defeat the rights of creditors.[6]

§ 640. The receipt of interest by the husband due on a mortgage, bond, or note to the wife, is the reduction of the money received, but it is not a reduction of the principal sum due;[7] nor is the collection of dividends on stocks a reduction of the stocks. To reduce the stocks themselves to possession, they must be transferred into the name of the husband.[8] Part payment of the principal of a note to the husband is not a reduction to possession of the remainder due.[9] A note, payable to a married woman, may be indorsed and transferred by the husband, and the signature of the wife is not necessary. Such indorsement and transfer of a negotiable instrument is a reduction to possession by the husband.[10] An agreement to sell the

[1] Hunter *v.* Hallett, 1 Edw. Ch. 388; Pickett *v.* Everett, 11 Mo. 568; Miller's Est., 1 Ash. 330; Barber *v.* Slade, 30 Vt. 191; Hall *v.* Young, 37 N. H. 134; Barron *v.* Barron, 24 Vt. 375; Holmes *v.* Holmes, 28 Vt. 765.

[2] Barron *v.* Barron, 24 Vt. 375; Durant *v.* Lalley, 3 Strob. 159; Rogers *v.* Bumpass, 4 Ired. Eq. 385; Savage *v.* Benham, 17 Ala. 120; Davis *v.* Davis, 46 Penn. St. 362; Wall *v.* Tomlinson, 16 Ves. 413; Ryland *v.* Smith, 1 My. & Cr. 53; Burnham *v.* Bennett, 2 Coll. 254; Baker *v.* Hall, 12 Ves. 497.

[3] Dunn *v.* Sargeant, 101 Mass. 336.

[4] Hind's Est., 5 Whart. 138; Gray's Est., 1 Barr, 327; Gochenaur's Est., 23 Penn. St. 460; McDowell *v.* Potter, 8 Barr, 191.

[5] Gray's Estate, 1 Barr, 327; Gochenaur's Estate, 23 Penn. St. 460.

[6] Nolen's App., 23 Penn. St. 35.

[7] Howman *v.* Corrie, 2 Vern. 190; Hart *v.* Stephens, 6 Q. B. 937; Stanwood *v.* Stanwood, 17 Mass. 57; Burr *v.* Sherwood, 3 Brad. Sur. 85.

[8] Arnold *v.* Ruggles, 1 R. I. 165.

[9] Nash *v.* Nash, 2 Mad. 133; Schuyler *v.* Hoyle, 5 John. Ch. 196.

[10] Scarpellini *v.* Acheson, 7 Q. B. 864; Gatens *v.* Madderly, 6 M. & W. 428;

chose is not a reduction;[1] nor is the set-off of the *chose* against the husband's debt, no money being paid or receipts given;[2] nor is a pledge or assignment of it as collateral security.[3] If a wife's real estate is sold, and notes are taken in the name of the husband, they become his; or if notes are taken in the name of the wife, the husband may collect them and reduce them to possession.[4] The money due on a mortgage to the wife may be received by the husband, and a court of equity will compel her to discharge it, if he dies.[5] The reduction must be complete before the husband's death; mere initiatory steps, which have not resulted in the actual receipt of the money by the husband or his agents, will not be sufficient.[6] And although his debt due to an estate in which his wife has a legacy may be set off against the legacy during his life,[7] it cannot be after his death;[8] nor can the legacy be applied to the debt of the husband due to a third person.[9]

§ 641. In some of the United States, the transfer, assignment,

McNeilage *v.* Holloway, 1 B. & Ald. 218; Sherrington *v.* Yates, 12 M. & W. 855; Mason *v.* Morgan, 2 Ad. & El. 30; Evans *v.* Secrest, 3 Ind. 545; Wall *v* Tomlinson, 16 Ves. 413; Hemmingway *v.* Mathews, 10 Tex. 207; Tryon *v.* Sutton, 13 Cal. 490; Wildman *v.* Wildman, 9 Ves. 174; Twisden *v.* Wise, 1 Vern. 161; Ryland *v.* Smith, 1 M. & C. 53; Stevens *v.* Beals, 10 Cush. 291; Garforth *v.* Bradey, 2 Ves. Sr. 675; Richards *v.* Richards, 2 B. & Ad. 447; Hart *v.* Stephens, 6 Q. B. 937; Allen *v.* Wilkins, 3 Allen, 322.

[1] Harwood *v.* Fisher, 1 Y. & Col. Ex. 110.

[2] Harrison *v.* Andrews, 13 Sim. 595; Carr *v.* Taylor, 10 Ves. 574. A debt due to an estate by a husband may be set off against a legacy to his wife from the same estate; Yoke *v.* Barnet, 1 Binn. 358; Flory *v.* Becker, 2 Barr, 471; but not after his death; Kreider *v.* Boyer, 10 Watts, 58; Stout *v.* Levan, 3 Barr, 235.

[3] Latourette *v.* Williams, 1 Barb. 9; Hartman *v.* Dowdel, 1 Rawle, 279; Tritt *v.* Colwell, 31 Penn. St. 228; Siter's Case, 4 Rawle, 468.

[4] Taggart *v.* Boldin, 10 Md. 104; McCrory *v.* Foster, 1 Io. 271; Peacock *v.* Pembroke, 4 Md. 280; Ramsdale *v.* Craighill, 9 Ohio, 199; Dixon *v.* Dixon, 18 Ohio, 113; Talbot *v.* Dennis, 1 Cart. 471; Casey *v.* Wiggin, 8 Gray, 231; Ellsworth *v.* Hinds, 5 Wis. 613; Bartlett *v.* Janeway, 4 Sand. Ch. 396; Barber *v.* Slade, 30 Vt. 191.

[5] Rees *v.* Keith, 11 Sim. 388; Bosvill *v.* Brander, 1 P. Wms. 458; Bates *v.* Dandy, 2 Atk. 208; Siter *v.* McClanachan, 2 Grat. 280.

[6] Mason *v.* McNeill, 23 Ala. 201; Donaldson *v.* West Branch Bank, 1 Barr, 286.

[7] Yoke *v.* Bennett, 1 Binn. 358; Flory *v.* Becker, 2 Barr, 471.

[8] Ibid.; Kreider *v.* Boyer, 10 Watts, 58; Stout *v.* Levan, 3 Barr, 285.

[9] Frauenfeldt's Est., 3 Whart. 415.

or release of a *chose in action*, in which the wife has a present interest, is such an act of ownership, on the part of the husband, that it will bar the right of survivorship in the wife, although the assignee may not have reduced the *chose* to actual possession.[1] In some States, the wife's *choses in action* will not pass to the husband's assignees in bankruptcy, under general words;[2] nor by a voluntary assignment in trust for creditors.[3] But if the *choses* are specifically named, they will pass to such assignees, whether they are assignees in bankruptcy or voluntary.[4] But it is said that assignees in bankruptcy will take, subject to the wife's right of survivorship, if they do not reduce the *chose* to actual possession.[5] A fraudulent assignment of his wife's *choses*, as after desertion, or after proceedings for a divorce are begun, cannot be supported;[6] nor can a voluntary assignment without consideration.[7]

§ 642. In some States, the *choses in action* of the wife so far vest in the husband, although he does no act to reduce them to possession, that creditors may attach and seize them on execution, or

[1] Chandos *v.* Talbot, 2 P. Wms. 601; Bates *v.* Dandy, 2 Atk. 207; Hawkins *v.* Obin, 2 Atk. 549; Parsons *v.* Parsons, 9 N. H. 309; Tucker *v.* Gordon, 5 N. H. 564; Schuyler *v.* Hoyle, 5 John. Ch. 196; Tuttle *v.* Fowler, 22 Conn. 58; Snowhill *v.* Snowhill, 1 Green, Ch. 30; Thomas *v.* Kelsoe, 7 Mon. 521; Lowry *v.* Houston, 3 How. (Miss.) 396; Shuman *v.* Reigart, 7 W. & S. 168; Siter's Case, 4 Rawle, 468; Webb's App., 21 Penn. St. 248; Smilie's Est., 22 Penn. St. 130; Hill *v.* Townsend, 24 Tex. 575; Manion *v.* Titsworth, 18 B. Mon. 582.

[2] Eshelman *v.* Shuman, 13 Penn. St. 561.

[3] Skinner's App., 5 Barr, 263; Slaymaker *v.* Bank, 10 Barr, 373; Wright *v.* Rutter, 2 Ves. Jr. 673.

[4] Richwine *v.* Keim, 1 Pa. 373; Shuman *v.* Reigart, 7 W. & S. 168; Eshelman *v.* Shuman, 13 Penn. St. 561; Siter's Case, 4 Rawle, 468; Barnes *v.* Pearson, 6 Ired. Eq. 482.

[5] Van Epps *v.* Van Deusen, 4 Paige, 64; Poor *v.* Hazleton, 16 N. H. 568; Outcalt *v.* Van Winkle, 1 Green, Ch. 513; Shay *v.* Sessaman, 10 Barr, 434; Krumbaar *v.* Burt, 2 Wash. C. C. 406; Shaw *v.* Mitchell, Davis, 216; Purdew *v.* Jackson, 1 Russ. 1; Hutchings *v.* Smith, 9 Sim. 137; Elwym *v.* Williams, 7 Jur. 338; 12 L. J. Ch. 440; 13 Sim. 309; Ashby *v.* Ashby, 1 Coll. 554; Wilkinson *v.* Charlesworth, 10 Beav. 328; Le Vasseux *v.* Scratton, 14 Sim. 118; Boston *v.* Boston, 13 Jur. 247; 16 Sim. 552; Macq. Husb. and Wife, 54; 2 Spence, Eq. Jur. 476.

[6] Krupp *v.* Scholl, 10 Barr, 194; Blenkinsop *v.* Blenkinsop, 1 De G., M. & G. 495. And see Tuttle *v.* Fowler, 22 Conn. 58.

[7] Wright *v.* Rutter, 2 Ves. Jr. 673; Burnett *v.* Kinnaston, 2 Vern. 401; Mitford *v.* Mitford, 9 Ves. 87; Johnson *v.* Johnson, 1 J. & W. 472; Jewson *v.* Moulson, 2 Atk. 417; Hartman *v.* Dowdel, 1 Rawle, 279.

by the trustee process.[1] But if the husband dies before judgment, his wife will take the *choses* by survivorship.[2] In other States, it is held that nothing vests in the husband until he has elected to reduce the *chose in action* to possession, and has done some act to that end; and that creditors cannot reach such *choses* until they vest in the husband; and that the husband cannot be compelled to elect, or reduce them to possession.[3] It has been held, that the right is so far personal to the husband that it cannot be exercised by a guardian if he is insane.[4]

§ 643. When the necessary steps are taken, a wife's *chose* is reduced to possession, her right to a settlement is barred, and her right by survivorship is destroyed, as, where a bond is taken from an executor to the husband alone for a legacy due the wife with or without judgment on the bond,[5] or a new security is taken in any form to the husband for the old security to the wife,[6] or a receipt is given by the husband alone for the *choses* of the wife,[7] or where a deed is made of the wife's property to trustees, in trust for the wife and her children.[8]

§ 644. If a note, bond, or legacy is given to a husband and wife jointly, the husband can collect the whole during his life, but if he does not reduce them to possession they survive to his wife on his death.[9] If the property is in court, a settlement can be ordered; or the fund can be reserved, and the interest paid to the husband

[1] Wheeler *v.* Bowen, 20 Pick. 263; Holbrook *v.* Waters, 19 Pick. 354; Vance *v.* McLaughlin, 8 Grat. 289; Dodd *v.* Geiger, 2 Grat. 98; James *v.* Gibbs, 1 Pat. & H. 277.

[2] Strong *v.* Smith, 1 Met. 476; Hayward *v.* Hayward, 20 Pick. 517.

[3] Skinner's App., 5 Barr, 263; Sayre *v.* Flournoy, 3 Kelly, 541; Dennison *v.* Nigh, 2 Watts, 90; Robinson *v.* Woelper, 1 Whart. 179; Wheeler *v.* Moore, 13 N. H. 478; Andrews *v.* Jones, 10 Ala. 400; Coffin *v.* Morrill, 2 Fost. 352; Mellingen *v.* Bausmann, 45 Penn. St. 522; Stoner *v.* Commonwealth, 16 Penn. St. 387; Nolen's App., 23 Penn. St. 37; Peacock *v.* Pembroke, 4 Md. 280; Harris *v.* Taylor, 3 Sneed, 536; Gallego *v.* Gallego, 2 Brock. 287.

[4] Andover *v.* Merrimack County, 37 N. H. 437. But see *In re* Jenkins, 5 Russ. 183.

[5] Stewart's App., 3 W. & S. 476; Yerby *v.* Lynch, 3 Grat. 460; De Witt *v.* Eldred, 4 W. & S. 422.

[6] Searing *v.* Searing, 9 Paige, 283.

[7] Starke *v.* Starke, 3 Rich. 438.

[8] Siter's Case, 4 Rawle, 464; Hansen *v.* Miller, 8 Jur. 209.

[9] Pike *v.* Collins, 33 Me. 43; Hayward *v.* Hayward, 20 Pick. 517; Laprimaudaye *v.* Teissier, 12 Beav. 206; Atcheson *v.* Atcheson, 11 Beav. 485.

during his life.[1] In case of the settlement of property jointly upon husband and wife, the husband may receive the entire income during his life, and his interests may be seized by his creditors, and they pass to his assignees in bankruptcy, although the instrument of settlement contains provisions attempting to avoid such a result.[2]

§ 645. It has already appeared, that a wife cannot ask for a settlement for herself alone, without including her children;[3] but this is a personal right, and the children cannot ask for a settlement after her death.[4] The wife, at any time before the settlement is actually executed, may waive it, and consent in court that her husband may take the property.[5] In some cases it was held, however, that the equity of the children attached upon the filing of the bill or petition of the wife; and that, if she died before further proceedings, the children might still be protected.[6] But, in the later cases, it has been held that the rights of the children to have the settlement attach only after decree; and that, if the wife dies before the decree, the husband takes all by survivorship as his wife's administrator.[7] If there are no children, the order or decree for a settlement will not affect the husband's rights, if the wife dies before the execution of the instrument; but if the settlement is drawn and approved by the court, it will control the property.[8] Where there are no children, the husband's next of kin will take the property.[9]

[1] Ibid.

[2] Carson *v.* O'Bannon, 7 Rich. Eq. 219; Rivers *v.* Thayer, 7 Rich. Eq. 166.

[3] Murray *v.* Elibank, 10 Ves. 90; 1 Lead. Ca. Eq. 360; Lloyd *v.* Williams, 1 Mad. 450; Groves *v.* Clark, 1 Keen, 132; Napier *v.* Howard, 3 Kelly, 193; Udall *v.* Kenney, 3 Cow. 609; Groverman *v.* Diffenderffer, 1 Gill & J. 22; Howard *v.* Moffatt, 2 John. Ch. 206; Andrews *v.* Jones, 10 Ala. 401.

[4] Scriven *v.* Tapley, 2 Ed. 337; Amb. 509; Lloyd *v.* Williams, 1 Mad. 450; Martin *v.* Sherman, 2 Sand. Ch. 341; Barker *v.* Woods, 1 Sand. Ch. 129; Bell *v.* Bell, 1 Kelly, 637.

[5] Row *v.* Jackson, 2 Dick. 604; Murray *v.* Elibank, 10 Ves. 84; 1 Lead. Ca. Eq. 360, notes; Martin *v.* Mitchell, 10 Ves. 89.

[6] Wallace *v.* Auldjo, 1 De G., J. & Sm. 643; Steinmetz *v.* Haltkin, 1 Gl. & J. 64; Murray *v.* Elibank, 10 Ves. 84; Groves *v.* Clark, 1 Keen, 132; Groves *v.* Perkins, 6 Sim. 584; Lloyd *v.* Williams, 1 Mad. 450; Mumford *v.* Murray, 1 Paige, 621; Helms *v.* Franciscus, 2 Bland, 581; Hill *v.* Hill, 3 Strob. Eq. 94.

[7] Delagarde *v.* Lampriere, 6 Beav. 344.

[8] Macauley *v.* Phillips, 4 Ves. 19.

[9] Carter *v.* Taggart, 1 De G., M. & G. 286; Bagshaw *v.* Winter, 5 De G. & Sm. 466.

There will be for the future little occasion to consider settlements in the

§ 646. At common law, a husband became liable for his wife's debt contracted before marriage; he was also bound to maintain her and her children, and was entitled to the enjoyment of her property. In equity a woman, in contemplation of marriage, might contract with an intended husband for the continued separate use and control of a certain portion, or the whole of her property.[1] These agreements were sustained in equity, on the principle that a person may waive or renounce a valuable right if he pleases, and that the right of the husband to his wife's property could be renounced by him, as it was one of his privileges. Equity also permits a stranger to give and settle property upon a married woman to her sole and separate use, free from the interference and control of the husband.[2] It was at first thought to be an infringement upon marital rights for a stranger to confer property upon a wife, independent of her husband, over which he could have no control, and in which he could have no interest. Equity has sustained these gifts of property to the wife, independent of the husband, upon the ground

United States, since the statutes settle nearly all a married woman's property upon herself, without even the intervention of a trustee. It may happen, however, that questions may arise in relation to marriages previous to the passage of the acts in the several States; or the property may come to the wife in some manner not embraced in the statutes, so that a husband's common-law rights may still extend to it. Wright *v.* Brown, 44 Penn. St. 224; Colvin *v.* Currier, 22 Barb. 387; Haines *v.* Ellis, 24 Penn. St. 253; Foster *v.* Penn. Ins. Co., 34 Penn. St. 134; Yale *v.* Dederer, 18 N. Y. 265; 22 N. Y. 450; Richen *v.* White, 43 Barb. 92; Rider *v.* Hulse, 33 Barb. 264; 24 N. Y. 372. It has, therefore, been necessary to refer to the matter briefly. In a few years this branch of the law will be entirely obsolete in this country.

[1] Parkes *v.* White, 11 Ves. 228; 2 Rop. Hus. and Wife, 151.

[2] Anderson *v.* Anderson, 2 M. & R. 427; Davies *v.* Thornycroft, 6 Sim. 420; Tullett *v.* Armstrong, 1 Beav. 1; 4 M. & Cr. 390; Scarborough *v.* Borman, 1 Beav. 34; 4 My. & Cr. 377. In Massey *v.* Parker, 2 M. & K. 174, Lord Cottenham remarked, that property, settled to the separate use of an unmarried woman, vested in her husband at her marriage, and a few cases in America have seemed to countenance the remark. Lindsay *v.* Harrison, 3 Eng. 311; Dick *v.* Pitchford, 1 Dev. & Bat. Eq. 480; Hamersley *v.* Smith, 4 Whart. 126; Miller *v.* Bingham, 1 Ired. 423; Apple *v.* Allen, 3 Jones, Eq. 342; Gully *v.* Hall, 31 Miss. 20; Bridges *v.* Wilkins, 3 Jones, Eq. 342. But the great body of American cases sustain the law, as established in England by Tullett *v.* Armstrong, 1 Beav. 1; 4 M. & C. 377; Fears *v.* Brooks, 12 Ga. 197; Robert *v.* West, 15 Ga. 123; Nix *v.* Bradley, 6 Rich. Eq. 43; Fellows *v.* Tann, 9 Ala. 1003; Shirley *v.* Shirley, 9 Paige, 363; Beauford *v.* Collier, 6 Humph. 487; Bridges *v.* Wilkins, 3 Jones, Eq. 342.

that the donor of the property, being the absolute owner, has the absolute right to dispose of it to such persons, and upon such conditions and limitations, not contrary to law, as he chooses; and as the husband has no rights in such property, it is depriving him of no rights, to confer none upon him. Thus it becomes a mere question of public policy, whether proprietary rights should be conferred upon a wife, independent of her husband. Public policy in regard to the matter has settled down upon the propriety of conferring separate proprietary rights upon married women. Equity has taken one other step in favor of married women, which is not generally permitted in favor of men or unmarried women. In general, conditions or limitations forbidding the alienation of property by persons *sui juris* cannot be maintained; but courts of equity early sanctioned a condition or limitation of property upon married women, forbidding them to anticipate the income in any way; that is, prohibiting them in any way from selling the property or its future produce for a present sum in hand. Thus protected, a married woman may enjoy property in her own right, in such manner that neither she nor her husband, nor both together, can alienate or anticipate the income.

§ 647. When these settlements or trusts for the separate use of married women were first established, it was supposed that a trustee was necessary,[1] but it is now determined that the interposition of an express trustee is not absolutely necessary; that if it is necessary in order to carry out the intention of the settlor to have a trustee, the husband shall be construed to take the legal title in trust for the wife, and he may be compelled to act accordingly.[2] But,

[1] Harvey *v.* Harvey, 1 P. Wms. 125; 2 Vern. 659; Burton *v.* Pierpoint, 2 P. Wms. 78; 2 Rop. Hus. and Wife, 152.

[2] Burnett *v.* Davis, 2 P. Wms. 316; Parker *v.* Brooke, 9 Ves. 583; Rollfe *v.* Budder, Bunb. 187; Prichard *v.* Ames, T. & R. 222; Newlands *v.* Poynter, 10 Sim. 377; 4 M. & Cr. 408; Turnley *v.* Kelley, Wallis. R. by Lyne, 311; Archer *v.* Rooke, 7 Ir. Eq. 478; Darley *v.* Darley, 3 Atk. 399; Lee *v.* Prideaux, 3 Bro. Ch. 383; Baggett *v.* Meux, 1 Phil. 627; Rich *v.* Cockell, 1 Phil. 375; Gardner *v.* Gardner, 1 Gif. 129; Major *v.* Lansley, 1 R. & M. 355; Herr's App., 5 W. & S. 494; Reade *v.* Livingstone, 3 John. Ch. 490; Searing *v.* Searing, 9 Paige, 284; Pinney *v.* Fellows, 15 Vt. 536; Barron *v.* Barron, 24 Vt. 375; Grant *v.* Grant, 34 L. J. Ch. 641; Wade *v.* Fisher, 9 Rich. Eq. 362; Boykin *v.* Ciples, 2 Hill, Ch. 200; Bosken *v.* Giles, Rice, Eq. 316; Clark *v.* Makenna, Cheeves, Eq. 163; Long *v.* White, 5 J. J. Marsh. 226; Trenton Banking Co. *v.* Woodruff, 1 Green, 118; Steel *v.* Steel, 1 Ired. Eq. 452; Freeman *v.* Freeman, 9 Mo. 772; Hamilton *v.* Bishop, 8 Yerg. 33; Jamison *v.* Brady, 6 S. & R. 466; Heck *v.* Clip-

in order to sustain a trust for the separate use of a married woman, the intention to exclude the husband must be clear and certain, and not a matter of inference, upon this principle that the husband is bound to maintain the wife, and bear the burdens incident to marriage, and he has *prima facie* a right to her property to enable him to discharge these obligations.[1] No particular form of words is necessary to create a trust for the separate use of the married woman; but when the meaning is clear, the court will carry the intention into effect.[2]

§ 648. A husband's right will not attach, if the gift is to the wife "for her sole and separate use;"[3] or "solely for her own use;"[4] or "for her livelihood;"[5] or "that she may receive and

pinger, 5 Barr, 385; Shirley *v.* Shirley, 9 Paige, 364; Fears *v.* Brooks, 12 Ga. 195.

[1] Wills *v.* Sayers, 4 Mad. 409; Massey *v.* Parker, 2 M. & K. 181; Kensington *v.* Dolland, 2 M. & K. 188; Moore *v.* Morris, 4 Dr. 37; *Ex parte* Ray, 1 Mad. 207; Rudisell *v.* Watson, 2 Dev. Eq. 430; Ashcroft *v.* Little, 4 Ired. Eq. 236; Hunt *v.* Booth, 1 Freem. 215; Williams *v.* Clairborne, 7 Sm. & M. 488; Carroll *v.* Lee, 3 Gill & J. 505; Evans *v.* Knorr, 4 Rawle, 66; Evans *v.* Gillespie, 1 Swan, 128; Cook *v.* Kennedy, 12 Ala. 42; Moss *v.* McCall, 12 Ala. 630; Pollard *v.* Merrill, 15 Ala. 170; Mitchell *v.* Gates, 23 Ala. 428; Welch *v.* Welch, 14 Ala. 76; Hale *v.* Stone, 14 Ala. 803; Fears *v.* Brooks, 12 Ga. 197.

[2] Darley *v.* Darley, 3 Atk. 399; Stanton *v.* Hall, 2 R. & M. 180; Stuart *v.* Kissam, 2 Barb. 294; West *v.* West, 3 Rand. 373; Lewis *v.* Adam, 6 Leigh, 320; Perry *v.* Boileau, 10 S. & R. 208; Ballard *v.* Taylor, 4 Des. 550; Davis *v.* Cain, 1 Ired. Eq. 305; Heathman *v.* Hall, 3 Ired. Eq. 414; Hamilton *v.* Bishop, 8 Yerg. 33; Beaufort *v.* Collier, 6 Humph. 487; Somers *v.* Craig, 9 Humph. 467; Nixon *v.* Rose, 12 Grat. 485; Fears *v.* Brooks, 12 Ga. 195; Clark *v.* Maguire, 16 Mo. 362.

[3] Parker *v.* Brooke, 9 Ves. 583; Petty *v.* Booth, 19 Ala. 633; Scarborough *v.* Borman, 1 Beav. 34; 4 M. & Cr. 377; Archer *v.* Rooke, 7 Ir. Eq. 498.

[4] *Re* Tarsley's Trust, L. R. 1 Eq. 561; Adamson *v.* Armitage, 19 Ves. 416; Coop. 283; *Ex parte* Ray, 1 Mad. 199; *Ex parte* Killick, 3 Mont. D. & D. 480; Davis *v.* Prout, 7 Beav. 288; Arthur *v.* Arthur, 11 Ir. Eq. 511; Lindsell *v.* Thacker, 12 Sim. 178; Massey *v.* Parker, 2 M. & K. 181; ——— *v.* Lyne, Yo. 562; Tullett *v.* Armstrong, 4 M. & Cr. 403; Gilbert *v.* Lewis, 1 De G., Jo. & S. 39; Lewis *v.* Mathews, L. R. 2 Eq. 177; Inglefield *v.* Coghlan, 2 Coll. 247; Jamison *v.* Brady, 6 Ser. & R. 466; Snyder *v.* Snyder, 10 Barr, 423; Jarvis *v.* Prentice, 19 Conn. 273; Goodrum *v.* Goodrum, 8 Ired. Eq. 313; Cuthbert *v.* Rolf, 19 Ala. 373; Warren *v.* Haley, 1 Sm. & M. Ch. 647; Stuart *v.* Kissam, 3 Barb. 494; Griffith *v.* Griffith, 5 B. Mon. 113; Fisher *v.* Filbert, 6 Barr, 61; Collins *v.* Rudolph, 19 Ala. 616.

[5] Darley *v.* Darley, 3 Atk. 399; Cape *v.* Cape, 2 Y. & C. 543; Lee *v.* Prieaux, 3 Bro. Ch. 383; Wardle *v.* Claxton, 9 Sim. 524.

enjoy the profits;"[1] or "to be at her disposal;"[2] or "to be by her laid out in what she shall think fit;"[3] or "for her own use independent of the husband;"[4] or "not subject to his control;"[5] or "to her own use and benefit independent of any other person;"[6] or "to receive the rents while she lives, whether married or single;"[7] and not to sell or mortgage, or "her receipt to be a sufficient discharge;"[8] or "to be delivered to her on demand;"[9] or if the gift is to the husband, should he be living with his wife, but if separate, then half to the husband and the other half to the wife "absolutely;"[10] or "to be for her own and her family's use during her natural life;"[11] or "to be paid to her semiannually during her life, and afterwards to her children;"[12] or "to be at her own disposal in true faith to her and her heirs for ever;"[13] or "for the use and benefit of the wife and her heirs;"[14] or "for the entire use, benefit, profit, and advantage of the wife;"[15] or "not to be sold, bartered, or traded by the husband;"[16] or "for her support."[17] A conveyance by a husband in trust for his wife is for her separate use;[18] a gift to her separate use and a subsequent legacy in addition thereto is separate;[19] and so is a provision not to be

[1] Tyrrell *v.* Hope, 2 Atk. 558.

[2] Prichard *v.* Ames, T. & R. 222; Kirk *v.* Paulin, 7 Vin. 96; Tyler *v.* Lake, 2 R. & M. 188; Stanton *v.* Hall, 2 R. & M. 180.

[3] Atcherley *v.* Vernon, 10 Mod. 531.

[4] Waggstaff *v.* Smith, 9 Ves. 520; Dixon *v.* Olmius, 2 Cox, 414; Simmons *v.* Horwood, 1 Keen, 9; Newlands *v.* Paynter, 4 M. & Cr. 408; Tullett *v.* Armstrong, 1 Beav. 1; 4 M. & Cr. 377.

[5] Bain *v.* Lescher, 11 Sim. 397.

[6] Margetts *v.* Barringer, 7 Sim. 482; Newman *v.* James, 12 Ala. 29; Brown *v.* Johnson, 17 Ala. 232; Gould *v.* Hill, 18 Ala. 84; Williams *v.* Maull, 20 Ala. 721; Gillespie *v.* Burleson, 28 Ala. 551; Ashcraft *v.* Little, 4 Ired. Eq. 236; Glover *v.* Hare, 16 Sim. 568.

[7] Goulder *v.* Camm, De G., F. & Jo. 146; 6 Jur. (N. S.) 113.

[8] Lee *v.* Prieaux, 3 Bro. Ch. 381 n., 383; Stanton *v.* Hall, 2 R. & M. 180; Tyler *v.* Lake, 2 R. & M. 188.

[9] Dixon *v.* Olmius, 2 Cox, 414.

[10] Shewell *v.* Dwarris, 1 John. (Eng.) 172; Brown *v.* Johnson, 17 Ala. 232.

[11] Heck *v.* Clippenger, 5 Barr, 385.

[12] Tyson's App., 10 Barr, 221; Hamilton *v.* Bishop, 8 Yerg. 33; Strong *v.* Gregory, 19 Ala. 146; Heck *v.* Clippenger, 5 Barr, 385.

[13] Bridges *v.* Wood, 4 Dana, 610.

[14] Good *v.* Harris, 2 Ired. Eq. 630.

[15] Heathman *v.* Hall, 3 Ired. Eq. 414.

[16] Woodrum *v.* Kirkpatrick, 2 Swan, 218; Clarke *v.* Windham, 12 Ala. 798.

[17] Markley *v.* Singletary, 11 Rich. Eq. 393.

[18] Steele *v.* Steele, 1 Ired. Eq. 452, is inconsistent with Wade *v.* Fisher, 9 Rich. Eq. 362.

[19] Warwick *v.* Hawkins, 21 L. J. Ch. 796; Davis *v.* Cain, 1 Ired. Eq. 334.

liable for a husband's debts,[1] the devisee and her heirs to use and enjoy the rents,[2] "to be hers and hers only;"[3] or that her husband shall not dispose of it without her consent;[4] or that she enjoy and receive the rents and profits.[5] A gift to the wife "exclusively" will exclude the husband.[6]

§ 649. On the other hand, it has been held that the following expressions are not so unequivocal as to afford certain evidence of an intention to exclude the husband from all control. "In trust to pay to her;"[7] or "to her and her assigns;"[8] or "to her use;"[9] or "to her own use;"[10] or "to her absolute use;"[11] or "to her heirs and assigns for her or their own sole use;"[12] or "to pay into her own proper hands for her own use;"[13] or "to pay to her to be applied to the maintenance of herself, and such child as the testator might happen to leave at his death;"[14] or "for the joint use of the husband and wife;"[15] or "the gift not to extend to any other person;"[16] or "to her and the heirs of her body, and to them alone;"[17] or "to A. during her life and after her death to her issue;"[18] or "to her use and benefit;"[19] or "not to be lia-

[1] Martin v. Bell, 9 Rich. Eq. 42; Young v. Young, 3 Jones, Eq. 216.

[2] Gardenhire v. Hinds, 1 Head, 402.

[3] Ellis v. Woods, 9 Rich. Eq. 19; Ozley v. Ikelheimer, 26 Ala. 332.

[4] Johnes v. Lockhart, 3 Bro. Ch. 383 n.

[5] Tyrrell v. Hope, 2 Atk. 561; Atcherly v. Vernon, 10 Mod. 531; Goulder v. Camm, 1 De G., F. & Jo. 146.

[6] Gould v. Hill, 18 Ala. 84.

[7] Dakins v. Berisford, 1 Ch. Ca. 194; Lumb v. Milnes, 5 Ves. 517; Brown v. Clark, 3 Ves. 166; Stanton v. Hall, 2 R. & M. 175; Beales v. Spencer, 2 N. C. C. 65.

[8] Ibid.

[9] Jacobs v. Amyatt, 1 Mad. 376 n.; Wills v. Sayers, 4 Mad. 411; Anon., cited 7 Vin. 96; Torbett v. Twining, 1 Yeates, 432; Tenant v. Stoney, 1 Rich. Eq. 222.

[10] Johnes v. Lockhart, 3 Bro. Ch. 383 n.; Wills v. Sayers, 4 Mad. 409; Roberts v. Spicer, 5 Mad. 491; Beales v. Spencer, 2 Y. & C. Ch. 651; Darcy v. Croft, 9 Ir. Eq. 19.

[11] Rycroft v. Christy, 3 Beav. 238; *Ex parte* Abbott, 1 Deacon, 338.

[12] Lewis v. Mathews, L. R. 2 Eq. 177; Rudisell v. Watson, 2 Dev. Eq. 430; Houston v. Embry, 1 Sneed, 480.

[13] Tyler v. Lake, 2 R. & M. 183; Kensington v. Dolland, 2 M. & K. 184; Blacklow v. Laws, 2 Hare, 48; Hartley v. Hurle, 5 Ves. 545, *contra.*

[14] Wardle v. Claxton, 9 Sim. 524; Chipchase v. Simpson, 16 Sim. 485.

[15] Bender v. Reynolds, 12 Ala. 446; Geyer v. Branch Bank, 21 Ala. 414.

[16] Ashcroft v. Little, 4 Ired. Eq. 236.

[17] Foster v. Kerr, 4 Rich. Eq. 390; Clevestine's App., 15 Penn. St. 499.

[18] Bryan v. Duncan, 11 Ga. 67.

[19] Fears v. Brooks, 12 Ga. 198; Clevestine's App., 15 Penn. St. 499.

ble for the husband's debts."[1] The mere gift to a trustee is not enough;[2] nor a mere direction to pay the income to the wife;[3] nor a bond to convey to the wife;[4] nor a conveyance to a wife and her heirs.[5] A direct devise to a widow to her sole use and benefit is not enough;[6] nor a gift to a wife only.[7]

§ 650. The authorities in the several States, and even in the same State, are conflicting with each other, as to what words are sufficient, and what are not sufficient, to create a separate use in a married woman. It is wholly a matter of intention to be gathered from the whole instrument; therefore the context may compel the court to give a different meaning to the same words; or, rather the court may be compelled to draw different conclusions of fact from the same words in different wills, the burden always being upon those who attempt to exclude the husband to show that such is the necessary intention of the instrument. In one case, it was said that the expressions which create a separate estate may be arranged in three classes: (1.) Where the technical words "sole and separate use" or equivalent words are used; (2.) Where the marital rights of the husband are expressly excluded; (3.) Where the wife is empowered to perform acts concerning the estate given to her, inconsistent with the disabilities of coverture.[8]

§ 651. The trust must be for the benefit of the wife, exclusive of all other persons; for if the gift is to trustees for the benefit of the wife and her husband, or of the wife and her children, or of the wife and any other person or persons, the marital rights of the wife will not be excluded; although the terms of the gift are such that if the gift was to the wife alone, a separate estate would be created in her.[9] So, if the gift is to the husband and another as

[1] Gillespie *v.* Burlison, 28 Ala. 551. *Contra* are Martin *v.* Bell, 9 Rich. Eq. 42; Young *v.* Young, 3 Jones, Eq. 266.

[2] Williams *v.* Maull, 20 Ala. 727; Hunt *v.* Booth, 1 Freem. Ch. 215; Mayberry *v.* Neely, 5 Humph. 339; Evans *v.* Knorr, 4 Rawle, 66; Welch *v.* Welch, 14 Ala. 77; Pollard *v.* Merrill, 15 Ala. 170.

[3] Fitch *v.* Ayer, 2 Conn. 143.

[4] Moore *v.* Jones, 13 Ala. 296.

[5] Hall *v.* Sayre, 10 B. Mon. 46; Fitch *v.* Ayer, 2 Conn. 143; Shirley *v.* Shirley, 9 Paige, 364.

[6] Gilbert *v.* Lewis, 1 De G., J. & M. 38.

[7] Sperett *v.* Willows, 11 Jur. (N. S.) 70.

[8] Nix *v.* Bradley, 6 Rich. Eq. 48.

[9] Wardle *v.* Claxton, 9 Sim. 524; Ashcroft *v.* Little, 4 Ired. Eq. 236; Inge *v.* Forrester, 6 Ala. 418; Jasper *v* Howard, 12 Ala. 652; Good *v.* Harris, 2 Ired.

trustees for the wife, it will not be to her separate use;[1] but a gift to the husband alone, in trust for his wife, will be to her separate use.[2]

§ 652. As before said, if property is conveyed to a single woman for her sole and separate use, she has the same control of it before marriage, as if it was given to her absolutely; but the limitation to her sole and separate use will take effect upon her marriage.[3] Until then, the words have no effect upon the property. Where the conveyance is directly to a single woman to her separate use without a trustee, the husband becomes her trustee on marriage.[4] But if a fund is given to a married woman for her separate use without a trustee, and her husband dies, and she sells the fund, and converts it into other property, and marries again, her husband will take it in the ordinary manner at common law.[5] Thus property, conveyed to a married woman to her sole and separate use, becomes absolutely hers, and may be sold by her as soon as her husband dies, or creditors may seize it for her debts.[6]

§ 653. If property is settled to the separate use of a woman, and the separate use is *intended* to be confined to a particular marriage, and the husband dies, and the widow marries again, the second husband will take his common-law rights in the property.[7] So if property is settled on a married woman for her separate use,

Eq. 630; Hamilton *v.* Bishop, 8 Yerg. 33; Chipchase *v.* Simpson, 16 Sim. 485; Bender *v.* Reynolds, 12 Ala. 446; Geyer *v.* Branch Bank, 2 Ala. 414; Lewis *v.* Mathews, L. R. 2 Eq. 177; Rudisell *v.* Watson, 2 Dev. Eq. 430; Houston *v.* Embry, 1 Sneed, 480. But see Heck *v.* Clippenger, 5 Barr, 385.

1 *Ex parte* Bulby, 1 Glyn & Jam. 167; Kensington *v.* Dolland, 2 M. & K. 184.

2 Ibid.; Darley *v.* Darley, 3 Atk. 399.

3 Brandon *v.* Robinson, 18 Ves. 429; Hallett *v.* Thompson, 5 Paige, 383; Dick *v.* Pitchford, 1 Dev. & B. 480; Blackstone Bank *v.* Davis, 21 Pick. 42; Nickel *v.* Hanley, 10 Grat. 336; Tullett *v.* Armstrong, 4 M. & C. 377; Newlands *v.* Paynter, 4 M. & C. 408; Russell *v.* Dickson, 2 Dr. & War. 138; Scarborough *v.* Borman, 1 Beav. 34; Clark *v.* Wyndham, 12 Ala. 870; Miller *v.* Bingham, 1 Ired. Eq. 423; Smith *v.* Starr, 3 Whart. 62; Hamersley *v.* Smith, 4 Whart. 126.

4 Archer *v.* Rooke, 7 Ir. Eq. 478.

5 Wright *v.* Wright, 2 John. & H. 647.

6 See all the cases before cited to this section. Barton *v.* Briscoe, Jac. 603; Jones *v.* Salter, 2 R. & R. 208; Woodmeston *v.* Walker, 2 R. & M. 197; Parker *v.* Converse, 5 Gray 336.

7 Barton *v.* Briscoe, Jac. 603; Benson *v.* Benson, 6 Sim. 126; Knight *v.* Knight, 6 Sim. 121; Jones *v.* Salter, 2 R. & M. 208; Moore *v.* Harris, 4 Dr. 33; Tudor *v.* Samyne, 2 Vern. 270; Turner's Case, 1 Ch. Ca. 307; 1 Vern. 7; Saunders *v.* Page, 3 Ch. R. 224; Pitt *v.* Hunt, 1 Vern. 18; Howard *v.* Hooker, 2 Ch. R. 81; Edmonds *v.* Dennington, cited 2 Vern. 17.

independent of her husband, "B.," and "B." dies, and the widow marries again, her second husband will take his common-law rights over the property.[1] But if the separate use is plainly intended by the instrument to extend to all future marriages, the intent will be carried into effect, so long as it can be applied to the property, and to all the income, whether in arrears or not at the time of the marriage.[2] Whether the separate use shall continue through several marriages is wholly a matter of intention. There was at one time a disposition to confine it to the first or present coverture; for, the moment the first husband is dead, the widow has an absolute power of disposal, and it was thought that, if a husband took a wife with such powers over her property, he must take his common-law rights over it;[3] but it is now established, that, if the property is clearly settled to the separate use of a woman, such separate use will attach so often as she may be married.[4]

§ 654. A married woman may deal with property settled to her separate use precisely as she could deal with it if she were a single woman, and without the concurrence of the trustees, unless the power of anticipation is restrained, and unless there are provisions in the instrument of settlement preventing her.[5] Lord Thurlow said, that "a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*."[6] But she will be protected against fraud, and the improper influence of her husband.[7] Therefore a married woman may sue and be sued in regard to her separate property.[8] She may obtain an order to

[1] Moore *v.* Harris, 4 Dr. 33.

[2] Ashton *v.* McDougall, 5 Beav. 56; *Re* Gaffee, 7 Hare, 101; 1 Mac. & G. 541.

[3] Hamersley *v.* Smith, 4 Whart. 126; Lindsay *v.* Harrison, 3 Eng. 311; Dick *v.* Pitchford, 1 Dev. & B. Eq. 480; Miller *v.* Bingham, 1 Ired. Eq. 423; Massey *v.* Parker, 2 M. & K. 174; Smith *v.* Starr, 3 Whart. 62. See Harrison *v.* Brolaskey, 20 Penn. St. 299; Clarke *v.* Wyndham, 12 Ala. 800; Steacy *v.* Rice, 27 Penn. St. 75.

[4] Roberts *v.* West, 15 Ga. 123; Gaffee's Trust, 1 Mac. & Gor. 541, overruling 7 Hare, 101; Beaufort *v.* Collier, 6 Humph. 487; Shirley *v.* Shirley, 9 Paige, 364; Waters *v.* Tazewell, 9 Md. 291; Tullett *v.* Armstrong, 1 Beav. 1; 4 M. & Cr. 377; Scarborough *v.* Borman, 1 Beav. 34.

[5] Grigby *v.* Cox, 1 Ves. 518; Dowling *v.* Maguire, Plunket, 19; Essex *v.* Atkins, 14 Ves. 552; Coryell *v.* Dunton, 7 Barr, 532.

[6] Hulme *v.* Tenant, 1 Bro. Ch. 20; 1 Lead. Ca. Eq. 398, and notes.

[7] Knight *v.* Knight, 11 Jur. (N. S.) 618.

[8] Jackson *v.* Haworth, 1 S. & S. 161; Thompson *v.* Beaseley, Eq. R. 59.

answer separately as a defendant,[1] and she may be served with process by leave of court if out of the jurisdiction.[2] She may present a petition with or without her husband ;[3] and she will be bound by her submission in her bill,[4] or answer,[5] or by a settlement of accounts,[6] or by a contract of sale,[7] and she may be made a contributor in the winding-up order of a corporation ;[8] her declarations may be read in evidence against her,[9] and she will be liable to attachment for want of an answer when she answers separately,[10] or for disobeying the orders of the court ;[11] or her separate property may be ordered to be sequestered.[12] But in all proceedings in equity in relation to the wife's separate estate, the husband ought to be made a defendant, especially if he claims any interest, or any of his acts are in question.[13]

§ 655. In England a married woman, being considered a single woman in relation to her separate property,[14] may exercise all the rights incident to the ownership of property, unless her power is restricted by the instrument of conveyance ; therefore, if personal property is simply given to her separate use, she may sell the same as

[1] Ibid. But if she answer separately, without leave of the court, her answer will be quashed. Perine *v.* Swaine, 1 John. Ch. 24. And see Furguson *v.* Smith, 2 John. Ch. 139.

[2] Copperthwaite *v.* Tuite, 13 Ir. Eq. 68.

[3] *Re* Crump, 34 Beav. 570.

[4] Allen *v.* Papworth, 1 Ves. 163.

[5] Clerk *v.* Miller, 2 Atk. 379 ; Bailey *v.* Jackson, C. P. Cooper, 495 ; Cowdery *v.* Way, Lewin on Trusts, 541 (5th ed.) ; Callow *v.* Howle, 1 De G. & Sm. 531 ; Beeching *v.* Morphew, 8 Hare, 120 ; Clive *v.* Carew, 1 John. & H. 207.

[6] Wilton *v.* Hill, 25 L. J. Ch. 156.

[7] Davidson *v.* Gardner, Sugd. V. & P. 891 (11th ed.) ; Stead *v.* Nelson, 2 Beav. 248 ; Harris *v.* Mott, 14 Beav. 169 ; Vansittart *v.* Vansittart, 4 K. & J. 70 ; Milnes *v.* Busk, 2 Ves. Jr. 498.

[8] *Re* Leeds Banking Co., 1 W. N. 361.

[9] Peacock *v.* Monk, 2 Ves. 193.

[10] Graham *v.* Fitch, 2 De G. & Sm. 246 ; Taylor *v.* Taylor, 12 Beav. 271 ; Home *v.* Patrick, 30 Beav. 405.

[11] Ottway *v.* Wing, 12 Sim. 90.

[12] Keogh *v.* Cathcart, 11 Ir. Eq. 280.

[13] Thorby *v.* Yates, 1 N. C. C. 438 ; Bradley *v.* Emerson, 7 Vt. 369 ; Clarkson *v.* De Peyster, 3 Paige, 336 ; Dewall *v.* Covenhoven, 5 Paige, 581 ; Grout *v.* Van Schoonhoven, 9 Paige, 255 ; Stuart *v.* Kissam, 2 Barb. S. C. 493 ; Sherman *v.* Burnham, 6 Barb. 403 ; Wilson *v.* Wilson, 6 Ired. Eq. 236.

[14] Hulme *v.* Tenant, 1 Bro. Ch. 21 ; 1 Lead. Ca. Eq. 398 ; Socket *v.* Wray, 4 Bro. Ch. 486 ; Peacock *v.* Monk, 2 Ves. 190 ; Pybus *v.* Smith, 4 Bro. Ch. 346 ; Lillia *v.* Ayre, 1 Ves. Jr. 278 ; Wagstaff *v.* Smith, 9 Ves. 524 ; Witts *v.* Dawkins, 12 Ves. 501 ; Sturgis *v.* Corp, 13 Ves. 190.

if she were single.[1] In New Jersey,[2] Connecticut,[3] Kentucky,[4] Virginia,[5] North Carolina,[6] Alabama,[7] Georgia,[8] Missouri,[9] the same rule is followed. But if a particular mode of dealing with her separate personal estate is prescribed in the instrument of settlement, and particular powers are given to her to be exercised, and alienation is forbidden, either in express or implied terms, she cannot deal with the estate, except in the manner pointed out, and she cannot sell in any other or different manner,[10] even by proceedings in court.[11] This rule is followed in all the American States, with this further addition in some of the States, that, unless the power of alienation is given to her in the instrument of settlement, she cannot sell the personal estate at all; for the reason she, as a married woman, can exercise no powers not conferred upon her by the gift, and the mere gift of personal property to her sole and separate use does not in express terms, nor by necessary implication, confer upon her the power of acting as a single woman, and of selling the same. This is the law in Pennsylvania,[12] South Carolina,[13] Rhode Island,[14] Maryland,[15] Mississippi,[16] and Tennessee.[17] In New York, this limitation of a wife's power of selling was first established by Chancellor Kent;[18] but he was overruled, and the English doctrine, that a wife may sell her separate personal property, unless pro-

[1] Fettiplace v. Gorges, 3 Bro. Ch. 10.

[2] Leaycraft v. Hedden, 3 Green, Ch. 551.

[3] Imlay v. Huntington, 20 Conn. 175.

[4] Coleman v. Woolley, 10 B. Mon. 320; Shipp v. Bowmar, 5 B. Mon. 163.

[5] Vizoneau v. Pegram, 2 Leigh, 183.

[6] Newlin v. Freeman, 4 Ired. Eq. 312.

[7] Bradford v. Greenway, 17 Ala. 805; Collins v. Lavenberg, 19 Ala. 685.

[8] Fears v. Brooks, 12 Ga. 200; Wylly v. Collins, 9 Ga. 223.

[9] Coats v. Robinson, 10 Mo. 757.

[10] Ross v. Ewer, 2 Atk. 156; Croft v. Slee, 4 Ves. 60; Anderson v. Dawson, 15 Ves. 532; Hopkins v. Myall, 2 R. & M. 86; Albany Ins. Co. v. Bay, 4 Comst. 9; Fears v. Brooks, 12 Ga. 200; Leaycraft v. Hedden, 3 Green, Ch. 512; Williamson v. Beckham, 8 Leigh, 20.

[11] Richards v. Chambers, 10 Ves. 580.

[12] Lancaster v. Dolan, 1 Rawle, 236.

[13] Ewen v. Smith, 3 Des. 417; Reid v. Lamar, 1 Strob. Eq. 27; Calhoun v. Calhoun, 2 Strob. 231; Porcher v. Reid, 12 Rich. Eq. 349; Nix v. Bradly, 6 Rich. Eq. 53.

[14] Metcalf v. Cook, 2 R. I. 355.

[15] Miller v. Williamson, 5 Md. 219; Tarr v. Williams, 4 Md. Ch. 68.

[16] Doty v. Mitchell, 9 Sm. & M. 435.

[17] Marshall v. Stephens, 8 Humph. 159; Litton v. Baldwin, 8 Humph. 209.

[18] Methodist Church v. Jaques, 3 John. Ch. 78.

hibited, has prevailed.[1] In States where the English rule prevails, if a power is given to a married woman to be exercised in relation to her separate personal property, and the absolute interest is given to her in default of her exercise of the power, she may decline to exercise the power, and thereby acquire the right to sell the property as a single woman.[2] Where a wife disposes of her separate property in trust, under a power contained in the instrument, the trustee must see to it that the power is executed as it is given; for if a married woman should dispose of the property in a manner not authorized by the power, and the trustee should part with the fund, he would be liable to replace it.[3]

§ 656. Where real estate is conveyed, either absolutely to the separate use of a married woman, or to a trustee for her absolute separate use, she can sell and dispose of it only in the manner provided by law. She must execute and acknowledge a deed. In most States it is provided by law, that a married woman shall not convey her real estate without the consent of her husband in writing, for the reason that the husband is entitled to his curtesy in both the legal and equitable real estate of the wife, though conveyed to her separate use.[4] But in those States where a wife may sell personal estate which is limited to her separate use, she may sell the income of real estate which is limited in the same manner; for the rents and profits may be disposed of without an express power, in the same manner as her personal estate.[5] So if an annuity, charged on land, is given to her separate use, she may sell it.[6] If

[1] Methodist Church *v.* Jaques, 17 John. 548, overruling 3 John. Ch. 78; Dyett *v.* Coal Co., 20 Wend. 570.

[2] Elton *v.* Shepherd, 1 Bro. Ch. 532; Anderson *v.* Dawson, 15 Ves. 532; Barford *v.* Street, 16 Ves. 135; Barrymore *v.* Ellis, 8 Sim. 1; 2 Rop. Hus. and Wife, 230.

[3] Hopkins *v.* Myall, 2 R. & M. 86; Mant *v.* Leith, 15 Beav. 526.

[4] Peacock *v.* Monk, 2 Ves. 192; Dillon *v.* Grace, 2 Sch. & L. 462; Wright *v.* Cadogan, 2 Eden, 257; Amb. 468; 2 Rop. Hus. & Wife, 185; 2 Story, Eq. Jur. § 138; Shipp *v.* Bowmar, 5 B. Mon. 163. But in New York, a married woman may convey any interest in her lands without joining her husband, and it seems without acknowledging the deed; it being in the nature of an appointment. Albany Fire Ins. Co. *v.* Bay, 4 Comst. 9; Lechmere *v.* Brotheridge, 32 Beav. 353; Taylor *v.* Meads, 34 L. J. (N. S.) Ch. 203; 11 Jur. (N. S.) 166; Adams *v.* Gamble, 11 Ir. Eq. 269; 12 Ir. Eq. 103; See 11 Jur. (N. S.) 77; Hall *v.* Waterhouse, 11 Jur. (N. S.) 361; *Ex parte* Shirley, 5 Bing. 226; Harris *v.* Mott, 14 Beav. 169; Taylor *v.* Meads, 10 Jur. (N. S.) 166.

[5] Vizoneau *v.* Pegram, 2 Leigh, 183.

[6] Major *v.* Lansley, 2 R. & M. 355.

a power of sale is given to her in the same instrument that conveys real estate to her separate use, she may exercise the power in the manner pointed out in the settlement, with or without the consent of her husband;[1] and equity compels her to execute such power, if she has for a valuable consideration entered into a contract to do so.[2]

§ 657. Intimately connected with the right of a married woman to dispose of her separate estate, is the right or power of such *feme covert* to contract debts, and charge her separate estate, either by specific agreements in relation to it, or by general engagements. In England, the courts have determined that if a married woman, having property to her separate use, binds herself by a written instrument to pay a sum of money, the implication of law is, that she intended to charge her separate estate, although she makes no reference, direct or indirect, to such separate estate; for, otherwise, the instrument is without meaning and nugatory, she having no power to make such an instrument except as a charge upon her separate estate. Therefore, if a married woman executes a bond,[3] even to her husband,[4] or joins her husband or other person in executing a bond,[5] or signs a promissory note [6] or bill of exchange,[7] or takes a lease agreeing to pay rent,[8] or gives a written retainer to a solicitor,[9] or if she enters into a written contract to purchase an estate,[10] her separate estate will be bound to make good her con-

[1] Rippon *v.* Dawding, Amb. 565; Rich *v.* Beaumont, 3 Bro. P. C. 308; Tomlinson *v.* Dighton, 1 P. Wms. 149; Peacock *v.* Monk, 2 Ves. 191; Downes *v.* Timperon, 4 Russ. 334; Wright *v.* Cadogan, 2 Eden, 239.

[2] Dowell *v.* Dew, 12 L. J. (N. S.) Ch. 158; 1 Y. & C. Ch. 345; 7 Jur. 117.

[3] Lillia *v.* Ayre, 1 Ves. Jr. 277; Norton *v.* Turvill, 2 P. Wms. 144; Peacock *v.* Monk, 2 Ves. 193; Tullett *v.* Armstrong, 4 Beav. 323.

[4] Heatley *v.* Thomas, 15 Ves. 596.

[5] Ibid. Stanford *v.* Marshall, 2 Atk. 68; Hulme *v.* Tenant, 1 Bro. Ch. 20, 1 Lead. Ca. Eq. 398, notes.

[6] Bullpin *v.* Clarke, 17 Ves. 365; Field *v.* Sowle, 4 Russ. 112; Tullett *v.* Armstrong, 4 Beav. 323; Fitzgibbon *v.* Blake, 3 Ir. Eq. 328.

[7] Ibid.; Stuart *v.* Kirkwall, 3 Mad. 387; Coppin *v.* Gray, 1 Y. & C. Ch. 205; Owen *v.* Homan, 4 H. L. Ca. 997.

[8] Gaston *v.* Frankum, 2 De G. & Sm. 561; 16 Jur. 507; Master *v.* Fuller, 4 Bro. Ch. 19; 1 Ves. Jr. 513.

[9] Murray *v.* Barlee, 4 Sim. 82; 3 M. & K. 209. But if the business relates to her husband's affairs, or to her children's, and not to her separate estate, her mere employment of a solicitor will not create a charge against her estate. Callow *v.* Howle, 1 De G. & Sm. 531; *Re* Pugh, 17 Beav. 336.

[10] Dowling *v.* Maguire, Ll. & G. t. Plunket, 1; but see Chester *v.* Platt, Sugd. V. & P. 173.

tract, and it may be reached by proper proceedings, though she is not liable personally; [1] and it is not necessary that her contract should refer to her separate estate, or that the other party should know that she was a married woman.[2] Where a single woman signed a bond, and afterwards property was settled upon her marriage, to her separate use, the holder of the bond filed his bill to have the bond paid out of her separate estate, and, the husband having absconded, the decree was made.[3]

§ 658. The principles, upon which the general contracts of married women have been held to create charges or liabilities to be answered out of their separate estates, have been the subject of much controversy and discussion. Thus it was held by high authority, that every dealing of a married woman in relation to her separate estate must be in the nature of an appointment, or a disposition; and that a married woman cannot enter into general contracts, and therefore she cannot bind her separate estate by general engagements.[4] It is now, however, well established in England, that a married woman may contract in relation to her separate estate, and that her contracts are not in the nature of appointments, or sales of her separate estate.[5] If a married woman can charge her separate estate only by some contract in the nature of an appointment, then a *written* instrument is necessary to constitute a valid appointment; but if the general contracts of a married woman are valid contracts to be paid out of her separate estate, then there is no distinction in principle between *written* and *verbal* contracts in that respect; and it is now substantially settled that the *verbal* contracts of a married woman are equally binding upon her separate estate.[6] But a parol contract will not bind a married

[1] Syke's Trust, 2 John. & Hem. 415; Croft *v.* Middleton, 2 K. & J. 194; 2 Jur. (N. S.) 528.

[2] Dowling *v.* Maguire, Ll. & G. t. Plunket, 1.

[3] Briscoe *v.* Kennedy, cited 1 Bro. Ch. 17.

[4] Bolton *v.* Williams, 2 Ves. Jr. 142; Whistler *v.* Newman, 4 Ves. 145; Greatly *v.* Noble, 3 Mad. 94; Stuart *v.* Kirkwall, 3 Mad. 389; Aguilar *v.* Aguilar, 5 Mad. 418; Field *v.* Sowle, 4 Russ. 114; Chester *v.* Platt, Sugd. V. & P. 173 (13th ed.); Murray *v.* Barlee, 4 Sim. 82; Digby *v.* Irvine, 6 Ir. Eq. 149.

[5] Owen *v.* Dickenson, 1 Cr. & Phil. 53; Dowling *v.* Maguire, Plunket, 19; Master *v.* Fuller, 4 Bro. Ch. 19; Stead *v.* Nelson, 2 Beav. 245; Bailey *v.* Jackson, C. P. Coop. 495; Francis *v.* Wigzell, 1 Mad. 261; Crosby *v.* Church, 3 Beav. 489; Tullett *v.* Armstrong, 4 Beav. 323.

[6] Murray *v.* Barlee, 3 M. & K. 223; Clinton *v.* Willes, 1 Sugd. Pow. 208 n.;

woman where the statute of frauds requires it to be in writing;[1] nor is the enforcement of the general engagement of a married woman, out of her separate estate, in the nature of a proceeding for the specific performance of a contract.[2]

§ 659. But while the general engagements of a married woman are not in the nature of appointments of her separate estate, yet in making those engagements the married woman must have a general intention that such contracts shall be satisfied out of her separate estate, or they cannot be enforced against either her or her property. Thus the torts of a married woman cannot be satisfied out of her separate property, because there can be no intention to create a charge upon her estate. So where there is no contract that implies such an intention, there can be no proceeding against her separate estate. Thus, where an annuity was charged on her separate estate, and was set aside for non-compliance with some rule of law, it was held that the purchase-money of the annuity could not be recovered back out of her separate estate, because it had never been in the contemplation of either party that the purchase-money should be paid back, and, as there was no contract, there could have been no intention of charging her separate estate.[3] And where a married woman had received money, claiming it as her own, it could not be recovered back from her separate estate; for there had never been an intention of paying it back at all.[4] It is difficult to reconcile all the English authorities. The common-law principle is, that a married woman can make no valid or binding contract. This principle is recognized in equity; and all the cases hold that a married woman can make no contract valid and binding upon herself personally; consequently that no judgment or decree can be made against her personally: that her contracts

Owens v. Dickenson, 1 Cr. & Phil. 53; Vaughn v. Vanderstegen, 2 Dr. 183; Wright v. Chard, 4 Dr. 673; Newcomen v. Hassard, 1 Ir. Eq. 274; Blatchford v. Woolley, 2 Dr. & Sm. 204; Shattock v. Shattock, L. R. 2 Eq. 182.

[1] Syke's Trust, 2 John. & H. 415.

[2] In Burke v. Tuite, 10 Ir. Eq. 467, it was held that contracts of a wife not in writing could not be satisfied out of her real estate, because such a contract created an interest in land. This would be so if the contract was in the nature of an appointment. And see Shattock v. Shattock, L. R. 2 Eq. 192; Johnson v. Gallagher, 2 De G., F. & J. 514.

[3] Jones v. Harris, 9 Ves. 486; Aguilar v. Aguilar, 5 Mad. 414; Bolton v. Williams, 4 Bro. Ch. 297; 2 Ves. Jr. 138; Johnson v. Gallagher, 3 De G., F. & J. 593; Shattock v. Shattock, L. R. 2 Eq. 182; Callow v. Howle, 1 De G. & Sm. 531.

[4] Wright v. Chard, 4 Dr. 673.

can be satisfied only out of her property, and that they can be satisfied out of her property only when she contracts upon the faith and credit of her separate property. The whole position is anomalous, and has been produced by the conflicting practices of courts of law and courts of equity. Vice-Chancellor Kindersley considers the law in a transition state, and not yet established clearly in all points, and says, "that the tendency is, having put a married woman in the position of a single woman in relation to her separate property, to carry that position to its fullest extent, short of making her personally responsible."[1] Lord Justice Turner stated the true principles, thus far established, as follows: "In order to bind her separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith and credit of that estate; and the question whether it was so or not is to be judged of by the court, upon all the circumstances of the case."[2]

§ 660. It is thus established in England, that a wife's general contracts may be satisfied out of her separate estate, if they were entered into with reference to, or upon the faith and credit of such estate; and that the contract of a married woman, being a nullity unless made with reference to her separate estate, will be presumed by the court, unless something else appears, to be made in reference to her separate estate, and therefore binding upon it.[3] This rule has been sanctioned and adopted in the States of Connecticut,[4] Maryland,[5] Alabama,[6] Kentucky,[7] North

[1] Wright *v.* Chard, 4 Dr. 685.

[2] Johnson *v.* Gallagher, 3 De G., F. & J. 515, approved in Leeds Banking Co. 12 Jur. (N. S.) 984.

[3] *Ante,* §§ 657-659.

[4] Imlay *v.* Huntington, 20 Conn. 149.

[5] Chew *v.* Beall, 13 Md. 348; Cook *v.* Husbands, 11 Md. 492. The early cases, Tarr *v.* Williams, 4 Md. Ch. 68; Williams *v.* Donaldson, 4 Md. Ch. 414, and Miller *v.* Williamson, 5 Md. 219, were the other way; but the last case, 11 Md. 492, seems to establish the English rule.

[6] Ozley *v.* Ikelheimer, 26 Ala. 382; Forrest *v.* Robinson, 4 Porter, 44; Saddler *v.* Houston, 4 Porter, 208; Bradford *v.* Greenway, 17 Ala. 797; Henry *v.* Smith, 17 Ala. 797; Puryear *v.* Beard, 14 Ala. 122; Puryear *v.* Puryear, 16 Ala. 486; Collins *v.* Lavenberg, 19 Ala. 682.

[7] Bell *v.* Kellar, 13 B. Mon. 381; Lillard *v.* Turner, 16 B. Mon. 374; Coleman *v.* Woolley, 10 B. Mon. 320; Jarmon *v.* Wilkinson, 7 B. Mon. 293. In Burch *v.* Breckenridge, 16 B. Mon. 482, it was held that the general contract of a married woman could not be enforced against her separate real estate, unless it was in writing. Long *v.* White, 5 J. J. Marsh. 226. Now altered by Rev. Stat. c. 47, § 17; Daniel *v.* Robinson, 18 B. Mon. 301; Williamson *v.* Williamson, 18 B. Mon. 329-385; Stocker *v.* Whitlock, 3 Met. 244; Hanley *v.* Downing, 4 Met. 95.

Carolina,[1] Missouri,[2] Florida,[3] and Georgia.[4] In New York, Chancellor Kent held that a married woman is not to all intents and purposes a single woman in regard to her separate estate, but only so far as the instrument of settlement or trust makes her a single woman; and, instead of holding that she has the full power of a single woman over her separate estate, unless restrained by the instrument of trust, the distinguished chancellor held that she has no power unless it is specially given; that her incapacity is the general rule, and the exception is to be strictly shown in every case.[5] But this doctrine was overruled on appeal;[6] and a modified rule has been acted upon, which concedes the power of the married woman to contract debts to be satisfied out of her separate estate, unless restrained by the instrument of conveyance, but limits her power to a power of contracting in relation to her separate estate, or for the benefit of such estate, or for her own personal benefit upon the faith and credit of such estate.[7] By this rule her general engagements, which have no reference at the time to her separate estate, or to her own benefit, cannot be enforced against such separate property.[8] In Virginia, the weight of authority seems to be in favor of the English rule.[9] In Vermont, the rule is substantially the same

[1] Harris v. Harris, 7 Ired. Eq. 311; Frazier v. Brownlow, 3 Ired. Eq. 237; Newlin v. Freeman, 4 Ired. Eq. 312.

[2] Whitesides v. Carman, 23 Mo. 457; Segond v. Garland, 23 Mo. 547; Coats v. Robinson, 10 Mo. 757.

[3] Lewis v. Yale, 4 Flor. 418.

[4] Wylly v. Collins, 9 Ga. 223; Roberts v. West, 15 Ga. 123; Fears v. Brooks, 12 Ga. 195; Weeks v. Sego, 9 Ga. 201.

[5] Methodist Church v. Jaques, 3 John. Ch. 78.

[6] Ibid.; 17 John. 548–585; Dyett v. Coal Co., 7 Paige, 9; 20 Wend. 570; Powell v. Murray, 2 Edw. Ch. 636; Wadham v. Society, &c., 2 Kern. 415; Albany Ins. Co. v. Bay, 4 Comst. 9; Cruger v. Cruger, 5 Barb. 227; 10 Barb. 597.

[7] Ibid.; Gardner v. Gardner, 7 Paige, 112; Cumming v. Williamson, 1 Sandf. 17; Dickerman v. Abrahams, 21 Barb. 551; Coon v. Brook, 21 Barb. 546.

[8] Curtis v. Engel, 2 Sand. 287; Knowles v. McCamley, 10 Paige, 343; Vanderheyden v. Mallory, 3 Barb. Ch. 10; 1 Comst. 453; Yale v. Dederer, 18 N. Y. 265; 22 N. Y. 456, overruling s. c. 21 Barb. 286; L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 34; Rogers v. Ludlow, 3 Sand. 104; Corn Exchange v. Babcock, 57 Barb. 222, 231; Heywood v. City of Buffalo, 14 N. Y. 540; Barnett v. Lichtenstein, 39 Barb. 194; Kelso v. Tabor, 52 Barb. 125; White v. McNutt, 33 N. Y. 371; Noyes v. Blakeman, 3 Sand. 531.

[9] Nixon v. Rose, 12 Grat. 425; Woodson v. Perkins, 5 Grat. 346. But

as the doctrine followed in New York.[1] In Wisconsin, the rule is substantially the same as in New York.[2]

§ 661. In Pennsylvania, the doctrine held by Chancellor Kent, in the case of Methodist Church *v.* Jaques, has been fully adopted, and firmly settled by the courts. By the practice in that State, a married woman cannot sell, convey, alienate, or in any way charge her separate estate, unless such power is expressly given to her in the deed of trust or settlement. Therefore no contract made by her, whether it is a general engagement by bond, note, or bill of exchange, or a special contract in relation to her separate estate, is valid and it cannot be enforced in any manner.[3] In South Carolina, in the case of Ewing *v.* Smith,[4] the English rule was at first established; but the decision in that case was reversed, and the rule, as held in Pennsylvania, was laid down and is now steadily acted on.[5] But a contract, whether made by the wife or trustee, for the protection, preservation, or benefit of the trust estate, or in furtherance of the purposes of the trust, can be enforced.[6] The rule, as held in Pennsylvania and South Carolina, is also held in Rhode Island,[7] Tennessee,[8] and Mississippi.[9] In New Hampshire, her separate estate is not bound by a general engagement,[10] nor is it in Massachusetts.[11]

Tucker, P., in Williamson *v.* Beekman, 8 Leigh, 20, expressed a different opinion.

[1] Frary *v.* Booth, 37 Vt. 78; Partridge *v.* Stocker, 36 Vt. 108.

[2] Todd *v.* Lee, 15 Wis. 365; 16 Wis. 480.

[3] Lancaster *v.* Dolan, 1 Rawle, 231; Lyne *v.* Crouse, 1 Barr, 111; Rogers *v.* Smith, 4 Barr, 93; Thomas *v.* Folwell, 2 Whart. 11; Dorance *v.* Scott, 3 Whart. 309; Wallace *v.* Coston, 9 Watts, 137.

[4] Ewing *v.* Smith, 3 Des. 417.

[5] Ibid.; Frazier *v.* Center, 1 McCord, Ch. 270; Magwood *v.* Johnston, 1 Hill, Ch. 228; Robinson *v.* Dart, Dudl. Eq. 128; Clark *v.* Makenna, Cheves, Eq. 163; Reid *v.* Lamar, 1 Strob. Eq. 27; Rochell *v.* Tompkins, 1 Strob. Eq. 114; Adams *v.* Mackey, 6 Rich. Eq. 75; Mayer *v.* Galluchat, 6 Rich. Eq. 1; Brown *v.* Postall, 4 Rich. Eq. 71.

[6] Cater *v.* Eveleigh, 4 Des. 19; James *v.* Mayrant, 4 Des. 591; Montgomery *v.* Eveleigh, 1 McCord, 267; Magwood *v.* Johnston, 1 Hill, Ch. 228; Clark *v.* Makenna, Cheves, Eq. 163; Reid *v.* Lamar, 1 Strob. Eq. 27; Rachell *v.* Tompkins, 1 Strob. Eq. 114; Adams *v.* Mackey, 6 Rich. Eq. 75.

[7] Metcalf *v.* Cook, 2 R. I. 355.

[8] Ware *v.* Sharp, 1 Swan, 489; Morgan *v.* Elam, 4 Yerg. 375; Marshall *v.* Stevens, 8 Humph. 159; Litton *v.* Baldwin, 8 Humph. 209.

[9] Armstrong *v.* Stoval, 26 Miss. 275; Dotey *v.* Mitchell, 9 Sm. & M. 435; Montgomery *v.* Agricultural Bank, 10 Sm. & M. 567; Dickson *v.* Miller, 11 Sm. & M. 594; Prewett *v.* Land, 36 Miss. 495.

[10] Bailey *v.* Pearson, 29 N. H. 77.

[11] Willard *v.* Eastman, 15 Gray, 328; Rogers *v.* Ward, 8 Allen, 388.

§ 662. No action at law can be maintained, upon her contracts against a married woman personally, although she is entitled to the beneficial interests of property in trust for her sole and separate use; nor can a bill in equity be filed against a married woman as a sole defendant in order to make her personally liable. There is no case in which a court has made a personal decree against a married woman. She may make her separate property answerable for her engagements; but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree is sought against her, the bill cannot be sustained.[1] But the party claiming a debt must file a bill against her and *her trustees*, and must pray payment of his demand out of her personal estate in the hands of trustees, to which she is absolutely entitled, and also out of the income of her real estate, including *arrears* of rent and accruing interest or rents, if there is no clause against anticipation, until the claim and costs have been satisfied.[2] The death of the husband, either before or while the suit is pending, will not defeat it, nor change its character; for although the death of the husband puts an end to the separate use, and gives the woman an entire and perfect right of dealing as a single woman, yet, if the contracts were made while she was married, no judgments or decrees can ever be entered against her personally; for at law such contracts have no validity, and the death of the husband does not give them a validity which they cannot otherwise have.[3] Determined cases go thus far, that the general engagements of the wife operate upon her personal property, and upon the rents and profits of her real estate, and her trustees are obliged to apply her personal estate, and the rents and profits of real estate when they arise, to the satisfaction of such general engagements; but courts do not use any *direct* processes against the separate estate of the wife, and the manner of reaching her separate property is by decree to bind the trustees to apply the personal estate in their hands, and the rents and profits of the real estate, according to the justice of the engagement to be carried into effect. There is no

[1] Sir T. Plumer, in Francis *v.* Wigzell, 1 Mad. 262.

[2] Hulme *v.* Tenant, 1 Bro. Ch. 20; Standford *v.* Marshall, 2 Atk. 68; Murray *v.* Barlee, 4 Sim. 82; 3 M. & K. 209; Field *v.* Sowle, 4 Russ. 112; Nantes *v.* Corrock, 9 Ves. 182; Bullpin *v.* Clarke, 17 Ves. 365; Jones *v.* Harris, 9 Ves. 492; Stuart *v.* Kirkwall, 3 Mad. 387.

[3] Field *v.* Sowle, 4 Russ. 112; Heatly *v.* Thomas, 15 Ves. 596; Kenge *v.* Delavall, 1 Vern. 326.

case where the remedy against the wife has been carried to the extent of decreeing, that the trustees shall sell or mortgage her separate real estate to raise money to meet her general engagements.[1] But Mr. Lewin thinks, that, if the instrument of trust is so worded as to place the entire interest and inheritance of the real estate at her disposal, the general engagements of the wife may bind the whole *corpus* of the real estate, whether *corpus* or *income*.[2] In all proceedings to enforce the general engagements of a married woman upon her separate property, it must be remembered that such engagements are enforced in equity, not because a married woman can make a valid contract in law or equity, but because in justice and equity a married woman's honest engagements ought to be answered.[3] Of course the propositions of this section apply only in those States where the English doctrine prevails. They have no application in those States where a married woman can make no charge upon her separate estate not specially authorized in the instrument of settlement.

§ 663. Two conflicting principles are struggling in the courts: one is, that the engagements of the wife are charges on her separate property, equivalent to so many assignments or appointments, to be satisfied out of her separate property in the order of their date;[4] the other is, that the wife's general contracts are not charges, but create a liability, the remedy for which, if the woman is single, is against the person; but, if she is married, there is no remedy against the person, but the law gives an equitable execution against her separate property. On this last principle, which is the one generally adopted, her separate property is liable, *pari passu*, as assets.[5] The remedy being wholly equitable, the statute of limitations does not apply to a proceeding against the separate property of the married woman;[6] and in case the nature of the property is such that the legal title to it cannot be reached by a legal

[1] Per Lord Thurlow in Hulme *v.* Tenant, 1 Bro. Ch. 20; Broughton *v.* James, 1 Coll. 26; Nantes *v.* Carrock, 9 Ves. 189.

[2] Lewin on Trusts, 548, 552.

[3] Cummins *v.* Sharpe, 21 Ind. 331; Pentz *v.* Simonson, 2 Beasl. 232; Glass *v.* Warwick, 40 Penn. St. 140. But see Maclay *v.* Love, 25 Cal. 367; Hanly *v.* Downing, 4 Met. Ky. 95.

[4] Shattack *v.* Shattack, L. R. 2 Eq. 182.

[5] Anon., 18 Ves. 258; Johnson *v.* Gallagher, 3 De G., F. & J. 520.

[6] Norton *v.* Turville, 2 P. Wms. 144; Vaughan *v.* Walker, 6 Ir. Ch. 471; 8 Ir. Ch. 458.

execution, the equitable interest cannot be reached by a decree in equity.[1] Thus if there has been a *bona fide* assignment, or conveyance, or mortgage to a purchaser,[2] or if there is a clause in the settlement against anticipation,[3] the equitable execution cannot reach the property. Nor can charges after her decease be imposed upon her separate estate; and as a husband is bound to bury his wife, it would seem that her separate estate could not be made liable for her funeral expenses.[4]

§ 664. The savings and accumulations by a married woman, out of her separate estate, are governed by the same rules as the separate estate itself, as "the sprout is to savor of the root and go the same way."[5] The same rule applies to the savings out of an allowance for maintenance on separation.[6] But savings out of money given by the husband to the wife for household and personal purposes belong to the husband.[7]

§ 665. If the husband and wife live together, and the husband receives from the trustees the income of the wife's separate estate, the wife or her representatives cannot claim to recover from the husband, or his estate, more than one year's income.[8] Whether one year's income can be recovered or not is a matter of great conflict of opinion and authority in England. There are many cases that hold that one year's income can be recovered,[9] and as many that it cannot.[10] Mr. Lewin says, that the better opinion is, independent of authority, that the wife can recover nothing; and he pertinently

[1] Nantes *v.* Carrock, 9 Ves. 182.

[2] Johnson *v.* Gallagher, 3 De G., F. & J. 520.

[3] Murray *v.* Barlee, 4 Sim. 95.

[4] Gregory *v.* Lockyer, 6 Mad. 90.

[5] Gore *v.* Knight, 2 Vern. 535; Malony *v.* Kennedy, 19 Sim. 254; Humpherey *v.* Richards, 2 Jur. (N. S.) 432; Barron *v.* Barron, 24 Vt. 375; Churchill *v.* Dibben, 9 Sim. 447 n.; 2 Kenyon, 85; Messenger *v.* Clarke, 5 Exch. 392; Merritt *v.* Lyon, 3 Barb. 110; Hoot *v.* Sorrell, 11 Ala. 386; Kee *v.* Vasser, 2 Ired. Eq. 553; Gentry *v.* McReynolds, 12 Mo. 533; Rogers *v.* Fales, 5 Barr, 104; Yardley *v.* Raub, 5 Whart. 123; Towers *v.* Hagner, 3 Whart. 57; Young *v.* Jones, 9 Humph. 551.

[6] Brooke *v.* Brooke, 25 Beav. 347; Messenger *v.* Clarke, 5 Exch. 388.

[7] Barrack *v.* McCulloch, 3 K. & J. 114; Mews *v.* Mews, 15 Beav. 529.

[8] Payne *v.* Little, 26 Beav. 1; *Ex parte* Elder, 2 Mad. 286 n.; Brodie *v.* Barry, 2 Ves. & B. 36; Rowley *v.* Unwin, 2 K. & J. 138.

[9] Powell *v.* Hankey, 2 P. Wms. 82; Fowler *v.* Fowler, 3 P. Wms. 353; Squire *v.* Dean, 4 Bro. Ch. 325; Smith *v.* Camelford, 2 Ves. Jr. 716; Dolbiac *v.* Dolbiac, 16 Ves. 126; Arthur *v.* Arthur, 11 Ir. Eq. 511.

[10] Burdon *v.* Burdon, 2 Mad. 286; Warwick *v.* Edwards, 1 Eq. Ca. Ab. 170; Thomas *v.* Bennett, 2 P. Wms. 341; Townshend *v.* Windham, 2 Ves. 7; Pea-

asks if she could recover any thing of the trustees on the ground of a misapplication of the income. The principle is, that the court presumes the consent of the wife to the husband's receipt *de anno in annum*, and the wife's assent is presumed to continue until revoked by something expressed or implied.[1] If, therefore, the wife did not in fact consent, but required the separate income to be paid to herself, the court will give her the arrears out of her husband's estate, back to the time of her dissent.[2] But the court will not pay any attention to idle complaints not seriously insisted upon, but will demand very clear evidence of an earnest and persistent claim on the part of the wife.[3] If the income has not come to the hands of the husband, but is still in the hands of a receiver, the acquiescence of the wife will not be presumed, and it will belong to her.[4] If the wife is insane or incapable of assenting, the husband's estate must account for the whole income received by him; but his estate will be allowed in equity for payments made for his wife's benefit which ought to have fallen upon her separate estate.[5] But there is a distinction between a married woman's separate estate and *pin-money* allowed to a wife for her personal use and ornament, and it has been held that there can be no claim upon the husband or his estate for any arrearages in such an allowance.[6]

§ 666. If a husband receives the capital fund of his wife's sepa-

cock *v.* Monk, 2 Ves. 190; Aston *v.* Aston, 1 Ves. 267; Parkes *v.* White, 11 Ves. 225; Brodie *v.* Barry, 2 Ves. & B. 36; Thrupp *v.* Harman, 3 M. & K. 513; Lea *v.* Grundy, 1 Jur. (N. S.) 953; Corbally *v.* Grainger, 4 Ir. Eq. 173; Mackey *v.* Maturin, 15 Ir. Eq. 150; Howard *v.* Digby, 2 Cl. & Fin. 643; 4 Sim. 601; Arthur *v.* Arthur, 11 Ir. Eq. 513; Beresford *v.* Armagh, 13 L. J. (N. S.) Ch. 235; Caton *v.* Ridout, 1 Mac. & G. 519; 2 H. & Tw. 55.

[1] Lewin on Trusts, 550; Caton *v.* Rideout, 2 H. & Tw. 41; McGlinsey's App., 14 S. & R. 64; Towers *v.* Hagner, 3 Whart. 48; Naglee *v.* Ingersoll, 7 Barr, 204; Yardley *v.* Raub, 5 Whart. 123; Methodist Church *v.* Jaques, 3 John. Ch. 77.

[2] Ridout *v.* Lewis, 1 Atk. 269; Moore *v.* Moore, 2 Atk. 272; Moore *v.* Scarborough, 2 Eq. Ca. Ab. 156; Parker *v.* Brooks, 9 Ves. 583.

[3] Thrupp *v.* Harman, 3 M. & K. 512; Corbally *v.* Grainger, 4 Ir. Eq. 173.

[4] Foss *v.* Foss, 15 Ir. Eq. 215.

[5] Att'y-Gen. *v.* Parnther, 3 Bro. Ch. 441; 4 Brock. 409; Howard *v.* Digby, 2 Cl. & F. 671; Nettleship *v.* Nettleship, 10 Sim. 236.

[6] Howard *v.* Digby, 2 Cl. & F. 634; 4 Sim. 588; 8 Bligh, N. P. 224; Aston *v.* Aston, 1 Ves. 267; Fowler *v.* Fowler, 3 P. Wms. 355; Barrack *v.* McCulloch, 3 K. & J. 110.

rate property, there is no presumption that she intended to give or transfer it to him, but he is *prima facie* a trustee for her, and a gift from her to him will not be presumed without clear evidence;[1] but if the husband uses the property in his business, or for the support of his family, with her knowledge and assent, a gift may be inferred in the absence of a contrary agreement.[2] But if there is an express agreement that the goods, furniture, or other property into which the wife's separate estate is converted by the husband, shall remain the property of the wife, her interest continues, and will be protected by the law;[3] or, if the property still stands in the name of the trustee.[4] The mere concurrence of the wife in the receipt of a legacy, given to her separate use, by the husband, is not a gift to him.[5]

§ 667. Where the absolute beneficial interest in the trust fund is given to the separate use of a married woman, without any restriction or direction as to the mode of possession or enjoyment, or in such manner that the statute of uses would execute the use or title in her, if it was real estate, she is entitled to call upon the trustees for an immediate conveyance or transfer of the legal title to her; and, if they refuse, they will be decreed to convey with costs.[6] It is immaterial that the trust was created while she was single; for marriage has no effect upon her separate estate in that respect.[7] So where the absolute beneficial interest is subject to the control and alienation of the wife, the concurrence of the trustee is not necessary to the validity of an alienation by her, unless it is made requisite by the terms of the trust.[8] The trustees will be compelled to give legal effect to any such alienation by transferring the property,[9] even if it is a gift and transfer to the husband, or for his benefit:[10] for a direct gift to the husband himself

[1] Rich *v.* Cockell, 9 Ves. 369.

[2] Gardner *v.* Gardner, 1 Gif. 126; McGlinsey's App., 14 S. & R. 64; Shirley *v.* Shirley, 9 Paige, 363.

[3] Taggard *v.* Talcott, 2 Edw. 628; Shirley *v.* Shirley, 9 Paige, 363.

[4] Yardley *v.* Raub, 5 Whart. 117.

[5] Rowe *v.* Rowe, 2 De G. & Sm. 294; 12 Jur. 909.

[6] Thorby *v.* Yates, 1 N. C. C. 438; Taylor *v.* Glanville, 3 Mad. 179.

[7] Ibid.

[8] Grigby *v.* Cox, 1 Ves. 518; Essex *v.* Atkins, 14 Ves. 552; Corgell *v.* Dunton, 7 Barr, 532.

[9] Ibid.

[10] Standford *v.* Marshall, 2 Atk. 69; Parkes *v.* White, 11 Ves. 209; Essex *v.* Atkins, 14 Ves. 542; Hughes *v.* Wells, 9 Hare, 749.

will be sustained if not made under the improper or undue influence of the husband.[1] The court will investigate the circumstances under which a gift is made to the husband, and if there appears to be any suspicious circumstances attending the gift, the court will refuse to carry it into effect.[2] If a married woman pledges or mortgages her separate estate for her husband's debts, she is entitled to all the rights of a surety against him, and to security for her liability out of his estate.[3] The wife cannot consent to a loan to the husband in the future: her consent must accompany the act.[4]

§ 668. A married woman has full power to dispose of her separate estate by will, or appointment in the nature of a will, unless restrained by the instrument of trust;[5] and her absolute equitable interests will be disposed of as directed in the will. The usual course of administration will be observed in regard to such estates.[6] If she dies without disposing of her separate estate, her husband will take her equitable personal estate, in the same manner as he takes her legal personal estate. If administration is necessary to reach any part of her personal estate, he is entitled to administration, and will take the property to his own use; or if another person is appointed administrator, such administrator must pay over the proceeds to the husband on final settlement.[7]

§ 669. Where a married woman procures or induces the trustee

[1] Freeman *v.* Moore, 1 Bro. P. C. 237; Frederic *v.* Hatwell, 1 Cox, 193; Parkes *v.* White, 11 Ves. 209; Dallam *v.* Wampole, 1 Pet. C. C. 116; Nedby *v.* Nedby, 5 De G. & S. 377; Jaques *v.* Methodist Church, 17 John. 548; Whitall *v.* Clark, 2 Edw. Ch. 149; Cruger *v.* Cruger, 5 Barb. 225; Hoover *v.* Samaritan Soc., 4 Whart. 445; Merriam *v.* Harsen, 2 Barb. Ch. 232.

[2] Pybus *v.* Smith, 1 Ves. Jr. 189; Nedby *v.* Nedby, 5 De G. & S. 577.

[3] Hudson *v.* Carmichael, 23 L. J. Ch. 893; Sheidle *v.* Weishlee, 16 Penn. St. 134; Neimawicz *v.* Gahn, 3 Paige, 614; Knight *v.* Whitehead, 26 Miss. 246.

[4] Child *v.* Child, 20 Beav. 50; Taylor *v.* Taylor, 4 Jur. (N. S.) 1218.

[5] Fettiplace *v.* Gorges, 1 Ves. Jr. 46; Rich *v.* Cockell, 9 Ves. 369; Humpherey *v.* Richards, 2 Jur. (N. S.) 432; Moore *v.* Morris, 4 Dr. 38.

[6] Norton *v.* Turvill, 2 P. Wms. 144; Tatham *v.* Drummond, 2 Hem. & Mill. 262.

[7] Prandley *v.* Fielder, 2 M. & K. 57; Molony *v.* Kennedy, 10 Sim. 254; Bird *v.* Peagrum, 13 C. B. 639; Johnstone *v.* Lumb, 15 Sim. 308; Drury *v.* Scott, 4 Y. & C. 264; Stead *v.* Clay, 1 Sim. 204; Stewart *v.* Stewart, 7 John. Ch. 229; McKennan *v.* Phillips, 6 Whart. 576; Brown *v.* Brown, 6 Humph. 127; Rogers *v.* White, 1 Sneed, 60; Cox *v.* Coleman, 13 B. Mon. 453; Brown *v.* Alden, 14 B. Mon. 141; Farie's App., 23 Penn. St. 29; McCosker *v.* Golden, 1 Brad. Sur. 64.

to commit a breach of trust, which results in the loss of the fund in which she has an interest to her separate use, the court treats her act as an alienation of the estate, so far as she had power to bind it.[1] So where a married woman, as a trustee, had wasted the trust estate, the ordinary right of retainer may be exercised against her separate estate under the *same* instrument.[2] So if she misemploys or misapplies any of the trust property, her own interests under the *same* instrument may be held to make good the loss.[3] But if there is a clause against anticipation in the instrument, no such remedy can be applied.[4]

§ 670. A married woman may be restrained by the terms of the trust from alienating or anticipating the income of her separate estate, during her present or any future coverture. The validity of such restraints is now well established.[5] The courts did not sustain the doctrine until the words of the restriction became so explicit that there was no escape, except in declaring such restrictions illegal.[6] Thus if the limitation is simply to her sole and separate use,[7] or to pay from time to time upon her receipt under her own proper hand,[8] or upon her personal appearance,[9] the wife is left at liberty to sell or anticipate her interest, as such expressions are only the naming of some of the incidents of the gift.[10] There are generally some negative words, as "not by anticipation," inserted in settlements, and it has been said that they are necessary;[11] but it is sufficient, if an intention to restrain antici-

[1] Crosby v. Church, 3 Beav. 485; Hanchett v. Briscoe, 22 Beav. 496. But see Whistler v. Newman, 4 Ves. 129, and observations of Lord Eldon on it in Parkes v. White, 11 Ves. 223; Brewer v. Swirley, 2 Sm. & Gif. 219; Hughes v. Mills, 9 Hare, 772, 773; Mara v. Manning, 2 Jones & Lat. 311.

[2] Pemberton v. McGill, 1 Dr. & Sm. 266.

[3] Clive v. Carew, 1 John. & Hem. 199.

[4] Ibid.

[5] Jackson v. Hobhouse, 2 Mer. 488; Parkes v. White, 11 Ves. 221; Tullett v. Armstrong, 1 Beav. 23; 4 M. & Cr. 393; Jollands v. Burdett, 33 L. J. Ch. 471.

[6] Hulme v. Tenant, 1 Bro. Ch. 16; Pybus v. Smith, 3 Bro. Ch. 340; 1 Ves. Jr. 189.

[7] Ibid.

[8] Ibid.; Ellis v. Atkinson, 3 Bro. Ch. 565, 568; Brown v. Lake, 14 Ves. 302; Acton v. White, 1 S. & S. 429; Witts v. Dawkins, 12 Ves. 501; Wagstaff v. Smith, 9 Ves. 520; Sturgis v. Corp, 13 Ves. 190; Scott v. Davis, 4 M. & Cr. 87; Hovey v. Blakeman, 9 Ves. 524.

[9] Ross's Trust, 1 Sim. (N. S.) 196.

[10] Parkes v. White, 11 Ves. 222.

[11] Brown v. Bamford, 11 Sim. 131; 2 Rop. Hus. and Wife, 236, 240.

pation can be gathered from the whole instrument,[1] as where the direction is to pay to such person as the wife shall appoint after it shall become due,[2] or for her sole, separate, and *inalienable* use,[3] or where the income is declared to be unassignable,[4] or where it is to remain in her possession, and be for her special use during her natural life, and at her death to go to her children, and no other use whatever.[5] It was at one time held, that "a trust to pay the proceeds to such persons as she should appoint when they became due, but not so as to anticipate the same, and, in default of appointment, into the hands of the wife for her separate use" (but without any other words to restrain her power of anticipation), was to be so construed that if the *feme covert* assigned the life-estate, limited to her in default of appointment, it destroyed the power of appointment, and the restraint upon anticipation annexed to it became nugatory; that is, the restraint against alienation applied *only to the power*, and not to an anticipation in some other way.[6] But these cases were reversed on appeal, or overruled; and now the construction is, that the payment into her hands, as well as the power to appoint, was not to operate until the income became due.[7]

§ 671. The restraint against alienation or anticipation will apply to both real and personal estate, and whether the estate is in fee or for life;[8] and when it has once attached, a court of equity cannot discharge it, even where alienation would be advantageous for the wife; as, where a large legacy was given to a married woman, on condition that she disposed of a small property, settled upon her without power of alienation, it was held that the condition could not be complied with, and the legacy therefore failed.[9] But an estate so settled is subject to paramount equities, as for raising costs of

[1] Ross's Trust, 1 Sim. (N. S.) 199; Doolan *v.* Blake, 3 Ir. Eq. 349.

[2] Field *v.* Evans, 15 Sim. 375; Baker *v.* Bradley, 7 De G., M. & G. 597.

[3] D'Œchsner *v.* Scott, 24 Beav. 239; Spring *v.* Pride, 10 Jur. (N. S.) 876.

[4] Rennie *v.* Ritchie, 12 Cl. & Fin. 204.

[5] Freeman *v.* Flood, 16 Ga. 528.

[6] Barrymore *v.* Ellis, 8 Sim. 1; Brown *v.* Bamford, 11 Sim. 127; Medley *v.* Horton, 14 Sim. 222.

[7] Moore *v.* Moore, 1 Coll. 84; Harrop *v.* Howard, 3 Hare, 624; Harnett *v.* MacDougall, 8 Beav. 127; Brown *v.* Bamford, 1 Phil. 620; Gaffee's Trust, 14 Jur. 277; 1 Mac. & G. 541; Field *v.* Evans, 15 Sim. 375; Baker *v.* Bradley, 7 De G., M. & G. 597.

[8] Baggett *v.* Meux, 1 Phil. 627; Gaffee's Trust, 14 Jur. 277; Freeman *v.* Flood, 16 Ga. 528.

[9] Robinson *v.* Wheelwright, 6 De G., M. & G. 535; 21 Beav. 214.

a suit which may enable the court to direct a sale.[1] A widow, after her husband's death, and a single woman before marriage, may dispose absolutely of gifts to their separate use, although coupled with words restraining their power of anticipation;[2] upon the principle "that any person, *sui juris*, possessing an interest, however remote, may dispose of such interest; and such person cannot be prevented, by any intention of the donor, from exercising the ordinary rights of ownership." Under whatever form of words alienation or anticipation may be restrained, a person who is *sui juris*, may dispose of her interest. But if such right of alienation and anticipation is not exercised while the woman is single and *sui juris*, both the separate use and the provision against anticipation will come into operation upon marriage;[3] and it will be carried into effect, though the law of the domicile of the parties forbids such restraint;[4] but such restraints will not be allowed to stand where they fall within the rule against perpetuities.[5] The restraint upon anticipation will not prevent a husband from receiving his wife's separate income; nor will it render his estate liable for more than one year's income;[6] nor will it prevent his wife's engagements from being enforced against all arrears of income of her separate estate;[7] nor does it prevent her giving an order for future income, revocable at pleasure;[8] nor does it prevent her adjustment of the amount with the trustees:[9] but compensation for a breach of trust cannot be enforced against a fund limited by the same instrument to her separate use without power of anticipation;[10] nor can interest on bonds or notes, or dividends on stocks,

[1] Fleming *v.* Armstrong, 34 Beav. 109, or in case of a divorce under the English statute. 22 & 23 Vict. c. 61, § 5; Pratt *v.* Jenner, 1 W. N. 265.

[2] Jones *v.* Salter, 2 R. & M. 208; Woodmeston *v.* Walker, 2 R. & M. 197; Brown *v.* Pocock, 2 R. & M. 210; 2 M. & K. 189; Massey *v.* Parker, 2 M. & K. 174. Parker *v.* Converse, 5 Gray, 336.

[3] Tullett *v.* Armstrong, 1 Beav. 1; 4 M. & Cr. 390, overruling Davies *v.* Thornycroft, 6 Sim. 420; Brown *v.* Pocock, 5 Sim. 663; Johnson *v.* Freeth, 6 Sim. 423.

[4] Peillow *v.* Brooking, 25 Beav. 218.

[5] Fry *v.* Capper, Kay, 163.

[6] Rowley *v.* Unwin, 2 K. & J. 138.

[7] Fitzgibbon *v.* Blake, 3 Ir. Eq. 328.

[8] Moore *v.* Moore, 1 Coll. 57.

[9] Wilton *v.* Hill, 2 L. J. Ch. 156; Derbishire *v.* Home, 5 De G., M. & G. 113; Stroud *v.* Grozer, Lewin on Trusts, 556 (5th ed.).

[10] Clive *v.* Carew, 1 John. & Hem. 199; Sheriff *v.* Butler, 12 Jur. (N. S.) 329; Davies *v.* Hodgson, 25 Beav. 186.

accrued, but not yet payable, be anticipated, if anticipation is restrained.[1]

§ 672. There is another kind of trusts for married women, created by deeds of separation between husband and wife. Such deeds are valid in law, so far that the covenants contained in them may form a good consideration for a promise to pay certain debts and expenses.[2] Courts of equity will not specifically enforce agreements of husband and wife to live separate and apart; for that is contrary to the policy of the law.[3] Yet where such agreements have been entered into and executed, courts will enforce the specific performance of the provisions in favor of the wife, and will compel the trustees under such deeds to perform their duty.[4] The jurisdiction of the court is generally confined to agreements concerning property, though it may enjoin the parties from litigation in courts, if they have covenanted not to prosecute a suit for

[1] *Re* Brittle, 2 De G., J. & Sm. 79; Jollands *v.* Burdett, 2 De G., M. & G. 79; 10 Jur. (N. S.) 349.

[2] Jones *v.* Waste, 5 Bing. N. C. 341, affirmed in 9 Cl. & F. 101; 4 M. & G. 1104.

[3] Head *v.* Head, 3 Atk. 550; Wilkes *v.* Wilkes, 2 Dick. 791; Worrall *v.* Worrall, 3 Mer. 268.

[4] Guth *v.* Guth, 3 Bro. Ch. 614; St. John *v.* St. John, 11 Ves. 526; Worrall *v.* Jacob, 3 Mer. 256; Westmeath *v.* Westmeath, Jac. 126; Westmeath *v.* Salisbury, 5 Bligh, 375; Hoare *v.* Hoare, 2 Ridg. P. C. 268; Wilson *v.* Wilson, 14 Sim. 405; 1 H. L. Ca. 538; Elworthy *v.* Bird, 2 S. & S. 372; Frampton *v* Frampton, 4 Beav. 287; Jones *v.* Waste, 5 Bing. N. C. 341; 9 Cl. & F. 10; 4 M. & G. 1104; Cook *v.* Wiggins, 10 Ves. 191; Seeling *v.* Crawley, 2 Vern. 386; Angier *v.* Angier, Gilb. Eq. 142; Pr. Ch. 496; Fletcher *v.* Fletcher, 2 Cox, 109; Hyde *v.* Price, 3 Ves. 437; Rodney *v.* Chambers, 2 East, 283; 6 East, 252; 2 B. & C. 551; Durant *v.* Fitley, 7 Price, 577; Stephens *v.* Olive, 2 Bro. Ch. 90; Hobbs *v.* Hull, 1 Cox, 445; More *v.* Freeman, Bunb. 205; Bateman *v.* Ross, 1 Dow. 235; Ross *v.* Willoughby, 10 Price, 2; Logan *v.* Birkett, 1 M. & K. 220; Clough *v.* Lambert, 10 Sim. 256; 4 M. & K. 561; Wellesley *v.* Wellesley, 4 M. & C. 561; Wilson *v.* Mushet, 3 B. & Ad. 743. Lord Chancellor Cottenham said, that all the older cases might be thrown aside; and that the later cases, especially those in the House of Lords, settled the law. Wilson *v.* Wilson, 1 H. L. Ca. 572. In the United States the same general rule is held. Champlin *v.* Champlin, 1 Hoff. Ch. 55; Rogers *v.* Rogers, 4 Paige, 518; Carson *v.* Murray, 3 Paige, 483; Mercein *v.* People, 25 Wend. 77; Hutton *v.* Duey, 3 Barr, 100; McKenna *v.* Phillips, 6 Whart. 571; Dillinger's App., 35 Penn. St. 357; Simpson *v.* Simpson, 4 Dana, 140; McCrocklin *v.* McCrocklin, 2 B. Mon. 370; Mansfield *v.* Mansfield, Wright (Ohio), 284; Reed *v.* Beazley, 1 Blackf. 97; Sterling *v.* Sterling, 12 Ga. 201; Coster *v.* Coster, 14 Sm. & M. 59; Picket *v.* Johns, 1 Dev. Ch. 123.

divorce, separation, or restitution of conjugal rights.[1] So if the husband has covenanted not to visit or annoy his wife, he can be enjoined from breaking the covenant.[2] The court may compel the execution of a deed where an agreement has been entered into for a good consideration and acted upon, or it may correct a mistake in such deed.[3] But no agreements for a future separation will be considered by the court.[4] Nor can the payment of an annuity be enforced if granted on condition that a separation should take place in the future.[5] An agreement, however, by a husband, that he will pay back all the advances made to his wife by her father, in case they separate, is valid, and may be enforced if made by deed.[6] Mere deeds of separation are no bar to a divorce, if there is good cause;[7] but if parties live apart by agreement and consent, a divorce cannot be obtained on the ground of desertion. Nor are they any bar to a claim for alimony upon a divorce granted, but the rights secured by such deeds will of course be taken into consideration as to the amount of alimony.[8]

§ 673. It may be said generally, that, in order to make a valid deed of separation, which will save the rights of all parties, there must be trustees interposed to take the property for the use of the wife, and to enter into covenants in her behalf.[9] If trustees are interposed, and they covenant, in consideration of the provisions for the wife, to indemnify the husband against her debts, or other claims on his property, it will form a valuable consideration, which will support the transaction against the husband's creditors.[10] The absence

[1] Wilson *v.* Wilson, 1 H. L. Ca. 571.

[2] Sanders *v.* Rodney, 16 Beav. 207; Green *v.* Green, 5 Hare 400 n.; Webster *v.* Webster, 4 De G., M. & G. 437.

[3] Wilson *v.* Wilson, 5 H. L. Ca. 40.

[4] Titley *v.* Durant, 7 Price, 577; Hobbs *v.* Hall, 1 Cox, 445; Westmeath *v.* Westmeath, Jac. 142, controlling Rodney *v.* Chambers, 2 East, 297; Hoare *v.* Hoare, 2 Ridg. P. C. 268; Chambers *v.* Caulfield, 6 East, 244.

[5] Cocksedge *v.* Cocksedge, 5 Hare, 397; 8 Jur. 659.

[6] Waring *v.* Waring, 10 B. Mon. 331.

[7] Anderson *v.* Anderson, 1 Edw. Ch. 380.

[8] Miller *v.* Miller, Saxt. 386.

[9] St. John *v.* St. John, 11 Ves. 526; Legard *v.* Johnson, 3 Ves. 359; Worrall *v.* Jacob, 3 Mer. 268; Carson *v.* Murray, 3 Paige, 483; Simpson *v.* Simpson, 4 Dana, 140; Bettle *v.* Wilson, 14 Ohio, 257; Tourney *v.* Sinclair, 3 How. (Miss.) 324; Carter *v.* Carter, 14 Sm. & M. 59; Watkins *v.* Watkins, 7 Yerg. 283.

[10] Stephens *v.* Olive, 2 Bro. Ch. 90; Compton *v.* Collinson, 2 Bro. Ch. 38; Worrall *v.* Jacob, 3 Mer. 256; Elworthy *v.* Bird, 2 S. & S. 381.

of such covenants on the part of the trustees will not invalidate the deed as against the husband;[1] but it would not be good, for want of a consideration, against his creditors.[2] If, however, the provisions for the wife still stand only in agreement, and there are no covenants by trustees, or other valuable considerations to support the agreement, it would be a *nudum pactum*, which equity cannot enforce.[3] If there is a suit for divorce, or for nullity of the marriage, and the husband enter into agreements, in consideration of the discontinuance of such suit, the discontinuance of the suit is a sufficient consideration for the agreements.[4] If the trust is actually created and acted upon, it is not necessary that the instrument should be formally executed as a deed.[5] So if an agreement for an immediate separation is entered into by husband and wife, and acted upon without the intervention of trustees, equity will sustain the agreement, and will carry it into effect by treating the husband as a trustee, and by compelling him to complete and carry the trust into effect.[6]

§ 674. Where property is vested by the husband in trustees for the separate use of the wife, under a deed of separation, the wife cannot exercise the same power in regard to it, that she can over her ordinary separate estate, but she will take it under all the common-law disabilities of coverture; consequently, she cannot sell or charge it with her debts or contracts.[7] But, of course, her power over the property will depend very much upon the terms of the deed of separation; for the husband may give her the absolute equitable interest of the property, or he may confine her to the reception of the income from year to year, and so he may clothe her with the power of disposing of the property after her death by a will or appointment, or he may limit the property to himself or his heirs after her decease. Thus where a husband put property into the hands of a trustee, for the use of the wife on a separation, and they

[1] Fitzer *v.* Fitzer, 2 Atk. 511; Westmeath *v.* Westmeath, Jacob, 126; Frampton *v.* Frampton, 4 Beav. 287; Reed *v.* Beazley, 1 Blackf. 98; Bowers *v.* Clark, Philadelphia Rep. 561.

[2] Ibid.

[3] Elworthy *v.* Bird, 2 S. & S. 371; Wilson *v.* Wilson, 14 Sim. 405; 1 H. L. Ca. 538.

[4] Ibid.

[5] Ibid.; Angier *v.* Angier, Pr. Ch. 496; Head *v.* Head, 3 Atk. 54.

[6] More *v.* Ellis, Bunb. 205; Guth *v.* Guth, 3 Bro. Ch. 614; Frampton *v.* Frampton, 4 Beav. 294; Hutton *v.* Duey, 3 Barr, 100; Barron *v.* Barron, 24 Vt. 375; Pickett *v.* Johns, 1 Dev. Eq. 123.

[7] Hyde *v.* Price, 3 Ves. 437.

were afterwards reconciled and lived together, it was held that the property was settled to the separate use of the wife, notwithstanding they lived together.[1] So where the settlement is once made, friendly visits between husband and wife, and expressions of regret at the separation, not accompanied with cohabitation, will not discharge or annul the settlement.[2] It is the duty of the trustees to carry out all the provisions of the trust for the wife, so long as it subsists; and if there are covenants of the husband or other persons for the benefit of the wife, the trustees must sue for the breach of them, and apply the proceeds to the purposes of the trust. If the trustees neglect or decline to do this, the wife may bring a suit in equity, by her next friend, against both the trustees and the husband, or other persons liable under the settlement.[3]

§ 675. The statutes of many of the United States have very materially affected the rights of married women in regard to their separate property; or rather these statutes have converted nearly all the property that married women may at any time have, into estates settled to their separate use, without the intervention of a trustee. The substance of all these statutes is, that all the property, both real and personal, which a married woman owns, or which comes to her by devise, bequest, gift, or grant; and that which she acquires by her trade, business, labor, or services, carried on or performed on her separate account; and that which she owned at the time of her marriage, and the issues, income, profits, and proceeds of such property, — shall be and remain her sole and separate property, and may be used, collected, and invested in her own name, and shall not be subject to the interference or control of her husband or liable for his debts; and she may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters, having relation to her separate property, business, trade, services, labor, and earning in the same manner as if she were *sole*. There is generally a provision attached to these statutes, that she shall not convey her real estate except her husband joins in the deed, or assents to the conveyance in writing, and the same provision exists in some States, in relation to some kinds of

[1] Huntly *v.* Huntly, 6 Ired. Eq. 514; Ratcliffe *v.* Huntly, 5 Ired. 545.
[2] Heyer *v.* Burger, 1 Hoff. Ch. 1; Webster *v.* Webster, 1 Sm. & Gif. 489.
[3] Cook *v.* Wiggins, 10 Ves. 191; Seagrave *v.* Seagrave, 13 Ves. 439.

personal property, as stocks or shares in corporations. It is also generally provided, that trustees may be appointed to hold the title of such property for the separate use of the married woman, if she desires it.[1] As the husband takes no present beneficial interest in his wife's property, at the time he assumes the obligations of marriage, the statutes of some States have released him from some of the burdens of marriage by providing that he shall not be liable for any of his wife's antenuptial debts or contracts;[2] and perhaps, the statutes, in order to make a perfect system, should go further, and provide that he should not be liable for any torts of his wife, as for slander, libel, and the like.[3]

§ 676. These statutes have not yet been moulded into a consistent whole, nor have they received such judicial construction that any certain general principles can be safely affirmed of them all; but it would appear that they cannot affect any rights of the husband in his wife's property which became vested before the passage of them, it being contrary to the general principles of law, as well as of the constitution of the United States, and of the several States, to destroy vested interests, or to transfer them from one person to another. Thus a husband, married in any one of the States before the passage of the statute in that State, took the property that his wife then had according to the statute or law in force at the time of the marriage.[4] Therefore if a husband took his wife's

[1] This is the substance of the Massachusetts statute, Gen. Stat. c. 108, §§ 1, 3, 4. It is impossible to cite all the statutes of so many different States. Some go further than the statute of Massachusetts, and some do not go so far. The general principles of the statutes in all the States are essentially the same, but there is great variety in the details.

[2] In Dickson *v.* Miller, 11 Sm. & M. 594, it is said, that "in marriage, although a husband runs the hazard of being liable for his wife, in an amount greater than the value of the estate he receives by her, he also has the chance of receiving by her an amount far exceeding her debts; but where the whole estate of the wife, notwithstanding coverture, continues separate to her, there is no such recompense to the husband for his obligations for his wife's debts, but, on the contrary, there may be a certainty of his becoming indebted, on behalf of his wife, with no possibility of his receiving an amount even equal to her debts." See Cater *v.* Everleigh, 4 Des. 19. Where statutes have abolished his liability for her debts this criticism is avoided. Bailey *v.* Pearson, 9 Fost. 77; Reunnecker *v.* Scott, 4 Green (Io.), 185; Callahan *v.* Patterson, 4 Tex. 61; Curry *v.* Shrader, 19 Ala. 831.

[3] Brown *v.* Kemper, 27 Md. 666.

[4] Eldredge *v.* Preble, 34 Me. 148; Peck *v.* Walton, 26 Vt. 82; Jenny *v.*

money at the time of his marriage, under existing laws, and a statute was afterwards passed conferring upon the wife the right to hold her separate property, and the husband purchased land with the money, and took the deed in his wife's name, the land will nevertheless belong to him, as purchased with his money.[1] But statutes may declare what rights a husband shall take in property that comes to his wife after the passage of the act, and after the marriage.[2] On principle, it would seem that the right to reduce a wife's *choses in action* to possession vested in the husband at the time of the marriage, and could not be divested by a statute passed after the marriage, although the husband had not, at the time of the passage of the act, reduced the *choses* to possession; and so it has been ruled in several cases.[3] No prior debts of the husband can alter the rights of the parties, and affect the interests of a married woman in property coming to her after the enactment of the statute.[4]

§ 677. The passage of these acts does not affect settlements, already made at the time of their passage, to the separate use of married women.[5] So they do not affect the right of a woman to a settlement of her estate upon herself, if she chooses to invoke the old equity of a settlement of her *choses in action*, it being held that these statutes are an enlargement and not a diminution of her rights.[6] The statutes of some of the States provide that she may have a trustee to take her separate property, if she prefers that mode of holding it. The jurisdiction of courts of equity over the property and proprietary rights of married women is not taken away by these acts, but the equity powers of the courts may still be invoked, where it is necessary to secure their separate property

Gray, 5 Ohio St. 45; Snyder *v.* Snyder, 3 Barb. 621; Perkins *v.* Cottrell, 15 Barb. 446; Burson's App., 22 Penn. 164; Roby *v.* Boswell, 23 Ga. 51; Tyrson *v.* Mattair, 8 Fla. 107; Maynard *v.* Williams, 17 Ala. 676; Ratcliff *v.* Dougherty, 24 Miss. 181; Tally *v.* Thompson, 20 Miss. 277; Carter *v.* Carter, 14 Sm. & M. 59; Love *v.* Robertson, 7 Tex. 6; Ryder *v.* Hulse, 33 Barb. 264; 24 N. Y. 372; Savage *v.* O'Neil, 42 Barb. 374; Maclay *v.* Love, 25 Cal. 367.

[1] Sharp *v.* Maxwell, 30 Miss. 442.

[2] Sleight *v.* Read, 18 Barb. 159; Southard *v.* Plummer, 36 Me. 64.

[3] Ryder *v.* Hulse, 24 N. Y. 372; Westvelt *v.* Gregg, 2 Kern. 202; Stearns *v.* Mathews, 30 Ala. 712. The opposite rule has been held in Pennsylvania and New Jersey. Henry *v.* Dilley, 1 Dutch. 302; Millinger *v.* Bausman, 45 Penn. St. 522; Goodyear *v.* Rumbaugh, 13 Penn. St. 480.

[4] Sleight *v.* Read, 18 Barb. 159. But see Cunningham *v.* Gray, 20 Mo. 170.

[5] Willis *v.* Cadenhead, 28 Ala. 472; Hardy *v.* Boaz, 29 Ala. 168.

[6] Blevins *v.* Buck, 26 Ala. 292.

to their use, according to the intention of the statutes, or the intention of the donors of such property.[1] It may be stated, as a general rule, that the same principles of construction and of practice apply to these statutes, as were applied to the old settlements of a wife's separate property upon herself. Thus the presumption still is, as it was at common law, that a married woman's property belongs to her husband; and it is necessary to rebut that presumption by showing that it came to the wife, under such circumstances, and at such times, and by such gifts, grants, or bequests, that it belongs to the wife, and not to him, and that it is not liable for his debts.[2] This is nothing more than the principle that runs through the whole body of jurisprudence. Statutes in derogation of the common law are strictly construed; and if a particular matter is to be taken out of the operation of the common law, it must be shown to be within the letter or spirit of the statute so changing the common law.

§ 678. The husband may constitute his wife, his agent to transact his business and to deal with his property. In the same manner the wife may appoint her husband, her agent to manage her separate property. And, as at common law, the mere fact that a husband did not reduce his wife's *choses in action* to possession immediately, but allowed her to use and enjoy them, and even to take notes in her own name, could not be used as conclusive proof that he abandoned his right, and gave the *choses* to her;[3] so the mere fact, that a husband is in possession of his wife's property under these statutes, will not destroy her right to the same, if it appears that he acts as her agent. So long as property may be identified as belonging to her, or so long as its income or proceeds can be clearly traced and identified as coming from her property, although managed by her husband as her agent, she is entitled to recover the same.[4] The wife may give a power of attorney to her

[1] Calvin *v.* Currier, 22 Barb. 371; Mitchell *v.* Otey, 23 Miss. 236.

[2] Eldredge *v.* Preble, 34 Me. 148; Gault *v.* Saffin, 44 Penn. St. 307; Bear *v.* Bear, 33 Penn. St. 525; Winter *v.* Walters, 37 Penn. St. 157; Gamber *v.* Gamber, 18 Penn. St. 363; Goodyear *v.* Rumbaugh, 13 Penn. St. 480; Alverson *v.* Jones, 10 Cal. 9; Stanton *v.* Kirsch, 6 Wis. 338; Smith *v.* Hewett, 13 Io. 94; Smith *v.* Henry, 35 Miss. 369. Contrary opinions were expressed in Johnson *v.* Runyan, 21 Ind. 115; Stewart *v.* Ball, 3 Mo. 154.

[3] Ryder *v.* Hulse, 33 Barb. 264; 24 N. Y. 372.

[4] Jenning *v.* Davis, 31 Conn. 134; Hutchins *v.* Colby, 43 N. H. 139; Teller

husband to execute a deed of her land in her name;[1] a husband can conduct a suit in the name of the wife for damages to her property;[2] and the husband may employ other agents and attorneys in her name in relation to her separate property under the statute.[3] So the fact, that the husband manages her property, or that she allows him a living from the income, gives his creditors no claim to other parts of her separate estate.[4] So if he lives with her on her land, and cultivates and improves it, and makes betterments, without any agreement with her, it will give neither him nor his creditors, any interest in the land, buildings, betterments, crops, or improvements; but the owner of the land, in the absence of all agreements, will own all these incidents to the land itself.[5] But, as under the law in relation to settlements for the separate use of a married woman, if she allowed her husband to receive her property, and to deal with it as his own in business, or in paying his debts or in supporting the family, she would be presumed to assent to such use; so if a married woman, owning property under these statutes, allows her husband to receive her separate property, and to use in business or mix it with his own in such manner that her property cannot be identified or separated from the general mass, she will lose her rights in such property as against her husband's creditors,[6] and she will have no remedy except in equity as a creditor.[7] If a husband, acting as the agent of his wife, signs a note in her name, he will not be held upon the note, although his wife may be insolvent;

v. Bishop, 8 Minn. 226; Kirkpatrick *v.* Beauford, 21 Ark. 268; Buckley *v.* Wells, 33 N. Y. 518; Knapp *v.* Smith, 27 N. Y. 277.

[1] Weisbrod *v.* Chicago, &c., R.R. Co., 18 Wis. 35; Peck *v.* Hendershott, 14 Io. 40.

[2] Woodman *v.* Neal, 48 Me. 266.

[3] Southard *v.* Plummer, 36 Me. 64.

[4] Buckley *v.* Wells, 33 N. Y. 518; Knapp *v.* Smith, 27 N. Y. 277.

[5] Betts *v.* Betts, 18 Ala. 787; McIntire *v.* Knowlton, 6 Allen, 565; Allen *v.* Hightower, 21 Ark. 316; Welston *v.* Hildreth, 39 Vt. 457; Lewis *v.* Johns, 24 Cal. 98; Chauvete *v.* Mason, 4 Green (Io.), 231; White *v.* Hildreth, 32 Vt. 465; Colman *v.* Satterfield, 2 Head, 259; Goss *v.* Cahill, 42 Barb. 216; Robinson *v.* Huffman, 15 B. Mon. 80; Jenny *v.* Grey, 5 Ohio St. 45; Wilkinson *v.* Wilkinson, 1 Head, 305; Johnson *v.* Vail, 1 McCart. 423; Hodges *v.* Cobb, 8 Rich. 50. A wife may lease her land to her husband. Atkin *v.* Lord, 39 N. H. 196.

[6] Glover *v.* Alcott, 11 Mich. 470; Kelly *v.* Drew, 12 Allen, 107; Gross *v.* Reddig, 45 Penn. St. 406; Gardner *v.* Gardner, 1 Gif. 126.

[7] Glidden *v.* Taylor, 16 Ohio St. 509.

that is, the same principles apply when husband and wife are principal and agent, as apply to other principals and agents.[1]

§ 679. When a married woman holds property to her separate use under a settlement, or under these statutes, she may give it to her husband, or sell it to him for a valuable consideration;[2] and if she allows him to receive her property, or the income of it, her assent will be presumed. If she gives it to him, she can make no claim upon him, or his estate for reimbursement;[3] but if the circumstances do not sustain the presumption of a gift, she will be entitled to compensation from his estate. So the terms upon which a husband is dealing with his wife's property may always be proved, and must generally be determined by the evidence. If it appears that the husband acted as the agent of the wife, there is no presumption of a gift.[4] As all transfers from the wife to the husband are somewhat suspicious by reason of the relation, and the danger of some secret influence, gifts of the capital sum are not presumed in the first instance; but there is less suspicion attached to transfers of the income to him, than to transfers of the capital sum, for the reason that the income is generally appropriated to, and consumed in the support of the husband and wife and their family.

§ 680. The rules in relation to the general contracts of married women, and their binding effect upon their separate estates under the old form of settlements apply substantially in the same manner to their separate estates under these statutes. It will be remembered, that the contracts themselves were utterly void, but that equity gave them effect as *quasi* charges upon their separate property.[5] These statutes have legalized contracts of married women. But all contracts made by them are not legalized. They are empowered to make "contracts, and to sue and be sued, only in relation to their separate estates." It was seen, that, under the old settlements in England, and in a few of the States, the general engagements of married women were enforced in equity against their separate estates, although those engagements had no

[1] Taylor *v.* Shelton, 30 Conn. 122.

[2] Lyn *v.* Ashton, 1 Russ. & M. 190; Dallam *v.* Wampole, 1 Pet. C. C. 116; 2 Kent, 111; Hinney *v.* Phillips, 50 Penn. St. 382; Johnston *v.* Johnston, 1 Grant, 468; White *v.* Callinan, 19 Ind. 43; Gage *v.* Dauchy, 28 Barb. 622; Roper *v.* Roper, 29 Ala. 247; Fox *v.* Jones, 1 West Va. 205.

[3] Paulet *v.* Delavel, 2 Ves. 663; Edelen *v.* Edelen, 11 Md. 415.

[4] Elijah *v.* Taylor, 37 Ill. 247; Wales *v.* Newbould, 9 Mich. 45.

[5] *Ante*, §§ 657-663.

reference to their separate estates, and were not for the benefit of the estates or of themselves personally.[1] In a majority of the United States, a more limited rule was applied, and the contracts of married women were not enforced against their separate estates, unless these contracts were made in relation to their estates, and were for the benefit of their estates, or for their own personal benefit.[2] The same principles are applied in enforcing the contracts of married women under the statutes. A married woman may give her note for her husband's or other person's debt, and make such note a legal charge upon her separate estate by duly executing a mortgage according to law.[3] But if a married woman executes a note for the debt of her husband, or for the debt of any other person, and such note or contract is not, by mortgage or other deed, made a charge or lien upon her separate estate, and is not for her personal benefit, nor for the benefit of her estate, nor in relation to it, it cannot be enforced against her; that is, it is not within the terms of the statute authorizing her to contract.[4] On this principle, all contracts and notes entered into by a wife in relation to her separate property, as for improvements made upon her separate land, or for materials to be used upon it in building a house, or for labor in cultivating it, may be enforced against her by a direct suit at law; and an execution may issue against her, and be levied upon her separate property.[5] But in an action of law

[1] *Ante*, § 660. [2] *Ante*, § 661.

[3] Eaton *v.* Wason, 47 Me. 132; Bartlett *v.* Bartlett, 4 Allen, 440; Demarest *v.* Wynkoop, 3 John. Ch. 129; Van Horne *v.* Everson, 13 Barb. 526; Vartie *v.* Underwood, 18 Barb. 561; Leavitt *v.* Peel, 25 N. Y. 474; Younge *v.* Graff, 28 Ill. 20; Ellis *v.* Kenyon, 25 Ind. 134; Watson *v.* Thurber, 11 Mich. 457; Wolff *v.* Van Meter, 19 Io. 134; Green *v.* Scranage, 19 Io. 461; Spear *v.* Ward, 20 Cal. 659; Gardner *v.* Gardner, 7 Paige, 112.

[4] Yale *v.* Dederer, 18 N. Y. 265; 22 N. Y. 450; White *v.* McNett, 33 N. Y. 371; Ledlie *v.* Vrooman, 41 Barb. 109; White *v.* Story, 43 Barb. 124; Parker *v.* Simonds, 1 Allen, 258; Crane *v.* Kelley, 7 Allen, 250; Shannon *v.* Canney, 44 N. H. 592; Bailey *v.* Pearson, 9 Fost. 77; Lytle's App., 36 Penn. St. 131; Noyes *v.* Blakeman, 3 Sand. 531; 2 Seld. 567; Manchester *v.* Sahler, 47 Barb. 155; Hutchman *v.* Underwood, 27 Tex. 255; Keaton *v.* Scott, 25 Ga. 652; Sweeney *v.* Smith, 15 B. Mon. 325; Wolff *v.* Van Meter, 19 Io. 134; Brunner's App., 47 Penn. St. 67; Patton *v.* Stewart, 19 Ind. 233; Steinman *v.* Ewing, 43 Penn. St. 63; Ramborger *v.* Ingram, 3 Penn. St. 146; Cummings *v.* Miller, 3 Grant, 146; Rumfelt *v.* Clemens, 46 Penn. St. 455; Parke *v.* Kleeber, 37 Penn. St. 251.

[5] Rogers *v.* Ward, 8 Allen, 387; Davenport *v.* Davenport, 5 Allen, 464; Parker *v.* Kane, 4 Allen, 346; Heugh *v.* Jones, 32 Penn. St. 432; Major *v.* Symmes, 19 Ind. 117; Conway *v.* Smith, 13 Wis. 125; Marshall *v.* Miller, 3 Met. (Ky.)

against a married woman living with her husband, the burden is upon the plaintiff to show such facts as will make her liable upon a contract.[1]

§ 681. Although a husband has a right to curtesy or a life-estate in his wife's real estate if he survives her, yet he cannot convey that estate or interest during her life, without her consent, so as to give possession to the purchaser; nor can his creditors seize it on execution;[2] nor can the husband in any way incumber the estate, as by a mechanic's lien for building a house upon it;[3] nor by mortgage,[4] — without the agreement, consent, or concurrence of the wife.

§ 682. The statutes of the several States have various provisions enabling a married woman to make a will of her separate property. In some States, the will must be assented to by the husband; in others, it need not be. In some States, she can give the whole estate to persons other than her husband; in others, she can give only a part away from her husband. In the absence of a will by the wife, the husband takes all her personal property at her decease as at common law, and the use of her real estate for life, if there is issue born alive.[5]

§ 683. By force of the statutes in several States, married women may now be appointed trustees, guardians, executors, and administrators, and may give bonds for the faithful performance of their duties.[6] In many States, she may sue without her husband for all matters touching her separate estate or contracts; she may submit to arbitration;[7] and in some States she may even sue her husband, like any stranger, in a court of law.[8]

§ 684. A married woman may sell any of her chattel interests, and take notes payable to herself, and the notes remain her per-

333; Butler *v.* Robertson, 11 Tex. 142; Carpenter *v.* Leonard, 5 Min. 155; McCormick *v.* Holbrook, 22 Io. 487.

[1] Tracy *v.* Keith, 11 Allen, 214.

[2] Jenny *v.* Grey, 5 Ohio St. 45; Coleman *v.* Satterfield, 2 Head, 259.

[3] Briggs *v.* Titus, 7 R. I. 441; Selph *v.* Howland, 23 Miss. 264; Spinning *v.* Blackburn, 13 Ohio St. 131; Pell *v.* Cole, 2 Met. (Ky.) 252; Hughes *v.* Peters, 1 Cold. 67.

[4] Patterson *v.* Flanagan, 1 Ala. S. C. 427.

[5] Rawsom *v.* Nichols, 22 N. Y. 110; Brown *v.* Brown, 6 Humph. 127; Wilkinson *v.* Wright, 6 B. Mon. 576.

[6] Stat. of Mass. 1869, c. 409; Springer *v.* Berry, 47 Me. 330.

[7] Palmer *v.* Davis, 2 N. Y. 242.

[8] Scott *v.* Scott, 13 Ind. 225.

sonal property;[1] and if a note for the wife's property is taken in the name of the husband, she may, upon proving the fact, claim the proceeds,[2] and she may even hold a mortgage upon her husband's estate.[3]

§ 685. As a general rule, a wife cannot convey her real estate without her husband joining in the deed, or without his concurrence or assent in writing, as he is entitled to curtesy in her real estate. But this depends upon the construction of the statutes in each State;[4] under an early statute in Massachusetts, now repealed, a wife's sole deed of her real estate was held to be valid.[5] A married woman may now be bound by her covenants in the deed of her land, it being a contract in relation to her separate property;[6] and so a married woman may be compelled specifically to perform a contract to convey her land, provided the contract is executed according to the statute; for if a husband's written consent is necessary to a valid conveyance of her land, his written consent is necessary to a valid agreement to convey, and if that is wanting, the contract cannot be enforced.[7]

§ 686. If a married woman has no separate property, she can make no contracts. The enabling power of the statutes does not go to that extent. Thus if a married woman, having no separate property, borrows money and gives a note, for the prospective purpose of purchasing land to her separate use, and afterwards purchases the land, and takes a deed in her own name, the note is void, as it is in no sense a contract in relation to her separate

[1] Nims *v.* Bigelow, 45 N. H. 343.

[2] Conrad *v.* Shomo, 44 Penn. St. 193; Buck *v.* Gibson, 37 Vt. 653; Baker *v.* Gregory, 28 Ala. 544.

[3] Power *v.* Lester, 23 N. Y. 527; Nims *v.* Bigelow, 45 N. H. 343; Bemis *v.* Call, 10 Allen, 512.

[4] Wright *v.* Brown, 44 Penn. St. 224; James *v.* Everly, 3 Grant, 150; Murphy *v.* Bright, 3 Grant, 296; Camden *v.* Vail, 23 Cal. 633; Eaton *v.* George, 42 N. H. 375; Maclay *v.* Love, 25 Cal. 367; Miller *v.* Hine, 13 Ohio St. 565; Alexander *v.* Saulsbury, 1 Ala. 436; Pentz *v.* Simonson, Beasl. 232; Hough *v.* Blythe, 20 Ind. 24; Major *v.* Symmes, 19 Ind. 117; Dodge *v.* Hollinshead, 6 Min. 25; Miller *v.* Wetherby, 12 Io. 415; Stoker *v.* Whitlock, 3 Met. (Ky.) 244.

[5] Beal *v.* Warren, 2 Gray, 447. See Mass. Gen. Stat. c. 108, § 3.

[6] Basford *v.* Peirson, 7 Allen, 524.

[7] Baker *v.* Hathaway, 5 Allen, 103; Jewett *v.* Davis, 10 Allen, 72; Woodward *v.* Seaver, 38 N. H. 29. And see Rumfelt *v.* Clemens, 46 Penn. St. 455.

property.[1] But it is otherwise, if a direct purchase is made to herself, and a note given to the vendor of the land for the purchase-money; for although, when the negotiation commenced, she had no separate property concerning which she could contract, yet, as soon as there was a conveyance to her separate use, she had title to separate property, and could make a valid contract by note or bond to pay the purchase-money.[2]

[1] Ames *v.* Foster, 42 N. H. 381; Dunning *v.* Pike, 46 Me. 461; Johnson *v.* Chisson, 14 Ind. 415.

[2] Chapman *v.* Foster, 6 Allen, 136; Bullin *v.* Dillage, 37 N. Y. 35; Darby *v.* Calligan, 16 N. Y. 21; Knapp *v.* Smith, 27 N. Y. 277; Estabrook *v.* Earle, 97 Mass. 302; Stewart *v.* Jenkins, 6 Allen, 303.

CHAPTER XXIII.

TRUSTS FOR CHARITABLE USES.

§ 687. Trusts for charitable uses form a large and important class of trusts. The questions that arise under this head are numerous, and often complicated and difficult of solution. Charitable trusts include all gifts in trust for religious and educational purposes in their ever varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied. These trusts are governed in many respects by the same rules that govern trusts for the private benefit of individuals or families. There must be the same proof of the due execution of a written instrument, whether it creates a public charity or a private trust, and in many respects the same rules of construction will apply, in order to determine the intention of the donor; but if it is once determined that the donor intended to create a public charity, very different rules from those that are applied in establishing and administering private trusts will be applied, in order to give effect to the intention of the donor and establish the charity. Thus, if in a gift for private

benefit the *cestuis que trust* are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail, and result to the donor, his heirs or legal representatives. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain, or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins.[1] So if a gift for a private purpose tends to create a perpetuity, it will be void; but a gift for a public charity is not void, although in some forms it creates a perpetuity.[2] It is said, that courts look with favor upon charitable gifts, and take special care to enforce them, to guard them from assault, and protect them from abuse. And certainly charity in thought, speech, and deed, challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory; and an inspired apostle exhausts his powerful eloquence in setting forth its beauty, and the nothingness of all things without it. Charitable bequests are said to come within that department of human affairs where the maxim, *ut res magis valeat, quam pereat*, has been, and should be applied.[3] The constitution of one State at least strictly enjoins all legislatures and magistrates in future periods to countenance and inculcate the principles of humanity and general benevolence, and public and private charity.[4]

§ 688. The origin of this peculiar form of jurisprudence has been a matter of much curious and learned speculation. It is not the object of this treatise to enter into such investigations, but to state the present condition of the law, for the benefit of those who are called upon to aid in its administration, and who have little time to spend upon collateral matters, however interesting. It may, however, in passing, be proper to suggest, that the same religious spirit and charitable sentiment which led individuals and communities to devote large sums of money to pious uses, religious houses, churches, and educational institutions, to the relief of the old and the poor, and to the general promotion of the public con-

[1] Fontain *v.* Ravenel, 17 How. 384; Saltonstall *v.* Sanders, 11 Allen, 456.

[2] Odell *v.* Odell, 10 Allen, 1; Williams *v.* Williams, 4 Selden, 533.

[3] Saltonstall *v.* Sanders, 11 Allen, 455.

[4] Constitution of Mass. c. 5, § 2.

venience, utility, and good, also led the makers and administrators of public laws to take a favorable and liberal view of such charitable donations.

§ 689. The early history of the law of charitable uses, like the early history of all the leading branches of the English or common law, is extremely obscure. That there were great charitable institutions, such as universities, colleges, and schools; and great religious houses, such as abbeys, monasteries, nunneries, and the like; that there were asylums and retreats for the poor and sick; and that almsgiving was common, is known; and that all these institutions were in some way established by the charity of pious men is known: but the beginning of these charitable foundations cannot be traced with certainty; nor is it easy to trace the history of the public laws by which they were encouraged, fostered, protected, and regulated. Among the early indications of the religious or charitable disposition of the people are the statutes of mortmain, so called, to prevent too large a proportion of the property of the realm from being given to religious houses, or to a *dead hand*, where it could not be readily used in the increasing trade and commerce of the kingdom. Notwithstanding these prohibitory statutes, care was taken to enforce the employment of bequests for charitable purposes. An early statute sets forth that many hospitals, founded as well by noble kings of the realm, and lords and ladies, as by divers other estates to the honor of God and his glorious mother, in aid and merit of the souls of the said founders, to the which hospitals the said founders had given a great part of their movable goods for the building of the same, and a great part of their lands and tenements, therewith to sustain impotent men and women, lazars, men out of their wits, and poor women with child, and to nourish, relieve, and refresh other poor people in the same, were then for the most part decayed, and the goods and profits misemployed. The act, in providing a remedy, directs that, as to those hospitals which were of the patronage and foundation of the king, the ordinaries were to institute inquiries, and certify the inquiries into the king's chancery; and as to all other hospitals they were, after due inquiry, to make the necessary correction and reformation.[1]

§ 690. It is quite certain, that the civil or Roman law was con-

[1] 2 Hen. V. Stat. 1, c. 1.

strued most indulgently, in favor of legacies and bequests for pious, charitable, and public uses, before the empire became Christian;[1] but it must be remembered, that Christianity, and the charitable sentiments which it inculcates and begets, had widely spread among the people before the government publicly announced itself as Christian. After the final conversion of the government to the Christian religion, legacies to pious uses, including legacies to works of piety and charity, whether they related to temporal or spiritual concerns, were deemed entitled to peculiar favor as privileged testaments.[2] It is not impossible, nor improbable, that the Christianized maxims of the civil law relating to pious and charitable trusts, were transferred into the jurisprudence of England. Lord Thurlow, indeed, said that the doctrine of charities grew up from the civil law.[3] But it must be observed, that, as soon as Christianity spread into Britain, the same ideas that modified the Roman law would be at work upon the public mind of England, and would mould and fashion the law and institutions of that country in the same way that they had influenced the civil law. It must also be remembered, that for a long time the laws of England went much further than the civil law in devoting the estates of deceased persons to charity. For until the statute of distributions, 22 Car. II. c. 13, was enacted, the ordinary was obliged to apply a portion of the residue of every intestate estate to charity, on the ground that there was a general principle of piety and charity in every man.[4] If such was the English method of dealing with intestate estates, a method not derived from the civil law, certainly wills and grants, appointing or authorizing such charitable distributions, would meet with especial favor and indulgence in the courts.

§ 691. So deeply imbedded were these charitable institutions in the minds of the people, that Henry VIII. in his struggle against the supremacy of the pope, felt obliged to strike at all these religious and charitable foundations. It is true that abbeys, monasteries, and other religious houses were the principal sufferers; but some

[1] Dig. Lib. 33, tit. 2; De Usu et Usufruc. Legatorum, §§ 16, 17; L'd Ch. J. Wilmot, notes, 53, 54.

[2] Domat, Civil Law, B. 4, tit. 2, § 6.

[3] White v. White, 1 Bro. Ch. 12; Moggridge v. Thackwell, 7 Ves. 36, 69; Mills v. Farmer, 1 Mer. 55, 94, 95; Jackson v. Phillips, 14 Allen, 539.

[4] 2 Black. 494, 495; Perkins, § 486; Tudor, Char. Uses, 210.

of the acts under which the king proceeded, embraced colleges, chapels, chantries, hospitals, and fraternities;[1] and St. Thomas's Hospital in Southwark was actually surrendered.[2] It is further said, that the great universities were obliged to petition the king that they might not be included under the general words of colleges and fraternities.[3] In this wide-spread attack upon the religious, educational, and alms-giving institutions of the kingdom, and in the confusion attending upon the transition from Papacy to Episcopacy, it cannot be doubted that all charities were much neglected, and that many of them abused or misemployed their funds. The short reign of Edward VI., and the disturbed reign of Philip and Mary, tended rather to increase, than to correct these abuses. But as soon as Elizabeth was firmly seated upon the throne, and the Reformation was assured, general attention was turned to the correction and encouragement of charities. In the first year of her reign, the act that restored the first fruits to the crown exempted schools and hospitals from the payment thereof.[4] In the same act are provisions in favor of the universities, the colleges of Eton and Winchester, and the chapel of St. George. Soon after, statutes were passed, regulating leases of lands belonging to ecclesiastical and eleemosynary institutions. Acts were passed authorizing private individuals to establish and endow hospitals. The Stat. 14 Eliz. c. 14, forcibly illustrates the indulgence and encouragement which was extended to charitable gifts. It recited that certain hospitals had been erected by Henry VIII. and Edward VI., and that lands had been given by other persons, and it was hoped many more would likewise charitably give; and that many such gifts and assurances had been, and were likely to be made by the last wills of the givers thereof, at which time for want of counsel or other opportunities, it might happen that the right names of the said corporations should not be truly expressed, whereby some question might grow of the validity of such grants, gifts, or devises; and it was enacted, that all gifts, grants, legacies, devises, and assurances, made or to be made, of any lands, tenements, and hereditaments, by will, feoffment, or otherwise, to the use or for the relief of the poor in any hospital then remaining, and being *in esse*, and employed to the relief and maintenance of the poor in said hospitals,

[1] 1 Burnet Hist. Reform. pp. 346, 347, 404–434; 33 Hen. VIII. c. 27.
[2] Ibid.
[3] Ibid.
[4] 1 Eliz. c. 4, §§ 34, 35, 40.

should be as good and available in law according to the true meaning of any such donor, as if the said corporations had been or were in writing, or deeds of such gifts, grants, devises, or assurances, or in such will or testament, rightly or truly named; saving to all third persons their rights and interests in the land given. The Stat. 31 Eliz. c. 6, remedied the abuses which had grown up in the elections and presentations to churches, colleges, schools, hospitals, societies, and other charitable organizations. The 39 Eliz. c. 6, authorized the queen to appoint a commission to inquire if grants or gifts to hospitals and other charitable uses were misemployed, and if so, to correct the abuses. The Statutes 8 Eliz. c. 11, 35 Eliz. c. 3, 39 Eliz. c. 4, 21, and 43 Eliz. c. 2 and 3, relate to a kind of compulsory charity, or support of the poor. These statutes, and especially the Stat. 43 Eliz. c. 2, are said to be the foundation of the poor laws, so long in force in England; and to them we may trace the origin of the pauper laws in force in the various States of this country.[1]

§ 692. All this legislation for charity finally culminated in the Stat. 43 Eliz. c. 4 (1601), commonly called the statute of charitable uses. The charitable objects and purposes enumerated in this statute are as follows: "Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free-schools, and scholars in universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes."[2] Since the pas-

[1] See Boyle, pp. 1–12.

[2] The following abstract of the statute, as given by Boyle, is here inserted, as it is not readily accessible to all: —

"The preamble sets forth that property of every kind had been given, limited, appointed, and assigned by the queen and other well disposed persons, for some or other of the purposes there specified, of which the following is an enumeration: Relief of aged and impotent and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning; free-schools; scholars in universities; houses of correction; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and prefermen to forphans; marriages of poor maids; supportation and help of tradesmen, handicraftsmen, and

sage of this statute, all the objects named therein are considered charitable. There are also many other uses, not named and not

persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes. It then recites that the lands and effects so appropriated had not been duly employed, and, for redress and remedy of such abuses and breaches of trust, proceeds to enact, that it should be lawful for the Lord Chancellor, or Lord Keeper of the Great Seal, and for the Chancellor of the Duchy of Lancaster, within their respective jurisdictions, to award commissions to the bishop of the diocese and chancellor (in case there should be any bishop of that diocese at the time), and to other persons, authorizing them, or any four of them, to inquire as well by the oaths of twelve men, as by all other good and lawful ways and means, of all gifts, limitations, assignments, and appointments, and of the abuses, breaches of trust, misemployments, and misgovernment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money, theretofore given, limited, appointed, or assigned, or which thereafter should be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed. And that the commissioners or any four of them (upon calling the parties interested in any such lands, &c.), should make inquiry by the oaths of twelve men or more of the county (the parties interested being allowed their challenge), and upon such inquiry, hearing, and examining thereof, set down such orders, judgments, and decrees, as the said lands, &c., might be duly and faithfully employed to and for such of the charitable and godly uses and intents before rehearsed respectively, for which they were given, limited, assigned, or appointed by the donors and founders thereof, which orders, judgments, and decrees, not being contrary or repugnant to the orders, statutes, or decrees of the donors or founders, should, by authority of the then parliament, stand firm and good according to the tenor and purport thereof, and should be executed accordingly, until the same should be undone or altered by the Lord Chancellor, or Lord Keeper, or the Chancellor of the County Palatine of Lancaster respectively, within their several jurisdictions, upon complaint by any party grieved to be made to them.

"Sect. 2. It is then provided that the act should not extend to the two universities, the colleges of Westminster, Eton, or Winchester, or to any cathedral or collegiate church.

"Sect. 3. Also that it should not extend to any city or town corporate, or to any lands or tenements given to the uses aforesaid within any such city or town corporate, where should be a special governor or governors to govern or direct such lands, tenements, or things disposed of to any the uses aforesaid; nor to any college, hospital, or free-school, which should have special visitors or governors or overseers appointed them by their founders.

"Sect. 4. It is further provided that the jurisdiction or power of the ordinary should not be prejudiced.

"Sect. 5. That no person should be appointed or act as commissioner or juror who should have possession of or pretend title to any of the said lands or other property.

"Sect. 6. That *bona fide* purchasers without notice should not be impeached

within the strict letter of the statute, but which, coming within its spirit, equity, and analogy, are considered charitable.

§ 693. This statute has filled a large space in judicial inquiries; and it was supposed for a time that it was the origin of the jurisdiction of courts of equity over the subject of charities. There are few reports of cases determined in chancery prior to the time of Elizabeth; while there are a few cases at law, in the argument and decision of which, no reference was made to a jurisdiction in chancery.[1]

by the decrees or orders of the commissioners for or concerning their estate or interest in any lands, &c., given, limited, or appointed to charitable uses. But that, nevertheless, the commissioners should make decrees and orders for recompense to be made by any person or persons, who, being put in trust or having notice of the charitable use, should break the trust or defraud the use, and also against their heirs, executors, and administrators, having assets in law or equity, so far as the same assets would extend.

"Sect. 7. The act then proceeds to except, out of the authority vested in the commissioners, all lands and hereditaments in any manner assured or come to the queen's majesty, or to Henry VIII., Edward VI., or Queen Mary; but enacts, that, if any such should have been given, appointed, or assigned to charitable uses since the beginning of her majesty's reign, they should be within the scope of the commissioner's inquiry.

"Sect. 8. It then goes on to enact, that all orders, judgments, and decrees of the commissioners should be certified under seal into the Court of Chancery, or into the Court of Chancery within the County Palatine of Lancaster, according to the jurisdiction, within such convenient time as should be limited in the commissions.

"Sect. 9. And that the Lord Chancellor, or Lord Keeper and the Chancellor of the Duchy, should within their several jurisdictions take such order for the due execution of all or any of the said judgments, decrees, and orders, as to either of them should seem fit and convenient.

"Sect. 10. The act lastly provides a remedy for persons aggrieved by the orders or decrees so certified by the commissioners, by declaring that complaint might be made to the Lord Chancellor, or Lord Keeper, or the Chancellor of the Duchy of Lancaster for redress; and that upon such complaint the said Lord Chancellor, or Lord Keeper, or the said Chancellor of the Duchy, might according to their several jurisdictions, by such course as to their wisdom should seem meetest, the circumstances of the case considered, proceed to the examination, hearing, and determining thereof; and upon hearing thereof should and might amend, diminish, alter or enlarge the orders, judgments, and decrees of the commissioners, as should be thought to stand with equity and good conscience according to the true intent and meaning of the donors and founders; and should and might tax and award good costs of suit by their discretions against such persons as they should find to complain unto them without just and sufficient cause."

[1] Porter's Case, 1 Rep. 22 a; Gibbons *v.* Maltyard, Poph. 6; Thetford School,

These facts led Lord Loughborough to observe, that "it does not appear that this court, at that period, had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere (1596), as far as the tradition of the times immediately following goes, there were no such informations as that upon which I am now sitting (an information to establish a charity); but they made out their case as well as they could at law." [1] The same facts and authorities led the Supreme Court of the United States to come to a similar conclusion.[2]

§ 694. On the other hand, it is said that the statute does not purport to take away any authority from the Court of Chancery, or to give any new jurisdiction, but it only authorizes a commission to inquire into and correct abuses, allowing an appeal to the Lord Chancellor in certain cases. It is further said that the Court of Chancery, immediately after the statute, entertained original bills in charity cases, and seemed to refer its jurisdiction, not to the statute, but to its original and inherent jurisdiction over all matters of trust and confidence.[3] Still further, Lord Northington, Lord Hardwicke, Lord Eldon, Lord Redesdale, Sir Edward Sugden, as the Lord-Chancellor of Ireland, Lord Chief-Justice Wilmot, Sir Joseph Jekyll, and Sir John Leach have expressed the clear opinion that the statute created no new law; that it simply created a new and ancillary jurisdiction by commission to issue out of chancery, to inquire whether funds devoted to charitable purposes had been misapplied.[4] But beyond this is the report of the commissioners

8 Rep. 130; The Skinners' Case, Moore, 120, pl. 277; Annis's Case, Anderson, 43; Perkins, 563; Bruerton's Case, 6 Rep. 2; Partridge *v.* Walker, Duke, 360; Hewett *v.* Wotton, cited 4 Rep. 109 b; Duke, 469; Chibnal *v.* Whitton, 4 Rep. 110 a; Martidall *v.* Martin, Cro. Eliz. 288.

[1] Attorney-General *v.* Bowyer, 3 Ves. 714, 726; Ludlow *v.* Greenhouse, 1 Bligh (N. S.), 61; Attorney-General *v.* Platt, Finch, 221; 1 Ch. Ca. 267; West *v.* Palmer, 1 Ch. Ca. 134; Duke, 379; Collinson's Case, Hob. 136; Rolt's Case, Moore, 888; Mills *v.* Farmer, 1 Mer. 55; Moggridge *v.* Thackwell, 7 Ves. 36.

[2] Baptist Association *v.* Hart's Ex'rs, 4 Wheat. 1.

[3] Payne's Case, Duke, 154; Guiddy's Case, 4 Jac. 1; Blackston *v.* Henworth Hospital, Duke, 644; 11 Jac. 1; Henshaw *v.* Morpeth, Duke, 142; Mayor of London's Case, Duke, 389; 1 Car. 15; Attorney-General *v.* Townsend, Duke, 590; 22 Car. 2; Chelmford's Case, Duke, 574.

[4] Attorney-General *v.* Dublin, 1 Bligh (N. S.), 312, 347; Attorney-General *v.* Skinners' Co., 2 Russ. 407, 420; Attorney-General *v.* Brentwood School, 1 My. & K. 376; Incorporated Soc. *v.* Richards, 1 Conn. & Laws. 58; 1 Dru. & War.

of public records, published in 1827, 1830, and 1832. These records contain about fifty cases before the statute, in which the Court of Chancery had exercised a jurisdiction in establishing, regulating, and enforcing gifts and grants to charitable uses, very similar to the jurisdiction now exercised by courts in those States where the statute, or the principles of the statute are in force.[1] Since the publication of these records, the matter has been again much discussed in the Supreme Court of the United States, and in other courts in America; and it is now conceded as settled, that courts of equity have an original and inherent jurisdiction over charities, independent of the statute.[2] The consequence of this final determination is important in this respect, that courts of equity, in the various States where they are not prohibited by statute, exercise an original, inherent jurisdiction in equity over charities, and apply to them the rules of equity, together with such other rules, applicable to charitable uses, as courts of equity may exercise under the constitutions and laws of the several States; and the courts do this by virtue of their inherent powers, without reference to the question whether the statute has been technically adopted in their States.[3]

258; Carie *v.* Bertie, 2 Vern. 342; Eyre *v.* Shaftesbury, 2 P. Wms. 119; Attorney-General *v.* Locke, 3 Atk. 165; Attorney-General *v.* Brereton, 2 Ves. 425; Attorney-General *v.* Middleton, 2 Ves. 327; Attorney-General *v.* Tancred, 1 Eden, 10; 1 W. Black. 90; Attorney-General *v.* Downing, Wilmot's notes, 24. For charitable cases in chancery prior to the statute, see Messenger *v.* Gloucester, Tothill, 58; Parrott *v.* Pawlett, Carey, 103; Elmer *v.* Scott, Choice Cas. in Chan. 155; Duke, 131, 136, 163, 361; Tothill, 120.

[1] For the convenience of those who desire to see these cases, we insert the pages of the "Proceedings in Chancery" where they may be found: Vol. I., pp. lvi., lvii., lxii., 81, 96, 98, 101, 134, 141, 159, 213, 216, 218, 225, 241, 257, 276, 282, 291, 308, 376, 378, 395–399; Vol. II., pp. xliv., 146, 271, 303, 430; Vol. III., pp. 67, 108, 169, 183, 197, 249, 252, 269, 286, 291, 292, 319. All that is contained in these cases is printed in full in Mr. Binney's argument in the Girard Will case, pp. 151–160.

[2] Vidal *v.* Girard's Ex'rs, 2 How. 127; Tappan *v.* Deblois, 45 Me. 122; Going *v.* Emery, 16 Pick. 107; Jackson *v.* Phillips, 14 Allen, 558; Williams *v.* Williams, 4 Selden, 533; Attorney-General *v.* Moore, 4 C. E. Green, 503; Norris *v.* Thompson, 4 C. E. Green, 307; Walker *v.* Walker, 25 Ga. 420; Williams *v.* Pearson, 38 Ala. 299; State *v.* Prewett, 20 Miss. 165; Paschall *v.* Acklin, 27 Texas, 173; Chambers *v.* St. Louis, 29 Mo. 543; Attorney-General *v.* Wallace, 7 B. Mon. 611; Franklin *v.* Armfield, 2 Sneed, 305; Urmry's Ex'rs *v.* Wooden, 1 Ohio St. 160; Sweeney *v.* Sampson, 5 Ind. 465; Gillman *v.* Hamilton, 16 Ill. 225.

[3] Ibid.

§ 695. It was at one time doubted whether the statute had not ousted the court of original jurisdiction, and whether proceedings in relation to charities must not in all cases be commenced by commission; but there were proceedings by original bill from the beginning,[1] and the doubt was soon overruled and has disappeared from the books.[2]

§ 696. From this discussion, it appears that the Statute, 43 Eliz. c. 4, accomplished three things in the law of charities: (1.) It established an enumeration, or kind of definition, standard, or test, to which all gifts and grants in trust could be brought, in order to determine whether they were charitable. (2.) It authorized a commission to inquire into the abuses and misemployment of funds and lands given to charity. But this proceeding by commission soon fell into disuse; and an original bill, or an information by the attorney-general, became the only means of redress. (3.) It repealed, *pro tanto*, all the statutes of mortmain in force before that time, so that there was no restriction in the laws of England upon gifts or grants for the purposes named in the statute, until the Statute of Mortmain, 9 Geo. II. c. 36.[3]

§ 697. It will be seen, that the words, charity and a charitable use, have a somewhat technical meaning in the law. Mr. Webster, in his argument in the Girard will case, attempted to establish that a charity and a charitable use, in the eye of the law, must involve the idea of Christianity in some or all of its purposes, or at least must not be opposed to the common Christian faith, doctrine, and practice.[4] Mr. Binney, in his argument in the same case, defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor in the catholic and universal sense, — given from these motives and to these ends, free from the stain or taint of every consideration that is personal,

[1] See *Ante*, § 694.

[2] Attorney-General *v.* Newman, 1 Ch. Ca. 157; 1 Lev. 284; West *v.* Knight, 1 Ch. Ca. 134; Parish of St. Dunstan *v.* Beauchamp, 1 Ch. Ca. 193; Anon., 1 Ch. Ca. 267; Eyre *v.* Shaftesbury, 2 P. Wms. 119; Attorney-General *v.* Brereton, 2 Ves. 425, 427.

[3] Magill *v.* Brown, Brightly, N. P. 575; Hobart, 136.

[4] 6 Webster's Works, 133; Bedford Charity, 2 Swans. 529; 1 Vern. 293; Dane, Abr. Ch. 219; King *v.* Wilson, 2 Strange, 834; Taylor's Case, 3 Mer. 405; Evans *v.* London, 2 Burns. Ecc. L. 95; Attorney-General *v.* Mansfield, 2 Russ. 501; Attorney-General *v.* Cullum, 1 Yo. & Col. 411; Updegraph *v.* Commonwealth, 11 S. & W. 394; Zeisweiss *v.* James, 63 Penn. St. 465.

private, and selfish."[1] The word "charity," in its *widest* sense, denotes all the good affections men ought to bear toward each other: in a more restricted sense, it means relief or alms to the poor: but in a court of chancery the signification of the word is derived from the statute of Elizabeth.[2] Hence it has been said, that those purposes are considered charitable which are enumerated in the statute, or which by analogy are deemed within its spirit or intendment.[3] Another short but practical definition has described it as "a gift to a general public use, which extends to the poor as well as the rich."[4] But Mr. Justice Gray has given a definition which includes all the facts and circumstances, and all varieties of charity under the law, and leaves nothing to be desired. In his words, "a charity in a legal sense may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, — either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."[5]

§ 698. A bequest in trust for the poor inhabitants of a particular place, parish, or town, is a charitable trust for the poor not receiving parochial or municipal aid and relief as paupers: on the ground that the charity is for the poor, and not for the rich; and if it was applied to the maintenance of those supported by the parish, town, or county, it would relieve wealthy tax-payers from their taxes, and not materially aid the poor.[6] There can be no clear distinction

[1] Girard Will Case, Mr. Binney's argument, 41; Price *v.* Maxwell, 28 Penn. St. 35.

[2] Tudor, Char. Uses, 4 (2d ed.).

[3] Morice *v.* Bishop of Durham, 9 Ves. 405; 10 Ves. 541.

[4] Jones *v.* Williams, Amb. 652; Coggeshall *v.* Pelton, 7 John. Ch. 294; Mitford *v.* Reynolds, 1 Phil. 191; Perin *v.* Carey, 24 How. 506.

[5] Jackson *v.* Phillips, 14 Allen, 556.

[6] Attorney-General *v.* Clarke, Amb. 422; Rogers *v.* Rogers, 2 Keen, 8; Attorney-General *v.* Wilkinson, 1 Beav. 373; Attorney-General *v.* Bovill, 1 Phil. 768; Attorney-General *v.* Exeter, 2 Russ. 53, 359; Attorney-General *v.* Brandreth, 1 Yo. & Col. Ch. 200; Hereford *v.* Adams, 7 Ves. 324; Attorney-General *v.* Price, 3 Atk. 110.

drawn in such cases; for to aid the poor may save them from the parish or town, and thus relieve wealthy tax-payers from burdens that would otherwise fall upon them. Generally, the intention of the donor will guide in the distribution of his bounty, as he may see fit to add some comforts to the meagre support of town or parish, or he may confine his alms to those not receiving public aid.[1] In the absence of all directions, it may be as well to confine the charity to those not in the public almshouse, unless the gift is in aid of the poor-rates.[2]

§ 699. Thus the following gifts for the poor have been held to be charitable within the letter or spirit of the statute, or within the law of charities, as administered in several of the States: a gift to the poor indefinitely;[3] or to a particular parish or place;[4] or workhouse;[5] or hospital;[6] or to the poor emigrating to a particular colony[7] or place;[8] or to a parish generally;[9] or to the governors of a hospital;[10] or to the widows and orphans of a parish;[11] or to the widows and seamen of a town;[12] or for poor and pious persons;[13] or to such poor housekeepers as A. should appoint;[14] or to

[1] Webb *v.* Neal, 5 Allen, 575; Attorney-General *v.* Blizard, 21 Beav. 233.

[2] Doe *v.* Howells, 2 B. & A. 744.

[3] Att'y-Gen. *v.* Mathews, 2 Lev. 167; Att'y-Gen. *v.* Peacock, Finch, 245; Amb. 422; Att'y-Gen. *v.* Rance, Amb. 422; Legge *v.* Asgill, Turn. & Russ. 265 n.; Howard *v.* American Peace Soc., 49 Me. 288.

[4] Att'y-Gen. *v.* Blizard, 21 Beav. 233; Bristow *v.* Bristow, 5 Beav. 289; Att'y-Gen. *v.* Wilkinson, 1 Beav. 370; Woodford *v.* Parkhurst, Duke, 70; Att'y-Gen. *v.* Clarke, Amb. 422; Att'y-Gen. *v.* Old South Soc., 13 Allen, 474; State *v.* Gerard, 2 Ired. Eq. 210; Overseers *v.* Tayloe, Gilm. 336; Shotwell *v.* Mott, 2 Sand. Ch. 46; Att'y-Gen. *v.* Bovill, 1 Phil. 762; *In re* Lambeth Charities, 22 L. J. Ch. 959; Att'y-Gen. *v.* Trinity Church, 9 Allen, 422.

[5] Att'y-Gen. *v.* Vint, 3 De G. & Sm. 704.

[6] Corp. of Reading *v.* Lane, Duke, 81; Att'y-Gen. *v.* Kell, 2 Beav. 575; Pelham *v.* Anderson, 2 Eden, 296.

[7] Barclay *v.* Maskelyne, 4 Jur. (N. S.) 1294; John. Ch. (Eng.) 124.

[8] Chambers *v.* St. Louis, 29 Mo. 543.

[9] West *v.* Knight, 1 Ch. Ca. 134; Champion *v.* Smith, Duke, 81; Att'y-Gen. *v.* Johnson, Amb. 190 n.

[10] Mayor of London's Case, Duke, 83.

[11] Att'y-Gen. *v.* Comber, 2 Sim. & S. 93; Att'y-Gen. *v.* Glegg, Amb. 584, 585 n.; 1 Atk. 356; Att'y-Gen. *v.* Speed, West, Ch. 491; Cook *v.* Duckenfield, 2 Atk. 562, 567.

[12] Powell *v.* Att'y-Gen., 3 Mer. 48; Urmey's Ex'rs *v.* Wooden, 1 Ohio St. 160.

[13] Nash *v.* Morely, 5 Beav. 177.

[14] Att'y-Gen. *v.* Pearce, 2 Atk. 87; Barnard. Ch. 208.

the indigent residents of certain towns to be selected by the trustees;[1] or to distribute groceries, clothing, fuel, and alms among the poor;[2] or for the relief of the destitute in such manner as charity is usually distributed by the ministers at large in the city of Boston;[3] or to twenty aged widows and spinsters of a parish.[4] Gifts for the poorer classes have been sustained; as, for letting out land at a low rent;[5] or for deserving literary men who have been unsuccessful.[6] So trusts for poor relations have been considered charitable, and will be confined to such poor relations as are next of kin under the statute of distributions; and poor relations becoming rich, and the representatives of poor relations, will be excluded:[7] but where the trust is of a perpetual character, it will extend to all the poor relations of the donor, and will not be confined to those within the statute of distributions.[8] Trusts for releasing poor debtors, and for the relief of decayed tradesmen are charitable.[9] So of a bequest for ten worthy men for the purchase of meat and wine fit for the service of two nights of the passover;[10] or for poor members of the Friends' Society, and for the relief of Indians.[11] So a bequest in aid of objects or purposes of charity, public or private, was held to be for the general relief of the poor.[12] A gift in aid of the poor-rates,[13] or to support schools and the poor of a county, is charitable.[14]

[1] Shotwell *v.* Mott, 2 Sand. Ch. 46; Hereford *v.* Adams, 7 Ves. 324; Paice *v.* Canterbury, 14 Ves. 364; Waldo *v.* Caley, 16 Ves. 206; Com. of Char. Donations *v.* Sullivan, 1 Dr. & War. 501.

[2] Washburn *v.* Sewell, 9 Met. 280; Grandom's Estate, 6 W. & S. 537.

[3] Derby *v.* Derby, 4 R. I. 414.

[4] Thompson *v.* Corby, 27 Beav. 649; Russell *v.* Kellett, 3 Sm. & Gif. 264.

[5] Crafton *v.* Frith, 15 Jur. 737; 2 L. J. (N. S.) Ch. 198.

[6] Thompson *v.* Thompson, 1 Coll. Ch. 395; Shotwell *v.* Mott, 2 Sand. Ch. 46.

[7] Brunsden *v.* Woolredge, Amb. 507; Green *v.* Howard, 1 Bro. Ch. 31 n.; Harding *v.* Glyn, 1 Atk. 169; Mahon *v.* Savage, 1 Sch. & Lef. 111; Swasey *v.* Amer. Bible Soc., 57 Me. 527; Smith *v.* Harrington, 4 Allen, 566.

[8] White *v.* White, 7 Ves. 423; Isaac *v.* De Friez, 17 Ves. 373 n.; Amb. 595; Att'y-Gen. *v.* Bucknall, 2 Atk. 328; Att'y-Gen. *v.* Price, 17 Ves. 371; Tudor, Char. 7.

[9] Att'y-Gen. *v.* Ironmongers' Co., 2 My. & K. 576; Att'y-Gen. *v.* Painters' Co., 2 Cox, 51.

[10] Straus *v.* Goldsmid, 8 Sim. 614.

[11] Magill *v.* Brown, Brightly, 347.

[12] Saltonstall *v.* Sanders, 11 Allen, 446.

[13] Doe *v.* Howells, 2 B. & A. 744.

[14] Heuser *v.* Harris, 42 Ill. 425.

§ 700. Education and schools of learning of all grades are referred to in the statute, and almost all gifts for educational purposes are held to be charitable;[1] as, gifts for the advancement of learning in every part of the world, so far as circumstances will permit;[2] or for the diffusion (a part in Pennsylvania, the residue in the United States) of useful knowledge and instruction among the institutes, clubs, or meetings of the working-classes, or manual laborers by the sweat of their brow;[3] to build or erect a school or free grammar-school,[4] or a school for the sons of gentlemen;[5] or to maintain a school-master;[6] or for the masters and fellows of a college;[7] or for the foundation of a scholarship,[8] fellowship,[9] or lectureship[10] in a college or university;[11] or for the perpetual endowment of two schools;[12] or to establish a college for orphans, although all ministers are for ever excluded from its walls;[13] or for the education of young men at Oxford for the Church of England to be selected;[14] or to maintain a library and reading-room;[15] or for paying premiums for the most important discoveries, or useful improvements made public upon light and heat;[16] or for the civilization of Indians;[17] or to assist literary persons in their pur-

[1] Jackson *v.* Phillips, 14 Allen, 552; Swasey *v.* Amer. Bible Soc., 57 Me. 527; Tainter *v.* Clark, 5 Allen, 66.

[2] Whicher *v.* Hume, 1 De G., M. & G. 506; 7 H. L. Ca. 124; 10 Eng. L. & Eq. 73; 14 Beav. 509.

[3] Sweeney *v.* Sampson, 5 Ind. 405.

[4] Hadley *v.* Hopkins Acad., 14 Pick. 241; State *v.* McGowen, 2 Ired. Eq. 9; Rugby School, Duke, 80; Gibbons *v.* Maltyard, Poph. 6; Att'y-Gen. *v.* Williams, 4 Bro. Ch. 525; Att'y-Gen. *v.* Bowles, 2 Ves. 547; Wright *v.* Lynn, 9 Barr, 433; Griffin *v.* Graham, 1 Hawks, 96.

[5] Att'y-Gen. *v.* Lonsdale, 1 Sim. 109.

[6] Hynshaw *v.* Morpeth, Duke, 69.

[7] Platt *v.* St. John's Coll., Duke, 77.

[8] Rex *v.* Newman, 1 Lev. 244; Att'y-Gen. *v.* Andrew, 3 Ves. 633.

[9] Case of Jesus' Coll., Duke, 78; Att'y-Gen. *v.* Bowyer, 3 Ves. 714.

[10] Att'y-Gen. *v.* Margaret and Regius Professors in Cambridge, 1 Vern. 55.

[11] Porter's Case, 1 Rep. 25 b; Att'y-Gen. *v.* Wharwood, 1 Ves. 537; Christ's Coll., Cambridge, 1 Eden, 10; Amb. 351; 1 Black. 90.

[12] Kirkbank *v.* Hudson, 7 Price, 213; Att'y-Gen. *v.* Williams, 4 Bro. Ch. 526.

[13] Vidal *v.* Girard's Ex'rs, 2 How. 127.

[14] *In re* Well Beloved Weeks, 7 Eng. L. & Eq. 73.

[15] Drury *v.* Natick, 10 Allen, 169; Jackson *v.* Phillips, 14 Allen, 552; Pickering *v.* Shotwell, 10 Barr, 23.

[16] American Acad. *v.* Harvard Coll., 12 Gray, 584.

[17] Magill *v.* Brown, Brightly, 347.

suits, or to publish an essay on science; [1] or to publish and distribute the works of Joanna Southcote; [2] or to promote the moral, intellectual, and physical instruction and education of a city; [3] or to create a "change of sentiment," which means to educate; [4] or a fund to increase the salaries of teachers.[5]

§ 701. The only reference that the statute makes to religious uses as charitable is to the "repair of churches." Sir Francis Moore says that the omission was intentional, in order to avoid confiscations in case the Reformation went backwards. But, in a Christian community of whatever variety of faith and form of worship, there would be little need of a statute to declare gifts for religious uses to be charitable. Therefore, both before and since the statute, gifts for the advancement, spread, and teaching of Christianity, or for the convenience and support of worship, or of the ministry, have been held charitable; [6] as gifts for the good,[7] or reparation, furniture, or ornament of a parish church; [8] or to a minister for preaching; [9] or for a pension to a perpetual curate; [10] or for unbeneficed curates; [11] or for augmentations of ecclesiastical persons to small vicarages and curacies; [12] or to Queen Anne's bounty; [13]

[1] Thompson *v.* Thompson, 1 Coll. N. C. C. 395.

[2] Thornton *v.* Howe, 31 Beav. 14.

[3] Lowell's App., 22 Pick. 215; Pickering *v.* Shotwell, 10 Barr, 27; Whicher *v.* Hume, 7 H. L. Ca. 124; Marsh *v.* Means, 3 Jur. (N. S.) 790; Hartshorne *v.* Nicholson, 4 Jur. (N. S.) 864; Barclay *v.* Maskelyne, 4 Jur. (N. S.) 1294; see Briggs *v.* Hartley, 14 Jur. 683.

[4] Jackson *v.* Phillips, 14 Allen, 552.

[5] Price *v.* Maxwell, 28 Penn. St. 23.

[6] Anon., Ander. 43, pl. 108; Pitt *v.* James, Hob. 123; Cheney's Case, Coke Lit. 342; 1 Cox, 316; Gibbons *v.* Maltyard, Poph. 6; Moore, 594; Porter's Case, 1 Rep. 26 a, n.; Bruerton's Case, 6 Rep. 1 b, 2 a; Barrey *v.* Ley, Dwight's Char. Ca. 92; Att'y-Gen. *v.* Downing, Wilmot, 15; Bridgman's Duke, 125, 154; Magill *v.* Brown, Brightly, 380, 381; Jackson *v.* Phillips, 14 Allen, 552, 553; Baker *v.* Dutton, Keen, 224, 232; Att'y-Gen. *v.* Jolly, 1 Rich. 99.

[7] Wingfield's Case, Duke, 80; Anon., Carey, 39; Nash's Charity, Dwight's Char. Ca. 114.

[8] *In re* Church of Donington-on-Baine, 6 Jur. (N. S.) 290; Att'y-Gen. *v.* Vivian, 1 Russ. 226; Att'y-Gen. *v.* Ruper, 2 P. Wms. 125; Magill *v.* Brown, Brightly, 347.

[9] Gibbons *v.* Maltyard, Poph. 6; Pember *v.* Inh. of Knighton, Duke, 82; Poph. 139; Penstred *v.* Payer, Duke, 82; 1 Eq. Ca. 95; Duke, 131, 132.

[10] Att'y-Gen. *v.* Parker, 1 Ves. 43; 14 Ves. 7.

[11] Pennington *v.* Buckley, 6 Hare, 453.

[12] Att'y-Gen. *v.* Brereton, 2 Ves. 426.

[13] Widmore *v.* Woodroffe, Amb. 636; 1 Bro. Ch. 13 n.; Middleton *v.* Clithrow, 3 Ves. 734.

or for the advancement of Christianity among infidels;[1] for foreign missions;[2] for the dissemination of the gospel at home and abroad;[3] "for the service of my Lord and Master;"[4] "to be disposed of for the benefit or advancement of such societies, subscriptions, or purposes having regard to the glory of God in the spiritual welfare of his creatures, as they in their discretion shall see fit;"[5] or for keeping the chimes of a church in repair;[6] or for payment of the singers;[7] or for keeping up an organ and paying the organist;[8] or for distributing Bibles and religious books and tracts;[9] or for a Sunday-school library;[10] or for the use of Catholic priests in or near London;[11] or to promote the knowledge of the Catholic religion among the poor and ignorant inhabitants of S.;[12] or for establishing a bishopric in America;[13] or "to a theological seminary for a permanent fund to be applied to the education of pious and indigent youth for the ministry, who adhere to the Westminster Confession of Faith;"[14] or for preaching a sermon on Ascension Day;[15] or to a church, to be laid out in bread for the poor;[16] or for the benefit of ministers of the gospel.[17]

§ 702. It is to be observed, that gifts to teach or propagate any

[1] Att'y-Gen. *v.* London, 1 Ves. Jr. 243; 3 Bro. Ch. 171.

[2] Bartlett *v.* King, 12 Mass. 537; Soc. for Propagating the Gospel *v.* Att'y-Gen., 3 Russ. 142; Fairbanks *v.* Lamson, 99 Mass. 533; see Bridges *v.* Pleasants, 4 Ired. Eq. 26.

[3] Att'y-Gen. *v.* Wallace, 7 B. Mon. 611; Burr *v.* Smith, 7 Vt. 241; Widmore *v.* Woodroffe, Amb. 636; Middleton *v.* Spicer, 1 Bro. Ch. 201.

[4] Going *v.* Emery, 16 Pick. 107; Powerscourt *v.* Powerscourt, 1 Moll. 616.

[5] Townsend *v.* Carus, 3 Hare, 267.

[6] Turner *v.* Ogden, 1 Cox, 316.

[7] Ibid.

[8] Att'y-Gen. *v.* Oakaver, 1 Ves. 535.

[9] Att'y-Gen. *v.* Stepney, 10 Ves. 22; Winslow *v.* Cummings, 3 Cush. 358; Bliss *v.* American Bible Society, 2 Allen, 334; Pickering *v.* Shotwell, 10 Barr, 32.

[10] Fairbanks *v.* Lamson, 99 Mass. 553.

[11] Att'y-Gen. *v.* Gladstone, 13 Sim. 7.

[12] West *v.* Shuttleworth, 2 My. & K. 684.

[13] Att'y-Gen. *v.* Bishop of Chester, 1 Bro. Ch. 444; Habershon *v.* Vardon, 7 Eng. L. & Eq. 228; 4 De G. & Sm. 467.

[14] McCord *v.* O'Chiltree, 8 Blackf. 15; Att'y-Gen. *v.* Lawes, 8 Hare, 32.

[15] Turner *v.* Ogden, 1 Cox, 316; Durour *v.* Motteux, 1 Ves. 320.

[16] Whitman *v.* Lex, 17 S. & R. 88.

[17] Att'y-Gen. *v.* Gladstone, 13 Sim. 7; Thornber *v.* Wilson, 3 Drew. 245; 4 Drew. 350; Att'y-Gen. *v.* Hickman, 2 Eq. Ca. Ab. 193; Att'y-Gen. *v.* Cock, 2 Ves. 273; Att'y-Gen. *v.* Lawes, 8 Hare, 32; Grieves *v.* Case, 4 Bro. Ch. 67; Weller *v.* Child, Amb. 524; Bishop Gore's Charity, 4 Dru. & War. 270.

faith or practice contrary to the established church of the kingdom, was for a long time illegal; and such gifts could not be sustained, as charities, for the purposes for which they were given.[1] Even now, gifts to aid in re-establishing the supremacy of the pope are contrary to public policy and void;[2] but gifts to dissenting societies, though their teaching is contrary to that of the established church, are now carried into effect as charitable.[3] At all times, gifts for the relief, comfort, and education of dissenters,[4] or Catholics,[5] or Jews,[6] not connected with the propagation of their faith, were considered charitable.[7]

§ 703. It is further to be remarked, that a gift to a priest or minister in his public office, to be used by him for such public, religious, and charitable purposes as he sees fit, will be held to be charitable: but it must be a gift to the donee in his official capacity, to be expended for public charitable purposes; for if it is a gift to the person, or individual in his private capacity, for his individual benefit and relief, it will not be charitable, though the individual is described by his official character.[8]

§ 704. The statute names the repair of bridges, ports, havens, causeways, sea-banks, and highways as charitable, and also the aid and ease of poor people in the payment of taxes: consequently, gifts for the general comfort, ease, and convenience of the people, rich as well as poor, are holden to be charitable; as to establish a bridge or lifeboat for a town;[9] or "for purposes conducing to the

[1] De Themmines *v.* De Bonneval, 5 Russ. 288; Da Costa *v.* De Pas, Amb. 228; 1 Dick. 258; Att'y-Gen. *v.* Baxter, 1 Vern. 248; 2 Vern. 105; 1 Eq. Ca. Ab. 96, pl. 9; Doe *v.* Hawthorn, 2 B. & Ald. 96; West *v.* Shuttleworth, 2 My. & K. 684; Briggs *v.* Hartly, 14 Jur. 683; *In re* Blundell, 30 Beav. 360.

[2] De Themmines *v.* De Bonneval, 5 Russ. 288.

[3] Att'y-Gen. *v.* Pearson, 3 Mer. 353; Att'y-Gen. *v.* Hickman, 2 Eq. Ca. Ab. 193; Shrewsbury *v.* Hornbury, 5 Hare, 406; Att'y-Gen. *v.* Lawes, 8 Hare, 32; Att'y-Gen. *v.* Cock, 2 Ves. 273; Att'y-Gen. *v.* Hickman, 2 Eq. Ca. Ab. 193.

[4] Att'y-Gen. *v.* Baxter, 1 Vern. 248; 2 Vern. 105; 1 Eq. Ca. Ab. 96; Att'y-Gen. *v.* Lawes, 8 Hare, 32; Weller *v.* Childs, Amb. 524; Bishop Gore's Charity, 4 Dru. & War. 270; Wellbeloved *v.* Jones, 1 Sim. & St. 40.

[5] West *v.* Shuttleworth, 5 My. & K. 684; Att'y-Gen. *v.* Gladstone, 13 Sim. 7.

[6] Straus *v.* Goldsmid, 8 Sim. 614.

[7] Ibid.

[8] Thornton *v.* Wilson, 3 Drew. 245; 4 Drew. 350, 357; Doe *v.* Aldridge, 4 T. R. 264; Doe *v.* Copestake, 6 East, 328; Morice *v.* Durham, 9 Ves. 399; 10 Ves. 522.

[9] Johnston *v.* Swan, 3 Mad. 437; Forbes *v.* Forbes, 23 Eng. L. & Eq. 335; Hampden *v.* Rice, 24 Conn. 350.

good of the county of W., and the parish of L. especially;"[1] for supplying water to the town of C. for the use of the inhabitants;[2] for the improvement of the town of Bolton,[3] and of Bath;[4] for charitable, beneficial, and public works at Decca in Bengal;[5] for the reduction of the national debt;[6] for erecting a town-house;[7] for planting and renewing shade trees in situations now exposed to the heat of the sun;[8] for the advantage and benefit of Great Britain;[9] for such purposes as the trustees may judge most for the benefit and ornament of the town.[10] Gifts to maintain a preaching minister, to build a sessions house; to rebuild St. Paul's Church; or to pave, light, cleanse, and improve a town,—are charitable;[11] so are gifts to discharge a tax on the commonalty;[12] or for a botanical garden for the public benefit;[13] or for an institution for studying and curing the diseases of beasts and birds useful to man;[14] or to the British museum for the collection and preservation of objects of science or art for the public improvement;[15] or to promote the public good by the encouragement of science and the useful arts;[16] or to purchase a fire-engine for a town;[17] or hose for a hose company;[18] or a gift to the Royal Geographical Society, or the Royal Humane Society;[19] or a grant of

[1] Att'y-Gen. *v.* Lonsdale, 1 Sim. 105.

[2] Jones *v.* Williams, Amb. 651.

[3] Att'y-Gen. *v.* Heelis, 2 Sim. & St. 67. [4] Howse *v.* Chapman, 4 Ves. 542.

[5] Mitford *v.* Reynolds, 1 Phil. 185.

[6] Ashton *v.* Langdale, 4 Eng. L. & Eq. 139; Newland *v.* Att'y-Gen., 3 Mer. 684; British Museum *v.* White, 2 Sim. & St. 596.

[7] Coggshall *v.* Pelton, 7 John. Ch. 292.

[8] Cresson's App., 30 Penn. St. 437.

[9] Nightingale *v.* Goulbourne, 5 Hare, 484; 2 Phil. 594.

[10] Feversham *v.* Ryder, 27 Eng. L. & Eq. 369.

[11] Att'y-Gen. *v.* Heelis, 2 S. & S. 67, 77; Howse *v.* Chapman, 4 Ves. 542; Duke, 109, 136; Eltham Parish *v.* Warreyn, Duke, 67; Collinson's Case, Hob. 136.

[12] Att'y-Gen. *v.* Bushby, 24 Beav. 290.

[13] Townley *v.* Bidwell, 6 Ves. 194.

[14] University of London *v.* Yarrow, 23 Beav. 159; 1 De G. & Jo. 72.

[15] British Museum *v.* White, 2 S. & S. 594; Beaumont *v.* Oliveira, L. R. 6 Eq. 534; L. R. 4 Ch. App., 309.

[16] Gort *v.* Att'y-Gen., 6 Dow. 136; Att'y-Gen. *v.* Andrews, 3 Ves. 633; American Academy *v.* Harvard Coll., 12 Gray, 594.

[17] Magill *v.* Brown, Brightly, 411.

[18] Thomas *v.* Ellmaker, 1 Parsons, Eq. 98.

[19] Beaumont *v.* Oliveira, L. R. 6 Eq. 534; L. R. 4 Ch. App., 309.

land for a pest-house for plague patients, though the plague had not appeared in England for one hundred and eighty years.[1]

§ 705. There are other and still more indefinite gifts, which have been held to be charitable within the letter and spirit of the statute; as gifts to benevolent and charitable purposes with a recommendation to apply them to domestic servants;[2] or "if there is any money left I desire it to be given in charity;"[3] or "to such charitable purposes as I shall name hereafter" (and none are named);[4] or to public and private charities;[5] or to dispose of the same in such charitable and benevolent purposes as one of the trustees shall direct;[6] or to be applied in aid of institutions for charitable and benevolent purposes, established or to be established in Edinburgh or vicinity;[7] or to be distributed in charity, either to private individuals or public institutions;[8] or for promoting charitable purposes as well of a public as a private nature;[9] or to such charitable purposes as V. shall appoint, V. dying in the testator's lifetime;[10] or "to the furtherance and promotion of the cause of piety and good morals; in aid of objects and purposes of benevolence or charity, public or private; to temperance, and for the education of deserving youth;"[11] or to religious and charitable institutions and purposes;[12] or to such charities as the executor shall deem most useful.[13] Gifts to be appropriated to the benefit of the Friends' Meeting are charitable;[14] or for the use of a lodge of Freemasons;[15] or to the American Peace Society to be expended in the

1 Att'y-Gen. v. Craven, 21 Beav. 392; Carne v. Long, 4 Jur. (N. S.) 474; 6 Jur. (N. S.) 639; 2 De G., F. & Jo. 75.

2 Miller v. Rowan, 5 Cl. & Fin. 99.

3 Legge v. Asgill, Turn. & Russ. 265 n.

4 Mills v. Farmer, 19 Ves. 482; 1 Mer. 55. Where the income was to be applied according to a statement appended, and there was no such statement, the court could not presume that the intent was charitable. Aston v. Wood, L. R. 6 Eq. 419.

5 Johnson v. Swan, 3 Mad. 437.

6 Jemmit v. Verrel, Amb. 585 n.

7 Hill v. Burns, 2 Wil. & Shaw, 80.

8 Horde v. Suffolk, 2 My. & K. 59.

9 Waldo v. Caley, 16 Ves. 206.

10 Moggridge v. Thackwell, 7 Ves. 39.

11 Saltonstall v. Sanders, 11 Allen, 454; Dolan v. Macdermot, L. R. 5 Eq. 60; Treat's App., 30 Conn. 113.

12 Baker v. Sutton, 1 Keen, 224.

13 Wells v. Doane, 3 Gray, 201.

14 Earle v. Wood, 8 Cush. 437; Dexter v. Gardner, 7 Allen, 245.

15 King v. Parker, 9 Cush. 71; Vander Volgen v. Yates, 3 Barb. 242; Duke v. Fuller, 9 N. H. 536. See Babb v. Reed, 5 Rawle, 151.

cause of peace;[1] or for the assistance of respectable Unitarian congregations;[2] or for the Universalist denomination;[3] or "for the preparation and circulation of books, newspapers, the delivery of speeches and lectures, and such other means as in the judgment of the trustees will create a public sentiment that will put an end to slavery in the United States;[4] or to assist fugitive slaves escaping from the slave-holding States;"[5] or to such charities and other public purposes as lawfully might be in the parish of T.;[6] or for the increase and encouragement of good servants;[7] or for the maintenance of a Shaker community.[8]

§ 706. It has been held, quite decidedly, that a trust to build a monument, tomb, or vault for the donor is not a charitable use;[9] in other cases, it has been held doubtful whether such trusts are charitable;[10] but it is now settled that a trust to build, maintain, and keep in repair tombs, vaults, and burying-grounds of the donors, their families or parishes, are so far charitable that they will be carried into effect.[11] A bequest of an annual sum for repairs upon a monument has been held good.[12] Such bequests will always be enforced as against the heir.[13]

§ 707. In all these cases, it is immaterial from what source the funds that constitute the trust are derived, whether from the bounty of individuals, the crown, the State, or legislature. If a trust is contemplated and endowed with funds from any source, for a general public purpose, it will be regulated and controlled by a court of equity, upon proceedings instituted before it.[14] But if the

[1] Tappan *v.* Deblois, 45 Me. 122.

[2] Shrewsbury *v.* Hornbury, 5 Hare, 406.

[3] North Adams Univer. Soc. *v.* Fitch, 8 Gray, 421.

[4] Jackson *v.* Phillips, 14 Allen, 558.

[5] Ibid.

[6] Dolan *v.* Macdermot, L. R. 5 Eq. 60.

[7] Loscombe *v.* Wintringham, 13 Beav. 87; 7 Eng. L. & Eq. 164; Reeve *v.* Attorney-General, 3 Hare, 191.

[8] Gass *v.* Wilhite, 2 Dana, 170.

[9] Mellick *v.* Asylum, Jacob. 180; Doe *v.* Pitcher, 6 Taunt. 359; Hoare *v.* Osborne, L. R. 1 Eq. 585.

[10] Mathews *v.* Masters, 1 P. Wms. 422, 423 n.; Durour *v.* Motteux, 1 Ves. 320; Willis *v.* Brown, 2 Jur. 987; Mitford *v.* Reynolds, 1 Phil. 185, 198; Adams *v.* Cole, 6 Beav. 353; Doe *v.* Pitcher, 3 M. & S. 410.

[11] Lloyd *v.* Lloyd, 10 Eng. L. & Eq. 139; 2 Sim. (N. S.) 255; Dexter *v.* Gardner, 7 Allen, 247; Swasey *v.* American Bible Soc., 57 Me. 527.

[12] Willis *v.* Brown, 2 Jur. 987.

[13] Gravenor *v.* Hallum, Amb. 643.

[14] Thomas *v.* Ellmaker, 1 Par. Eq. Ca. 98; Att'y-Gen. *v.* Shrewsbury, 6 Beav.

legislature, by general or special laws, establishes schools, hospitals, roads, harbors, and other public improvements, and appropriates the money therefor, and directs by a public law how such money shall be raised and expended, such works are not charities within the meaning of the law, and courts of equity have no jurisdiction to regulate and control them.[1]

§ 708. The cases, thus far enumerated as good charitable uses, serve to indicate what trusts come within the letter or equity of the statute. It does not follow, however, that American courts can enforce all bequests which may be called charities. The purpose of the gift may be charitable beyond a question; but the court, in the ordinary exercise of its judicial powers, may be unable to establish and administer it. For example, if a testator bequeaths a sum of money in trust for such charitable purpose as he shall name thereafter, and dies without naming the purpose,[2] it is plain that the testator had a charitable intent; but to establish and administer such a charity requires a power and jurisdiction that American courts do not possess; to wit, the power of completing the testator's will, and of naming the purposes to which the bequest shall be applied. This is a prerogative power which belongs to the sovereign power in the State, and courts of equity do not possess it, unless it is conferred upon them by statute. The same remarks apply to many of the cases hereafter enumerated, which were disallowed and set aside as charitable trusts. Many of the gifts were charitable within all the principles of the statute; but there was some indefiniteness in the application of the fund to the objects named, which the courts decided they had not the rightful power to control.

§ 709. Before proceeding to notice and enumerate the cases in which trusts have been held not to be charitable within the letter and equity of the statute, or which for other reasons have been set aside and disallowed, it is proper again to observe that courts look with favor upon all such donations, and endeavor to carry them into effect, if it can be done consistently with the rules of law. If the words of a gift are ambiguous or contradictory, they are so construed as to support the charity if possible. It is an estab-

220; Att'y-Gen. *v.* Eastlake, 11 Hare, 205; Att'y-Gen. *v.* Heelis, 2 S. & S. 76; Att'y-Gen. *v.* Brown, 1 Swans. 297; Hullman *v.* Honcomp, 5 Ohio St. 237.

[1] Att'y-Gen. *v.* Heelis, 2 S. & S. 77.

[2] Mills *v.* Farmer, 19 Ves. 482; 1 Mer. 55.

lished maxim of interpretation, that the court is bound to carry the gift into effect, if it can see a general charitable intention, consistent with the rules of law, even if the particular manner indicated by the donor is illegal or impracticable;[1] or as Lord Hardwicke said, "The bequest is not void, and there is no authority to construe it to be void, if by law it can possibly be made good;" or, in other words, "there is no authority to construe it to be void by law if it can possibly be made good.[2] But no forced construction will be adopted to uphold the gift.[3] If the fair meaning of the words may include a legal as well as an illegal application, the gift will be upheld, and restrained within the bounds of law; or if a word is used which has two meanings, one of which will effect, and the other defeat the purpose of the gift, the former will be adopted.[4] From the foregoing cases and principles, it will be seen that courts of chancery uphold and administer gifts where they are made to particular purposes which are charitable within the letter and spirit of the statute, or where they are made to charity generally, if there is a trustee with power to make them definite and certain. It will further be seen, that the word "charity" has obtained a signification in law, and that courts do not uphold or administer trusts for particular purposes which are not charitable within the meaning of the law; nor trusts expressed in general words, which do not come within the legal signification of the word "charity."

§ 710. In order that there may be a good trust for a charitable use, there must always be some public benefit open to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite, until they are selected or appointed to be the particular beneficiaries of the trust for the time being.

[1] Williams v. Williams, 4 Selden, 525; Martin v. Margham, 14 Sim. 230; Jackson v. Phillips, 14 Allen, 556; Bartlett v. King, 12 Mass. 543; Inglis v. Sailor's Snug Harbor, 3 Pet. 117, 118.

[2] Soresby v. Hollins, 9 Mod. 221; Amb. 211; 1 Coll. Jurid. 439; Att'y-Gen. v. Whitechurch, 3 Ves. 144; Curtis v. Hutton, 14 Ves. 539; Dent v. Allcroft, 30 Beav. 340; Feversham v. Ryder, 5 De G., M. & G. 353; Edwards v. Hall, 11 Hare, 12; 6 De G., M. & G. 89; Philpot v. St. George Hospital, 6 H. L. Ca. 338.

[3] Att'y-Gen. v. Williams, 2 Cox, 388; Tatham v. Drummond, 11 L. T. (N. S.) 325; 10 Jur. (N. S.) 1087.

[4] Whicker v. Hume, 14 Beav. 509; 1 De G., M. & G. 506; 7 H. L. Ca. 124; Saltonstall v. Sanders, 11 Allen, 455; Jackson v. Phillips, 14 Allen, 557.

Consequently a trust to establish a school which is not free, but the benefits of which are confined to particular individuals who are named in the will, is not a charitable trust, and will not be regulated by the court.[1] A trust for forming a museum in connection with the trustees of Shakspeare's house in Stratford, and for such other purposes as the executors should think fit,[2] is not charitable, because the benefit is confined to particular individuals, and also because the executor has the power to apply the funds to "other purposes," which may be any thing but charitable. A trust for the political restoration of the Jews to Jerusalem is not charitable in its nature;[3] and so a gift to secure the passage of laws granting women the right to vote and hold office, and the rights of men generally, has nothing of the idea of charity in it.[4] Money contributed by the members of a club to a common fund, to be applied to the relief and assistance of the particular members of the club when in sickness, want of employment, or other disability, is not a charitable fund to be controlled by a court of equity.[5] There is a distinction between a fund contributed by members of a club, society, association, or lodge, to be employed and disposed of among themselves as the members may at any time agree, and a gift conferred, as matter of bounty, upon such club, society, or lodge in trust to be distributed in charity. In the latter case, it is a charitable use.[6] A bequest to a corporation to enable it to keep a larger supply of corn in London for the market is not charitable;[7] and a devise to a corporation to distribute the rents among twenty-four persons named, as they may need assistance, is not charitable; but it gives a vested right to each of the *cestuis que trust* to seek redress in equity.[8]

§ 711. There are other cases where legacies are given in trust

[1] Blandford *v.* Fackerell, 4 Bro. Ch. 394; Att'y-Gen. *v.* Hewer, 2 Vern. 387. A school of art was said not to be charitable. Duke, 128.

[2] Thompson *v.* Shakespear, 1 John. 612; 6 Jur. (N. S.) 118, 281.

[3] Habershon *v.* Vardon, 7 Eng. L. & Eq. 228; 4 De G. & Sm. 467.

[4] Jackson *v.* Phillips, 14 Allen, 571.

[5] Babb *v.* Reed, 5 Rawle, 151; Att'y-Gen. *v.* Federal St. Meeting-house, 3 Gray, 44; Anon., 3 Atk. 277; Brenon's Estate, Brightly, 345.

[6] Duke *v.* Fuller, 9 N. H. 538; Vanden Volgen *v.* Yates, 3 Barb. Ch. 290; Thomas *v.* Ellmaker, 1 Par. Eq. 108; Penfield *v.* Sumner, 11 Vt. 226; Wright *v.* Lynn, 9 Barr, 433; Indianapolis *v.* Grand Master, 25 Ind. 518.

[7] Att'y-Gen. *v.* Haberdasher's Co., 1 My. & K. 420.

[8] Liley *v.* Hey, 1 Hare, 580.

for purposes that are clearly charitable; but these purposes are joined with words that authorize the trustees to expend the fund for general purposes which are not charitable. If the fund is not apportioned by the donor, the trustees may expend the whole for one purpose or another which is not charitable, and at the same time execute the exact power given them under the will. In such cases, courts cannot establish and administer the fund as charitable. For example, a gift for such charitable and *other purposes* as the executors might think fit cannot be sustained as charitable; for the executors have power by the will to apply the whole to purposes *other* than charitable.[1] So a gift to executors in trust to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons in such shares as they should think fit, was not sustained for the same reason.[2] So gifts in trust for such uses as the trustees see fit,[3] or to such persons as the trustees think fit,[4] have no element of charity in them that courts can administer. A gift in trust for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging works of general utility,[5] was not sustained. So a trust for benevolent purposes was not sustained, as benevolence may or may not be charitable in the law.[6] For the same reason where a bequest was made to the Bishop of Durham, in trust for such objects of benevolence and liberality as he should approve, the court held that the fund could not be administered as a charity, and ordered it to be paid over to the next of kin.[7] These cases all proceed upon the maxim, that a trust to be valid must be under the control of a court, and the trust must be of such a nature that its administration can be reviewed. A trust for charity must therefore be governed by some principles that are familiar to the court. These principles have grown up in relation to the words "charity," and a "charitable use," and to descriptions that come within them; but there are no rules that can be applied to mere benevolence, liberality, or generosity, or to any words that give a discretion and power to the trustees to apply the funds to any purposes within the whole range of human action.

[1] Ellis *v.* Selby, 1 M. & Cr. 286, 299; 7 Sim. 352.

[2] Vezey *v.* Jamson, 1 S. & S. 69.

[3] Fowler *v.* Garlike, 1 Russ. & My. 232; Nash *v.* Morley, 5 Beav. 182.

[4] Gibbs *v.* Ramsey, 2 Ves. & B. 295.

[5] Kendall *v.* Granger, 5 Beav. 300.

[6] James *v.* Allen, 3 Mer. 17; Norris *v.* Thompson, 4 C. E. Green, 311.

[7] Morice *v.* Bishop of Durham, 9 Ves. 399; 10 Ves. 522.

§ 712. In addition to the above cases which proceed upon clear and intelligible principles, are two cases which have given rise to much criticism and discussion. Ommanney *v.* Butcher[1] decided that a trust for "private charity" could not be administered in a court of equity. Williams *v.* Kershaw[2] determined that a trust for "benevolent, charitable, and religious purposes," was not a good charitable use within the letter or spirit of the statute. The objection to the first case is, that "private charity" refers to private almsgiving, or private relief of the poor; that the objects of such charity are uncertain and indefinite until selected by the trustees; that the distribution of alms and relief to the poor in such manner is no more personal than the relief of the individual poor must always be; that the trustees can be required to account for the distribution of the funds, and that they can be dealt with by the court for any bad faith or breach of the trust; in short that such a gift has all the elements of a good charitable use. The principal objection to the other decision is, that the word "benevolent," in the connection in which it was used, signified "charitable;" that, upon the most approved rules of interpretation applied to charitable bequests, the word should have had its meaning fixed by the context; and that, taking all together, a good charitable use was intended, and not a general, liberal, or benevolent use. Mr. Boyle examines and criticises these cases at great length, and concludes that they are not true expositions of the law.[3] In Massachusetts, a bequest was made in trust "in aid of objects and purposes of benevolence or charity, public or private." Mr. Justice Gray examined these cases with great care, and arrived at the conclusion that they were at least of doubtful authority in England, and that they certainly would not be followed in Massachusetts.[4] In New

[1] Ommanney *v.* Butcher, 1 Turn. & Russ. 260.

[2] Williams *v.* Kershaw, 5 Law Jur. (N. S.) Ch. 84, cited 1 Keen, 232; 1 My. & Cr. 293.

[3] Boyle on Charities, pp. 286–299.

[4] Saltonstall *v.* Sanders, 11 Allen, 462. In this case, Mr. Justice Gray says: "The decision which goes furthest to support the position of the plaintiffs as to the meaning of the words 'private charity' is that of Ommanney *v.* Butcher, Turn. & Russ. 260. There a testator, after legacies to certain individuals, and to various schools, hospitals, and other religious and charitable institutions of which he was a governor or trustee, added, 'In case there is any money remaining, I should wish it to be given in private charity.' Sir Thomas Plumer, M. R., held this last bequest too indefinite to be carried out, either by the sign-manual of the crown, or by the ordinary jurisdiction in chancery. The opinion does not show that degree of thought and research which characterizes most of the judg-

Jersey, a gift in trust to be distributed "to benevolent, religious, and charitable institutions," at the discretion of the wife of the

ments of that learned person. His statement that there was no case in which private charity had been acted upon by the court is inconsistent with the long line of authorities above quoted, not one of which is noticed in the opinion, except Legge *v.* Asgill; and no attempt is made to distinguish that case, although the direction there that any money left unemployed might 'be given in charity,' as Mr. Boyle remarks in his able and discriminating treatise, 'surely must be regarded as pointing quite as much, if not more, to private than to public charity.' Boyle on Charities, 300. Sir Thomas Plumer's expression, that 'the charities recognized by this court are public in their nature, they are such as the court can see to the execution of,' suggests the inference that he thought it necessary to have the funds distributed openly in the public view, or the court could not supervise the distribution. This inference is confirmed by his adding, 'assisting individuals in distress is private charity; but how can such a charity be executed by the court?' To which it may be answered, 'By requiring an account, as of any other trustee who is charged with neglect or breach of trust.' And the cases already cited show that Lord Hardwicke, Lord Eldon, Sir William Grant, and Sir John Leach upheld and executed charities for privately assisting indefinite numbers of individuals in distress. Sir Thomas Plumer says, 'In all cases the general principle is, that the trust must be of such a tangible nature as that the court can deal with it; when it is mixed up with general moral duty, it is not the subject of the jurisdiction of a court of justice.' But general moral duty, carried out in acts beneficial to an indefinite number or class of persons, is of the very essence of a charity; and, in the cases in which trusts have been set aside as too vague, it has been upon the ground that they might be applied to the benefit of particular individuals, to benefit whom was of no general or public advantage. If, as he says, 'private charity is in its nature indefinite,' it has the principal requisite of a public charity. This judgment of Sir Thomas Plumer, although countenanced by *obiter dicta* of Lord Cottenham near the beginning of his career as chancellor, in Williams *v.* Kershaw, 5 Law Jour. (N. S.) Ch. 86, and Ellis *v.* Selly, 1 Myl. & Cr. 293, cannot, in a court not bound by it as a precedent, outweigh all the other authorities.

"There is a species of organization, sometimes called a 'private charity,' which is not a public or general charity in the view of the Stat. of Eliz., or of a court of chancery; and that is an association for the mutual benefit of the contributors, and of no other persons. But such a case wants the essential element of indefiniteness in the immediate objects, if not that of gratuity in the contribution. Anon., 3 Atk. 277; Attorney-General *v.* Haberdashers' Co., 1 Myl. & K. 420; Carne *v.* Long, 2 De G., F. & J. 75; Attorney-General *v.* Federal St. Meeting-house, 3 Gray, 44–52. Upon no reasonable construction can a bequest to 'private charity,' still less one to 'charity public or private,' be brought within that class.

"The decisions of Lord Langdale, to which the plaintiffs have referred, were as follows: In one of them he held a bequest to executors to receive the interest half-yearly, 'and divide it among poor pious persons, male or female, old or infirm, as they see fit, not omitting large and sick families, if of good character,' to

testator, was declared not to be a good charitable use, and that the word "benevolent," in the collocation in which it was found in

be a valid charitable bequest for the poor. Nash *v.* Morley, 5 Beav. 177. In the other, of a bequest to trustees to be applied at their discretion, 'for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility,' Lord Langdale said that if the sentence had ended with the word 'individuals' it would have been a good charitable purpose; but he felt himself bound by the decisions to hold that the words 'general utility' (which do not occur in the will before us) were large enough to include purposes which were not charitable, and that the whole bequest was therefore void. Kendall *v.* Granger, 5 Beav. 300.

"In Ellis *v.* Selly, 7 Sim. 352; s. c. 1 Myl. & Cr. 286, the only point decided was, that a bequest in trust for 'charitable or other purposes,' as the trustee should think fit, was void. The correctness of that decision cannot be doubted; for the testator could hardly have expressed more clearly an intention to allow the fund to be applied to purposes which were not charitable, as well as to those which were. The decision of Sir John Leach, in Vezey *v.* Jamson, 1 Sim. & Stu. 69, against the validity of a gift in trust for 'such charitable or public purposes as the laws of the land would admit of, or to any person or persons,' and in such shares and manner as the trustees should think fit or as the laws admitted of, is to the same effect; and manifests no intention to overrule or qualify the cases in which he had upheld trusts for 'public or private charities,' or 'to be distributed in charity to private individuals or public institutions,' or for 'charitable and benevolent purposes.' Johnston *v.* Swann and Horde *v.* Earl of Suffolk, *ut supra;* Jemmit *v.* Verril, *infra,* and the passages quoted from Lord Lyndhurst's opinion in Mitford *v.* Reynolds, 1 Phil. 190, and from Tudor on Charitable Trusts (2d ed.), 223, go no further. Within the same class falls the decision of Vice-Chancellor Knight Bruce, that a direction that part of the testator's property should 'be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works,' part of the profits of which works he gave to members of his family, was void. Thompson *v.* Thompson, 1 Colly. R. 388, 392, 399. Others of the cases cited for the plaintiffs related to bequests in trust to be disposed of in the trustees' discretion, without any mention whatever of charities in the will. Such were Fowler *v.* Garlike, 1 Russ. & Myl. 232, and Stubbs *v.* Sargon, 2 Keen, 255; s. c. 3 Myl. & Cr. 507.

"We are therefore of opinion, that, upon principle and authority, a bequest for 'objects and purposes of charity, public or private,' is a valid charitable gift. The effect of the use of the word 'benevolence' in connection with the word 'charity' remains to be considered.

"The earliest case cited for the plaintiffs upon this point is that in which Sir William Grant and Lord Eldon, on appeal, held that a bequest to the Bishop of Durham in trust to be applied 'to such objects of benevolence and liberality as the Bishop of Durham, in his own discretion, should most approve of,' was too indefinite to be executed. Morice *v.* Bishop of Durham, 9 Ves. 399; s. c. 10 Ves. 521. But 'liberality' might include gifts to persons who were neither poor nor deserving, and in no sense legal or moral objects of charity. The word 'charity' was not used; and its absence was much relied on, Sir William Grant saying, 'The use of the word

that will, did not mean "charitable."[1] The word "benevolent" has often been construed by the court to mean the same thing as

"'charitable" seems to have been purposely avoided in this will, in order to leave the bishop the most unrestrained discretion.' 9 Ves. 404, 405; 10 Ves. 541. Sir William Grant afterwards held, that a bequest to trustees 'to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on,' fell within the same class. James v. Allen, 3 Mer. 17. But in that case again, the word 'charity' was not used. Lord Brougham subsequently defined the distinction upon which those cases turned, thus: 'If the intention be charity, the court will execute it, however vaguely the donor may have indicated his purpose. But mere purposes of a kind generally beneficial, as of those of benevolence or liberality, without specifying the objects who are to receive, and those objects not being the poor, the court will never attempt to execute.' Attorney-General v. Haberdashers' Co., 1 Myl. & K. 428.

"Vice-Chancellor Leach used 'general benevolence' as equivalent to charity. He held a bequest 'to the widows and orphans of the parish of Lindfield' to be a charitable gift for the poor widows and orphans of that parish, because it 'could not in its nature have proceeded from motives of personal bounty to particular individuals; it must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two classes who are within the scope of general benevolence.' Attorney-General v. Comber, 2 Sim. & Stu. 93. And he upheld a bequest to trustees to be applied and disposed of 'for such charitable and benevolent purposes' as one of them should direct and think proper. Jemmit v. Verril, Amb. 585, note.

"By far the strongest case in favor of the plaintiffs is that of Williams v. Kershaw, which is not to be found in any of the regular reports, but is reported by Mr. Beavan in 5 Law Jour. (N. S.) Ch. 84, and an abstract of it printed in 5 Clark & Fin. 111. In that case, a testator, after legacies for education, the poor, missionary societies, and dissenting ministers, gave the residue of his personal estate to trustees, to apply the income 'to and for such benevolent, charitable, and religious purposes as they in their discretion shall think most advantageous and beneficial.' Sir Christopher C. Pepys, M. R., considered himself bound by the cases of Morice v. Bishop of Durham, James v. Allen, and Ommanney v. Butcher, to hold that this would authorize the application of the income to benevolent purposes which were neither charitable nor religious, and was therefore void; and two months afterwards, having meanwhile become Lord Chancellor Cottenham, he referred to the decision with approval. Ellis v. Selby, 1 Myl. & Cr. 298.

"But that decision is directly opposed to the construction given to like words in earlier and later judgments of the House of Lords upon appeals from the courts of Scotland. In Hill v. Burns, 2 Wils. & Shaw, 80, a bequest was held

[1] Norris v. Thompson, 4 C. E. Green, 308.

"charitable" in the law, and trusts for benevolent or charitable purposes have been carried into effect.[1] In Massachusetts, the word "benevolence" has been so often used in the constitution of the State, and in so many general and private statutes as equivalent to, and synonymous with, the word "charity," that it has come to have that meaning in the law.[2]

§ 713. There is another class of trusts for charities that courts decline to sustain and administer, on the ground that they are *too* general, vague, and indefinite to be applied to any certain charitable use. This class is larger in America than in England, as the Lord Chancellor in the English chancery can exercise the prerogative of the crown in administering an indefinite trust; but American courts can exercise only the ordinary judicial powers of courts of equity. Even in England, Lord Chancellor Thurlow declined to sustain a trust to buy and distribute such books as

valid by which a testatrix appointed the residue of her estate 'to be applied by my said trustees in aid of the institutions for charitable and benevolent purposes, established or to be established in the city of Glasgow or neighborhood thereof; and that in such way and manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated, as to my said trustees shall seem proper; declaring, as I hereby expressly provide and declare, that they shall be the judges of the appropriation of the said residue for the purposes aforesaid.' That case was cited as authority by Lord Lyndhurst in Crichton *v.* Grierson, 3 Bligh, N. R. 434; s. c., 3 Wils. & Shaw, 341. In a later case, in which Williams *v.* Kershaw was cited, the House of Lords established a residuary bequest to trustees to be applied 'to such benevolent and charitable purposes as they think proper,' recommending them, if it should amount to £600, to hold the principal, and pay out the income annually 'to faithful domestic servants, settled in Glasgow or the neighborhood, who can produce testimonials of good character and morals from their masters and mistresses after ten years' service;' but if less than that amount the testator authorized his trustees 'to distribute the same to such charitable or benevolent purposes as they may think proper.' Miller *v.* Rowan, 5 Clark & Fin. 99; s. c., 2 Shaw & Macl. 866.

"It was indeed said, in the two cases last cited, that the law of England as to charitable bequests was more strict than the law of Scotland. But the decisions of the English courts since our revolution are of no binding authority in this court; and, upon such a question as the interpretation of the word 'benevolence,' as connected with 'charity,' of no peculiar weight, when opposed to the well-settled meaning of those words in our own law."

[1] Miller *v.* Rowan, 5 Cl. & Fin. 99; Jemmit *v.* Verril, Amb. 585 n.; Hill *v.* Burns, 2 Wils. & Shaw, 80; Saltonstall *v.* Sanders, 11 Allen, 465; Johnson *v.* Swan, 3 Mad. 457.

[2] Saltonstall *v.* Sanders, 11 Allen, 468, 470.

might have a tendency to promote the interest of virtue and religion and the happiness of mankind.[1] Where a testator directed his executors to pay over certain property for the benefit of the Methodist Episcopal Church in America, to be disposed of by the conference, or the different members composing the same, as they, in their godly wisdom, shall judge will be most expedient or beneficial for the increase or prosperity of the gospel, it was held that the bequest was void for uncertainty.[2] A devise to the annual conference of the Methodist Episcopal Church for the benefit of institutions of learning under the superintendence of said conference, and the missionary society of said church, and to be otherwise disposed of as the Tennessee annual conference may deem best in their wisdom, was held void; and an act of the legislature appointing trustees to receive the fund was held unconstitutional and void.[3] A bequest to be applied to home or foreign missions and poor saints was held void;[4] and so a direction to the trustees to expend any surplus income for the support of indigent pious young men, preparing for the ministry in New Haven, was held void.[5] If there were trustees in these cases ready and willing to receive the funds, and to execute the powers conferred by the testaments, and to select the objects of the trust and thus make them certain, and apply the funds to such objects, it is difficult to see why the courts could not have carried these trusts into effect without invoking any extraordinary powers.

§ 714. If the sum to be given to a charitable use be left blank or uncertain, the trust will fail; as where £6000 was given for a hospital to increase till it amounted to —— for supporting —— boys,[6] it was held to have failed. So if the original sum to be given is not specified;[7] and if a gross sum is given for charitable uses, and for other purposes which fail for illegality or indefiniteness, or for want of certainty in the sum to be applied to the charity,[8] the trust will fail. But where a sum certain

[1] Brown v. Yeall, 7 Ves. 50 n., 76; 9 Ves. 406; 10 Ves. 27, cited.

[2] Holland v. Peck, 2 Ired. Ch. 255.

[3] Green v. Allen, 5 Humph. 170.

[4] Bridges v. Pleasants, 4 Ired. Ch. 26.

[5] White v. Fisk, 22 Conn. 31.

[6] Ewen v. Bannerman, 2 Dow. & Cl. 74.

[7] Flint v. Warren, 15 Sim. 626; Second Cong. Soc. v. First Cong. Soc., 14 N. H. 315; Russell v. Jackson, 10 Hare, 204; Cox v. Bassett, 3 Ves. 155; Hartshorne v. Nichols, 26 Beav. 58.

[8] 1 Jarman on Wills, pp. 195, 196 (ed. 1861).

was given to a testator's relations, and to a charity, but the proportions were not named, the court applied the maxim that *equality is equity*, and divided the fund equally between the family and the charity.[1] Mr. Boyle contends, that, as the words in Williams *v.* Kershaw[2] were "for benevolent, charitable, and religious purposes," the fund should have been divided into three parts, as two of the purposes were good at any rate, even if "benevolent" did not mean "charitable," and two parts of the fund should have been applied to the valid objects, and the other part returned to the next of kin.[3] Where a bequest of £1000 was made to the Jews, Poor Mile End, and there were two charitable institutions for Jews at that place, as it was uncertain to which the bequest was intended, the court divided it equally.[4] Where a testator bequeathed a fund to trustees for erecting such monument to his memory as they saw fit, and in building an organ gallery to the church, and the trustees expended the whole sum upon the monument, the court held it to be a breach of the trust.[5] In all these cases, the intention of the testator, to be gathered from the whole will, should guide in the administration of the fund.[6] Where a testator devised a sum to the school society of the town of S., and directed that the society should annually appoint trustees to hold the fund, and there were two societies of the same name, the court ordered the trustees to be appointed by both societies.[7]

§ 715. If a gift is made for a purpose called charitable, it will not be upheld if it contravenes an express provision of law, or if it is for a purpose forbidden by public policy. In other words, courts

[1] Att'y-Gen. *v.* Doyley, 2 Eq. Ca. Ab. 194; 4 Vin. 485; 7 Ves. 78 n.; Moggridge *v.* Thackwell, 3 Bro. Ch. 517; 1 Ves. Jr. 464; 7 Ves. 38; Mills *v.* Farmer, 1 Mer. 55; 19 Ves. 483; Att'y-Gen. *v.* Bradley, 1 Eden, 482; Saulsbury *v.* Denton, 3 K. & J. 529; Longman *v.* Brown, 7 Ves. 124; Penny *v.* Turner, 2 Phil. 493; Tothill, 92, 95, 96.

[2] 5 L. Jur. (N. S.) Ch. 84; 5 Cl. & Fin. 111.

[3] Boyle on Charities, pp. 290–293; Hoare *v.* Osborne, L. R. 1 Eq. 585.

[4] Bennett *v.* Hayter, 2 Beav. 81; Waller *v.* Child, Amb. 524; Bishop Gore's Charity, 4 Dr. & War. 270; Simon *v.* Barker, 5 Russ. 112; Pieschel *v.* Paris, 2 S. & S. 384; Saulsbury *v.* Denton, 3 K. & J. 529.

[5] Adams *v.* Cole, 6 Beav. 353. See Down *v.* Warrall, 1 My. & K. 561.

[6] Harding *v.* Glyn, 1 Atk. 469; Cole *v.* Wade, 16 Ves. 44; Down *v.* Worrall, 1 My. & K. 561; Marlborough *v.* Godolphin, 2 Ves. 61; Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.

[7] First Cong. Soc. of Southington *v.* Atwater, 23 Conn. 56.

will not allow, or carry into effect, charitable donations which tend to a breach of the laws of the land. Thus a gift for procuring the discharge of persons confined under sentence for a breach of the criminal laws is void.[1] But a gift to aid fugitive slaves in escaping from slavery was not held illegal, on the ground that there were many ways in which it could be employed that would not be contrary to law.[2] In England, a gift to promote a religious faith, contrary to the statute, was void.[3] So all gifts to superstitious uses, so called, such as praying for the souls of the dead, maintaining *obit* lamps, and for other similar objects, in the struggle of the Reformation and afterwards were held to be against public policy and void. But in this country, where all religious denominations, doctrines, and forms of worship are tolerated, or rather protected, so long as the public peace is not disturbed, there can be in the law no such thing as a superstitious use.[4] The most common illustration of the rule, that courts will not uphold gifts for charitable purposes where such gifts contravene some law, is found in the numerous cases that have arisen under the English Statute of Mortmain, 9 George II., c. 36, and other similar statutes, which enacted that no lands, hereditaments, or money to be laid out in lands, shall be given for any religious or charitable purpose, except by deed executed in the presence of two witnesses twelve months before the death of the donor, and enrolled as therein directed. Under this statute, an immense number of charitable bequests have been defeated because they contravened the law. As we have no such statutes in America, the cases, and the rules established by them, are not stated. They only serve to illustrate other branches of the law in the United States, but have no direct practical application.[5] In New York and Pennsylvania, there are statutes upon the subject; and in New York a corporation cannot take lands in

[1] Thrupp *v.* Collett, 26 Beav. 125; Russell *v.* Jackson, 10 Hare, 204.

[2] Jackson *v.* Phillips, 14 Allen, 570.

[3] De Themmines *v.* De Bonnevall, 5 Russ. 288; Da Costa *v.* De Pas, Amb. 228; 2 Swan, 487 n.; 1 Dick. 258; Finley *v.* Hunter, 2 Strob. Eq. 218; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Lusk *v.* Lewis, 32 Miss. 297.

[4] Methodist Church *v.* Remington, 1 Watts, 218; Gass *v.* Wilhite, 2 Dana, 170; Magill *v.* Brown, Brightly, 373.

[5] Those who desire to see the learning and the cases upon the English statute of mortmain, may consult 1 Jarman on Wills, pp. 200–224; Tudor on Charities, 93, 101; 2 Redf. on Wills, pp. 508–516 (2d ed.).

trust for a charity for purposes other than those for which the corporation was chartered.[1]

§ 716. If the objects and purposes for which a trust is intended to be created is once determined to be charitable within the intent of the law, and if the trust contravenes no law or rule of public policy, courts are bound to give effect to it, if possible, in the exercise of their chancery powers. Of course, in carrying into effect public charities, rules suitable and adequate to the purpose must be applied. Where a testatrix gave £2000 to a trustee for the purpose of enabling him to give it to either branch of the testatrix's family, as he deemed most prudent, and the trustee died without disposing of the fund, the court said that the trust was too indefinite to be executed in favor of individuals.[2] But if a trust is created for the education of six orphans, to be selected from a certain district by the trustees, and the power can be executed by the trustees or their successors, there certainly is no difficulty in carrying the trust into execution. A trust created for the relief of the poor must, of course, be administered differently from a trust to pay the income to an individual, and the rules applicable to a charitable trust must, in the nature of things, differ from the rules governing a private trust. Both sets of rules are equally within the chancery powers of the American courts. A trust to give a sum of money to an individual named is certain; and so a trust to distribute a sum of money in charity to the poor of a certain district is certain, according to its own nature. To apply the same rules to subjects so diverse, would be to subvert the administration of law.

§ 717. In dealing with the subject of charities, courts, in many cases, seem to suppose that there is need of some extraordinary powers to carry them into effect: they have used expressions which indicate a supposition that their ordinary equity powers were not

[1] In Pennsylvania, Act 1855 provides that no real or personal property shall be given to charitable uses, except by deed or will attested by two credible or disinterested witnesses, at least one calendar month before the decease of the testator or grantor. See McLean *v.* Wade, 41 Penn. St. 266.

In New York, Act 1848, c. 319, provides that no person, having a wife, child, or parent, shall give more than one-fourth of his estate to charitable corporations, and no gift by will shall be valid unless executed at least two months before his death. Act of 1860 enabled a person to give one-half of his estate in certain cases. See Levy *v.* Levy, 33 N. Y. 114; Harris *v.* Slaght, 46 Barb. 470.

[2] Stubbs *v.* Sargon, 2 Keen, 255.

sufficient to give effect to many charitable bequests. The fact is, that the ordinary judicial powers of courts of equity, applied properly to the subject-matter, are sufficient to carry into effect almost all charitable bequests. The professional mind of America has labored over the doctrine of *cy près* as it is called, and has seemed to suppose that most charitable bequests cannot be carried out without the aid of some arbitrary power. It is proposed to examine the doctrine of *cy près*, and afterwards to state the rules in relation to certainty in the trustees for a charity, and in relation to certainty in the objects or beneficiaries of a charity.

§ 718. In studying the cases upon charitable uses, cited in the preceding sections, it is necessary to bear this suggestion constantly in mind: in England the Court of Chancery, or the Lord-Chancellor exercised a double function, — the one a judicial function, in adjudicating upon the legal questions arising upon charitable gifts; the other a ministerial function, as the keeper of the king's conscience. The general superintendence or administration of all charities was in the king as *parens patriæ*. The judicial part of this administration the king intrusted to the ordinary equity jurisdiction of the Court of Chancery. That part of the king's jurisdiction over charities which did not come within the ordinary equity jurisdiction of the court, the king exercised as part of his prerogative by his sign-manual. The chancellor often exercised this prerogative power of the king; and thus many charities have been established and administered by the chancellor and no very clear line has been drawn between those established by him exercising his ordinary judicial power in the Court of Chancery, and those established by the extraordinary or prerogative power of the crown exercised through the chancellor. Thus, if gifts were made for charitable uses that were illegal or contrary to public policy, or that were impossible to be carried into effect, the king, as general supervisor of charities, could devote them to such other charitable purposes, *cy près* the original gift, as he pleased. This he did through his prerogative power by his sign-manual, exercised by his chancellor personally, and not judicially. The instances in which such prerogative powers were exercised are reported in the books, together with judicial determinations, and thus much misapprehension and confusion have arisen. If gifts were made to establish a Jewish synagogue, to teach Judaism in opposition to Christianity, or to re-establish the supremacy of the pope, or to

educate children in the Catholic faith contrary to the statutes, or to promote dissent contrary to the acts of uniformity, or to keep alive superstitious customs and practices, the charities could not, of course, be carried into effect as given, and the king gave effect to them as charities, by his royal prerogative, *cy près* the original purposes.[1] This mode of procedure was founded upon this reasoning: if it appeared that the donor had a general charitable intent, and that the particular form of the charity was not of the substance of the charity, and that the donor did not contemplate that his heir or legal representatives should ever have the property, then the gift should not result or revert to the heir, but should be employed in some legal charity, as near to the original purpose as possible.[2] This seems strange to modern ideas; but if a donor has indicated a general charitable purpose, and has disinherited his heir to that extent, it is no greater outrage upon the donor to devote the gift to some similar charitable purpose, than it is to return it to the heir, and not employ it in charity at all; and so if a gift for an illegal charity is forfeited to the king, it is not a more objectionable exercise of the royal prerogative to devote that gift to some other charity, *cy près* the original purpose, than to expend it in private indulgence. But whether the prerogatives of the British crown were proper or improper, or whether they were wisely exercised or not in the cases named, is no question here. No such power exists in any American magistrates, judicial or ministerial, and none can exist until it is conferred by the legislature. The cases named are not law in America, and probably nothing like them will ever have a place in its jurisprudence.

§ 719. There is another large class of cases to which the same observations apply. Many of the cases heretofore cited were gifts to *charity* generally, or to *religion*, or to *education*, without indicating

[1] Att'y-Gen. *v.* Baxter, 1 Vern. 248; 1 Eq. Ca. Ab. 96, pl. 9; 2 Vern. 105; 7 Ves. 76; Whorwood *v.* University Coll., 1 Ves. 537; De Garcin *v.* Lawson, 4 Ves. 433 n.; Gates *v.* Jones, 2 Vern. 266; Smoot *v.* Prujean, 6 Ves. 560; Adams *v.* Lambert, 4 Co. 529; Att'y-Gen. *v.* Fishmongers' Co., 2 Beav. 151; 5 My. & Cr. 11; Crofts *v.* Evetts, Mo. 784; Att'y-Gen. *v.* Power, 1 Ball & B. 145; Cary *v.* Abbott, 7 Ves. 490; Att'y-Gen. *v.* Todd, 1 Keen, 803; Des Themmines *v.* De Bonneval, 5 Russ. 288; Briggs *v.* Hartley, 14 Jur. 683; Da Costa *v.* De Pas, 2 Swans. 487–490; 1 Amb. 288; 1 Dick. 258; Isaac *v.* Gompertz, 7 Ves. 61; Rex *v.* Partington, 1 Salk. 162, 334; Att'y-Gen. *v.* Vint, 3 De G. & Sm. 704.

[2] Cary *v.* Abbott, 7 Ves. 490.

when, where, or how the gifts were to be applied or used, and without the appointment of a trustee or other person to select the objects, or appropriate and apply the funds. Gifts have been made to such charitable purposes as should be named thereafter, and none were named; or to such uses as should be directed in a codicil or note in writing, and there was no codicil or note in writing; or to such school as should be appointed, and none was appointed.[1] In these and similar cases, it was assumed that the testator had impressed upon the fund a general charitable purpose for ever; that the fund should not go to the heir, or next of kin; and that the king should interpose his prerogative, and by his sign-manual appoint the use, charity, or school, and the manner in which the fund should be expended. The chancellor exercised this power of the king, and many instances of its exercise are in the books.[2] It is plain that to divide a fund, left to *charity* generally, among several asylums, hospitals, and almsgiving institutions, is not a judicial act at all: it is a mere ministerial act, to be regulated by no rules of law, but to be governed by the good sense and sound discretion of the person who makes the division or distribution. There is a wide distinction between a gift to *charity*, and a gift to a *trustee* to be by *him* applied to *charity*.[3] In the first case, the court has only to give the fund to charitable institutions, which is a ministerial or prerogative act; in the second case, the court has jurisdiction over the *trustee*, as it has over all trustees, to

[1] Mills *v.* Farmer, 1 Mer. 55; Moggridge *v.* Thackwell, 7 Ves. 36; Att'y-Gen. *v.* Syderfin, 1 Vern. 224; 2 Freem. 261; Att'y-Gen. *v.* Jackson, 11 Ves. 365; White *v.* White, 1 Bro. Ch. 12.

[2] Moggridge *v.* Thackwell, 7 Ves. 75; Att'y-Gen. *v.* Syderfin, 1 Vern. 224; Att'y-Gen. *v.* Mathews, 2 Lev. 167; Finch, 245; Paice *v.* Archbishop of Canterbury, 14 Ves. 372; Clifford *v.* Franers, Freem. 330.

[3] In Brown *v.* Yeall, 7 Ves. 50, the gift was for purchasing and distributing such books as may have a tendency to promote the interest of virtue and religion and the happiness of mankind; this charitable purpose to be carried into effect under such persons and according to such regulations as the High Court of Chancery should decree or order. Lord Thurlow, armed with the prerogative power of the king, declined to carry out this charity. It will be observed that the chancellor had the duty, by this will, of appointing trustees or other agents to carry out these purposes, and also of designating, by decree, such books as would promote the interest of virtue, religion, and the happiness of mankind. But if Mr. Bradley had given his money to a trustee with direction to him to purchase and distribute such books as are above named, the trustee might have been compelled to execute the trust in good faith, and according to a sound discretion within the meaning of the will.

see that he does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable. In the cases here supposed, if the crown or the chancellor directs a fund given to charity generally, and without the interposition of a trustee, to be divided or distributed to several institutions, there would seem to be no room for the doctrine called *cy près* as a judicial doctrine; for such a distribution is a mere arbitrary act, and can, in the nature of things, be governed by no general rules of law. The courts in America have generally declined, in the absence of legislative authority, to administer these indefinite gifts to charity or religion or education or public utility, unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons.[1]

§ 720. If a testator makes a bequest to trustees to be employed by them in charity, or to be distributed among such charitable institutions as they shall select, or to educate orphans to be selected by them, or generally to be devoted to such charities or purposes of education, religion, or morality as they in their judgment shall judge best, and the trustees have the funds in their possession, and are willing to act, courts can and will sustain the charities, and

[1] In 2 Redf. on Wills, p. 518, 2d ed., it is said, that "the distinction in England between a class of cases administered in the Court of Chancery by its ordinary powers, and that where the administration is referred by the king, as *parens patriæ*, to the chancellor, by virtue of the sign-manual, is not important in this country, since both classes of cases are here administered by the courts of chancery, under their ordinary jurisdiction, wherever a jurisdiction for the administration of charitable bequests has been created in equity either by express statute or by the adoption of the principles of the statute of Elizabeth." With due deference to so eminent, learned, and authoritative a jurist and writer, the proposition is respectfully denied. In all the cases, the courts have shown a most anxious solicitude to exercise only the ordinary powers of chancery jurisdiction, and not to trench upon any extraordinary or prerogative powers, in order that the governments of the several States may continue in practice, as they are in theory, governments of laws and not of men. It is true that our courts have made mistakes in tracing the line between ordinary jurisdiction and prerogative power, and in some cases they have declined to carry into effect trusts, which they might well have administered in the ordinary exercise of judicial powers, for fear of exceeding their jurisdiction; as in White *v.* Fisk, 22 Conn. 31. And again, they have occasionally stepped over the line, as where they have upheld an indefinite charity to the poor, no trustee being interposed. But generally, American courts have erred in not going so far as they might have gone in the exercise of their ordinary judicial powers. See this matter fully and ably discussed by Mr. Justice Gray in Jackson *v.* Phillips, 14 Allen, 576.

direct the trustees to carry out the will of the testator and exercise the powers confided to them.[1] Thus in Saltonstall *v.* Sanders,[2] where a testator bequeathed the residue of his estate to his executors in trust to hold and invest the same, and to appropriate the whole of the principal or income as they might think proper, in the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths; and gave the trustees, their survivors and successors, full power, discretion, and authority to expend the income or capital in such manner as in their judgment would best promote the objects named; and the trustees were in possession of the property, and were willing to perform the trust, if competent and legal for them to do so, — the court established the trust; and this seems to be the law as established by the authorities. In White *v.* Fisk[3] the bequest was "Any surplus income I direct my trustees to expend for the support of indigent pious young men, preparing for the ministry in New Haven," and the court declared that they had no power to execute the trust, or to make a selection of the young men to be supported and educated. It does not appear in this case whether the trustees were willing to perform the duties imposed upon them by the will; but if the trustees were willing to accept and execute the trust, there was no extraordinary jurisdiction for the court to exercise, and the trust might well have been upheld. The court was merely required to see that the trustees executed the powers within the true meaning and scope of the will, and if there was a breach of trust, to deal with it as they would with any other breach of trust. It may be said that it would be difficult to establish a breach of trust because of its uncertainty; but certainly it would not be difficult to determine whether the money was expended by the trustees in the support and education of young men studying for the ministry in New Haven. If the trustees named had died before the testator, or refused to act,

[1] Gibson *v.* McCall, 1 Rich. L. 174; Derby *v.* Derby, 4 R. I. 414; Going *v.* Emery, 16 Pick. 107; Wells *v.* Doane, 3 Gray, 201; Att'y-Gen. *v.* Pearce, 2 Atk. 87; Mitford *v.* Reynolds, 1 Phil. 185; Nightingale *v.* Goulbourn, 5 Hare, 484; 2 Phil. 594; Treat's App., 30 Conn. 113.

[2] Saltonstall *v.* Sanders, 11 Allen, 446.

[3] White *v.* Fisk, 22 Conn. 31. Perhaps this case is modified by Treat's App., 30 Conn. 113, where quite as indefinite a power of selection was given to trustees, and the trust was upheld.

another question would have arisen which was not discussed in the case.

§ 721. If a testator gives an estate to trustees to be applied to charity generally, or to such charitable purposes and institutions as they in their discretion shall judge best, and the trustees die before the testator, or make no selection of the objects or application of the fund, or decline to act, the court will be governed by the intent of the donor, to be gathered from the interpretation of the whole instrument, in determining the question whether they can appoint new trustees to exercise the power and discretion given to the trustees named in the will.[1] Thus in Lorings *v.* Marsh,[2] it was held that the discretion and power, given to the trustees named in the will, did not create a personal trust and confidence in them, because power and discretion were given to them and *their successors.* In Fontain *v.* Ravenel, the court held the power and discretion in the trustees, named in the will, to distribute the fund among charitable institutions, as they should think best, to be a personal trust and confidence in them, and, as they had died before the power could be executed, no others could execute it. As the trust was too indefinite to be executed by the court in its judicial capacity, and without calling in the aid of a prerogative power, it failed, and the fund went to the next of kin. This is, without question, the general law in relation to private trusts; and if this construction, applied to bequests for charitable uses, carries out the true intent of the donor, it is the best rule to follow. In applying such a rule to charitable gifts, courts would undoubtedly consider that the testator intended to make an effectual disposition of his property for the general purposes named, and that he intended the power to be exercised when the occasion arose, and not before. Thus, in the case of Fontain *v.* Ravenel,[3] the power was not to be exercised until the death of the testator's wife, and it is hardly to be supposed that the testator intended that the

[1] Att'y-Gen. *v.* Fletcher, 5 L. J. (N. S.) Ch. 75; Att'y-Gen. *v.* Boultbee, 2 Ves. Jr. 380; 3 Ves. 220; Att'y-Gen. *v.* Glegg, 1 Atk. 356.

[2] Lorings *v.* Marsh, 2 Clifford, 469; 6 Wallace, 337; Marsh *v.* Renton, 9 Allen, 132; Att'y-Gen. *v.* Gladstone, 13 Sim. 7; Reeve *v.* Att'y-Gen., 3 Hare, 191; Att'y-Gen. *v.* Glegg, 1 Atk. 356.

[3] Fontain *v.* Ravenel, 17 How. 382; Zeisweiss *v.* James, 63 Penn. St. 425; Att'y-Gen. *v.* Doyley, 4 Vin. 485; 2 Eq. Ca. Ab. 194; 7 Ves. 58 n.; 16 Ves. 47; Hibbard *v.* Lambe, Amb. 309; Cole *v.* Wade, 16 Ves. 45; Eaton *v.* Smith, 2 Beav. 236; Hill on Trustees, 211.

charitable purposes of his will should be defeated, if his wife happened to outlive his other trustees, a contingency which the court thought was unprovided for. On the contrary, it is not a violent construction to presume that the testator intended the power to be executed by the trustees in possession of the fund at the time the power could first be exercised, although the power did not in terms extend to them. Again, there are classes of indefinite trusts where the trustees must exercise a continuing power and discretion in the selection of objects of the charity. Successors to the trustees appointed in the will, though not named, would have the right to exercise the power from the clear intent of the testator.[1]

§ 722. If a donor makes a gift in trust for a particular charitable purpose, as to establish a particular school, hospital, asylum, or other charitable institution, and appoints no trustee; or the trustee appointed by him is incapable of taking the gift, and of acting in that behalf; or if the trustee dies before the testator, or declines to act; or if trustees are named or appointed who are not *in esse*, but are to come into existence thereafter, as by an act of incorporation,—courts of equity, in the exercise of their ordinary jurisdiction, can establish the charity; for it is their invariable practice not to allow a legal and valid trust to fail for want of a trustee. Therefore courts will appoint trustees in such cases to take up and carry out the clear purposes of the donor, and they will order the heir or legal representatives to hold the fund upon the declared trust, until trustees can be appointed to execute the trust as contemplated.[2] In exercising this jurisdiction, courts are called upon to exercise no extraordinary or prerogative powers. In the matters thus far discussed in the four preceding sections, there is no room for the *cy près* doctrine, as it is called, as a *judicial* doctrine. So far as courts have sustained charities, as courts, they have sustained them within the strict limits of ordinary chancery jurisdiction. Where illegal or indefinite charities, without trustees with powers to determine the definite purposes, have been sustained and carried into effect *cy près*, it has been done by the sovereign power as an act of prerogative and grace. Lord Eldon expressed the rule when he

[1] See Moore *v.* Moore, 4 Dana, 366; Down *v.* Worrall, 1 My. & K. 561; Green *v.* Allen, 5 Humph. 170; Griffin *v.* Graham, 1 Hawks, 96.

[2] Reeve *v.* Att'y-Gen., 3 Hare, 191; Inglis *v.* Sailors' Snug Harbor, 3 Peters, 99; Hayter *v.* Trego, 5 Russ. 113; Denyer *v.* Druce, Taml. 32.

said: "I have conversed with many persons upon it. I have had great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign-manual; but where the execution is to be by a trustee with general or some objects pointed out, then the court will take the administration of the trust." [1]

§ 723. But there are cases in which courts, in the strict discharge of their judicial duty, may well apply a fund devoted to a particular charity to a cognate purpose, to prevent a failure of justice, and to protect trustees in applying moneys in their hands to some useful purposes. Thus where there was a bequest to trustees to apply part of a fund to the redemption of British slaves in Turkey and Barbary; and, after a time, there ceased to be British slaves to redeem; and the fund had accumulated for many years; the court directed the trustees to apply the income to kindred charities, as nearly alike the original purpose as possible. The court indicated what was the probable *cy près* purpose of the testator in case of the failure of his original purpose.[2] *Cy près*, as applied to judicial acts, is a rule of construction and not of administration. The judgment of the court, in this last case, may be sustained as a judicial act, on the ground that the court construed such an application of the funds, upon the failure of the first purpose, to be within the probable intention of the donor. To say that a donor had no intention, under such circumstances, is to beg the question to be determined by construing the written instrument; for Lord Brougham has very forcibly said, that, if the construction shows that the fund was to be employed in the way pointed out for ever, *and in no other way*,[3] then all *cy près* construction must fail. And so it may be said, that, if the construction of the written instrument bears out the assertion that the donor had no intention, in case of the failure of his first purpose, the charity must fail on the failure of objects to which to apply it. In giving a construction to an instrument under such circumstances, courts consider the whole instrument in the light of all the circumstances, and conclude, from

[1] In Moggridge *v.* Thackwell, 7 Ves. 86; Paice *v.* Canterbury, 14 Ves. 372; Boyle, 241.

[2] Att'y-Gen. *v.* Ironmongers' Co., 2 Beav. 313; 1 Cr. & Phil. 508.

[3] Att'y-Gen. *v.* Ironmongers' Co., 2 My. & K. 576.

the will and all the facts, what was the probable intention of the testator. As in construing a deed under doubtful circumstances, it is construed most strongly against the grantor, and most favorably for the grantee, so courts lean to a construction in favor of charity, rather than against it. It may be said with truth, that the presumption of an intention in the donor is very slight; but the presumption on which action is based in many human affairs is very slight; and if the conclusion arrived at is unsatisfactory, it must be remembered that the construction of any written instrument many years after its date, and amid an entirely new order of things, and when many unexpected events have occurred, is always unsatisfactory, and the result arrived at is at best but a probable one.[1]

§ 724. So where bequests were made to trustees to be expended in the circulation of books, newspapers, the delivery of speeches, lectures, and such other means as in their judgment will create a public sentiment that will put an end to negro slavery in the United States, and for the benefit of fugitive slaves escaping from the slave-holding States;[2] and afterwards slavery was abolished, so that there could be no objects as specially designated in the will to which the charity could attach, the court, in construing the whole will, determined that it was the intention of the testator to establish a permanent charity for the benefit of the colored race, and that it was his intention, in case the special purposes named in the will should fail, that the funds should be applied to the nearest similar use. The court, in making this decision, disclaims the exercise of any prerogative power, and it founds its judgment upon the ordinary right and duty of courts to construe written instruments, and to carry the intention of parties to written instruments into effect when such intention can be discovered with reasonable probability. There can be no dispute as to the duty of the court to construe written instruments in order to

[1] See Popkin *v.* Sargent, 10 Cush. 327.

[2] Jackson *v.* Phillips, 14 Allen, 539. In this case, the only question (it being established that it was a good charity) was whether, the purpose of the testator being accomplished by the abolition of slavery, he intended that the fund, if any thing remained, should revert to his heirs. It is quite plain that he did not expect his purpose would be accomplished so soon, or till long after his gift was exhausted, as he provided for other gifts to be added to his own, and so far, it is plain that he did not contemplate or intend that his heirs should take any part of his gift.

ascertain the intention of the parties thereto, and there can be no question that it is the duty of courts to carry such intention into effect as near as may be when it can be done consistently with the law of the land. If, therefore, the purposes of a charity named in a will fail, and there are no objects to which to apply the funds, the court must read the whole will in order to determine whether the charitable intention of the testator has come to an end, and the fund must revert to the heir or personal representative; or whether a probable intention can be gathered from the instrument, that, in the event which has happened, the donor intended that his gift should be applied *cy près* the original purpose.[1]

[1] Att'y-Gen. *v.* Pyle, 1 Atk. 435; Att'y-Gen. *v.* Vint, 3 De G. & Sm. 705; Att'y-Gen. *v.* Lawes, 8 Hare, 32; Att'y-Gen. *v.* Green, 2 Bro. Ch. 492; Moggridge *v.* Thackwell, 3 Bro. Ch. 517; 1 Ves. Jr. 464; Att'y-Gen. *v.* Whitchurch, 3 Ves. 143; Att'y-Gen. *v.* Guise, 2 Vern. 166; Att'y-Gen. *v.* Baliol Coll. 9 Mod. 407; Att'y-Gen. *v.* Glasgow Coll., 2 Coll. 665; 1 H. L. Ca. 800.

The cases, both in England and this country, wherein the doctrine of *cy près*, in its several aspects, is considered and applied, are collected and explained by Mr. Justice Gray in his very elaborate opinion in Jackson *v.* Phillips, 14 Allen, 574–694, an abstract of which is here given.

In England, there are two distinct powers exercised by the chancellor in charity cases, under this doctrine of *cy près*, — the one derived from the royal prerogative, the other in the exercise of judicial authority. The disposition of a charity under the royal prerogative finds no counterpart in this country. The English cases under this head may be divided into two classes: (1.) Bequests to uses charitable, but illegal, as to a form of religion not tolerated. Att'y-Gen. *v.* Baxter, 1 Vern. 248; 2 Vern. 105; 1 Eq. Ca. Ab. 96; 7 Ves. 76; Da Costa *v.* De Pas, Amb. 228; 2 Swanst. 489, note; 1 Dick. 258; Rex *v.* Partington, 2 Salk. 162. See 4 Dane, Ab. 239; Gass *v.* Wilhite, 2 Dana, 176; Methodist Church *v.* Remington, 1 Watts, 226, and comments of Lord Thurlow in Moggridge *v.* Thackwell, 1 Ves. Jr. 469, and of Sir Wm. Grant in Cary *v.* Abbott, 7 Ves. 494. (2.) Gifts to charity generally, with no trustee interposed, and no appointment provided for, or the power of appointment delegated to a person who dies without exercising it. Boyle on Char. 238; Att'y-Gen. *v.* Syderfin, 1 Vern. 224; 1 Eq. Ca. Ab. 96; Att'y-Gen. *v.* Fletcher, 5 L. J. (N. S.) Ch. 75. See Moggridge *v.* Thackwell, *sup.*; Dwight's Argument in Rose Will Case, 272. This power, exercised by the English courts, does not exist in any court in this country. 4 Kent. 508, note; Fontain *v.* Ravenel, 17 How. 369, 384; Moore *v.* Moore, 4 Dana, 365; Whitman *v.* Lex, 17 S. & R. 93; Att'y-Gen. *v.* Jolly, 1 Rich. Eq. 108; Dickson *v.* Montgomery, 1 Swan, 348; Le Page *v.* MacNamara, 5 Iowa, 146; Bartlett *v.* King, 12 Mass. 545; Sohier *v.* Mass. Gen. Hosp., 3 Cush. 496.

But the application of the *cy près* doctrine, in the exercise of a general equity jurisdiction, stands upon very different grounds, and is favored in this country, as well as in England. It existed prior to the Stat. of 43 Eliz. Symm's Case,

§ 725. Where a fund was given to found a school for the education of the poor within a certain district, and by an act of Parlia-

Duke, 163; Reade *v.* Silles, Acta Canc. 559; 1 Spence, Eq. 588, note; Parker *v.* Brown, 1 Col. Pr. Ch. 81; 1 My. & K. 389; Dwight's Cha. Ca. 33; Parrot *v.* Pawlett, Cary, 47; Elmer *v.* Scott, Choice Ca. Ch. 155; Matthew *v.* Marow, and Hensman *v.* Hackney, Dwight's Cha. Ca. 65, 77; Tudor, 102, 103. For authorities on this point in this country, see Vidal *v.* Girard, 2 How. 194–196, and cases cited; Perrin *v.* Carey, 24 How. 501; Magill *v.* Brown, Brightly, 346; 2 Kent, 286–288, and note; Burbank *v.* Whitney, 24 Pick. 152; Preachers' Aid Soc. *v.* Rich, 45 Me. 559; Derby *v.* Derby, 4 R. I. 436; Urmey *v.* Wooden, 1 Ohio St. 160; Chambers *v.* St. Louis, 29 Mo. 543.

The discretion of the chancellor to depart from the express intent of the founder of a charity was not enlarged, but was intended rather to be limited, by Stat. of 43 Eliz. See statute, *ante*, § 692; also Lord Coke, 2 Inst. 712, and Duke, 11, 156, 169, 372, 619; Lord Eldon in Att'y-Gen. *v.* Brown, 1 Swanst. 291; 1 Wils. Ch. 354; Lord Redesdale in Att'y-Gen. *v.* Mayor of Dublin, 1 Bligh, N. R. 347, and Corporation of Ludlow *v.* Greenhouse, 1 Bligh, N. R. 48, 62; Lord Keeper Bridgman in Att'y-Gen. *v.* Newman, 1 Ch. Ca. 158; Sir Joseph Jekyll, in Eyre *v.* Shaftesbury, 2 P. Wms. 119; Lord Hardwicke, in Att'y-Gen. *v.* Middleton, 2 Ves. Sen. 328; Att'y-General *v.* Carroll, Acta Canc. 729; Dwight's Argument, 259–268; Tudor, 161, 162. In Massachusetts, Going *v.* Emery, 119; County Attorney *v.* May, 5 Cush. 338; Gen. Stat. c. 14, § 20.

A bequest to trustees for a charitable purpose, pointed out, lawful and valid at the testator's death, and no intention expressed to limit it to a particular institution or mode of application, and afterwards the scheme becomes impracticable or illegal, the fund, having once vested as a charity, is to be applied by a court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular intention — *cy près* — as possible. Att'y-Gen. *v.* Warrick, Dwight's Cha. Ca. 140; West, Ch. 60, 62; Bloomfield *v.* Stowe Market, Duke, 644; Att'y-Gen. *v.* Guise, 2 Vern. 166; Att'y-Gen. *v.* Baliol College, 9 Mod. 407; Att'y-Gen. *v.* Glasgow College, 2 Coll. 665–674; 1 H. L. Ca. 800–826; 2 Vern. 267, note; 3 Ves. 650, note; Att'y-Gen. *v.* Hicks, Highmore on Mortmain, 336–354; 3 Bro. Ch. 166, note; Att'y-Gen. *v.* Craven, 21 Beav. 392, 408; Att'y-Gen. *v.* Pyle, 1 Atk. 435; Att'y-Gen. *v.* Green, 2 Bro. Ch. 492; Att'y-Gen. *v.* Bishop of London, 3 Bro. Ch. 171; Moggridge *v.* Thackwell, 3 Bro. Ch. 517; 1 Ves. Jr. 464; Att'y-Gen. *v.* Glyn, 12 Sim. 84; Att'y-Gen. *v.* Lawes, 8 Hare, 32; Att'y-Gen. *v.* Vint, 3 De G. & Sm. 705; Att'y-Gen. *v.* Boultbee, 2 Ves. Jr. 387; Att'y-Gen. *v.* Whitchurch, 3 Ves. 143; Att'y-Gen. *v.* Minshull, 4 Ves. 14. Lord Eldon held a gift to a person, in trust for such charitable purposes as he should appoint, to be good. Moggridge *v.* Thackwell, 7 Ves. 36; 13 Ves. 416; Paice *v.* Archbishop of Canterbury, 14 Ves. 364; Mills *v.* Farmer, 19 Ves. 483; 1 Mer. 55. The American cases on this point are: Wells *v.* Doane, 3 Gray, 201; Fontain *v.* Ravenel, 17 How. 387; Moore *v.* Moore, 4 Dana, 336; Lorings *v.* Marsh, 6 Wallace, 337. Where the charitable gift never took effect at all for various reasons, see Jones *v.* Williams, Amb. 651; Att'y-Gen. *v.* Whitchurch, 3 Ves. 141; Smith *v.* Oliver, 11 Beav. 481; Att'y-Gen. *v.* Bishop of Oxford, 1

43

ment the whole district was taken for a dock, so that all the objects of the charity as specified in the will failed, the court directed the

Bro. Ch. 444, note, cited 2 Cox, Ch. 365; 2 Ves. Jr. 388, and 4 Ves. 431; Cherry *v.* Mott, 1 My. & Cr. 123; Marsh *v.* Means, 3 Jur. (N. S.) 790.

Cases upon this subject relating to redemption of captives and slaves, where the captives and slaves intended to be benefited no longer exist: Belton's Charities; Att'y-Gen. *v.* Ironmongers' Company, 3 My. & K. 576; 2 Beav. 313; Cr. & Phil. 208; 10 Cl. & Fin. 908; Lady Mico's Charity; Att'y-Gen. *v.* Gibson, 2 Beav. 317, note; also, Cr. & Phil. 226, 228, and Jackson *v.* Phillips, 14 Allen, 539.

There is no adjudication of this question in the Supreme Court of the United States. Bap. Assoc. *v.* Hart's Ex'rs, 4 Wheat. 1, and Wheeler *v.* Smith, 9 How. 79, arose under the law of Virginia. See 2 How. 192; 24 How. 501; 4 Met. 380; 12 Gray, 593; 2 Kent, Com. 287. In Fontain *v.* Ravenel, 17 How. 369, the executor died without appointing the disposition of the charity; and the court held it not to be within the equity jurisdiction of the court, and nothing could reach it but the prerogative power, which did not exist in the court. In Maryland and Virginia, the Stat. of 43 Eliz. has been expressly repealed, and charities are treated as other trusts. Dashiell *v.* Att'y-Gen. 5 H. & J. 392; Gallego *v.* Att'y-Gen., 3 Leigh, 450; and so in New York the Court has finally decided. Bascom *v.* Albertson, 34 N. Y. 584. In North Carolina, there is some conflict; but the view of Maryland and Virginia is now adopted. Griffin *v.* Graham, 1 Hawks, 96; McAuley *v.* Wilson, 1 Dev. Eq. 276; Holland *v.* Peck, 2 Ired. Eq. 255. In Alabama, see Carter *v.* Balfour, 19 Ala. 830. On the other hand, in Kentucky, the courts sustain the distinction between the prerogative power and the equity jurisdiction. Moore *v.* Moore, 4 Dana, 366; Gass *v.* Wilhite, 2 Dana, 177; Curling *v.* Curling, 8 Dana, 38. In Pennsylvania, the power exercised under the sign-manual does not exist. Methodist Church *v.* Remington, 1 Watts, 226, and Witman *v.* Lex, 17 S. & R. 93; but in Philadelphia *v.* Girard, 45 Penn. 27, the court sustains the *cy-près* doctrine, when clearly within the equity power of the court. See Stat. in Penn. 1855. So in South Carolina and Illinois. Att'y-Gen. *v.* Jolly, 1 Rich. Eq. 99; 2 Strob. Eq. 395; Gilman *v.* Hamilton, 16 Ill. 231. In all the New England States, except Connecticut, the doctrine of *cy près* as a judicial power has been countenanced, or left an open question. Burr *v.* Smith, 7 Vt. 287; Sec. Cong. Soc. *v.* First Cong. Soc., 14 N. H. 330; Brown *v.* Concord, 33 N. H. 296; Derby *v.* Derby, 4 R. I. 439; Tappan *v.* Deblois, 45 Me. 131; Howard *v.* Amer. Peace Soc., 49 Me. 302; Treat's App., 30 Conn. 113. See also 2 Red. on Wills, 815, note; McCord *v.* Ochiltree, 8 Black. 15; Beall *v.* Fox, 4 Ga. 427; Chambers *v.* St. Louis, 29 Mo. 592; Lepage *v.* McNamara, 5 Iowa, 146; McIntyre *v.* Lanesville, 17 Ohio St. 352.

In Massachusetts, the Stat. of 43 Eliz. has always been considered part of the common law. 4 Dane, Ab. 6, 239; Earle *v.* Wood, 8 Cush. 445; Anc. Chart. 52; Drury *v.* Natick, 10 Allen, 180; Odell *v.* Odell, 10 Allen, 1, 6; Dexter *v.* Gardner, 7 Allen, 243; Burbank *v.* Whitney, 24 Pick. 146; Bartlett *v.* Nye, 4 Met. 378; Washburn *v.* Sewall, 9 Met. 280; Univ. Soc. *v.* Fitch, 8 Gray, 421;

funds to be applied under a scheme *cy près* the original purpose, on the ground that such must have been the intention of the donor.[1] So where property is given in trust, and sums certain are directed to be paid out of the income to several different charitable purposes, and one of them fails, the circumstance that the donor has named other charities for other parts of the income is a circumstance to be used in the construction of the instrument, to determine whether the donor intended that, in case of the failure of one purpose, the whole fund should be applied to the others; but such circumstance, though of importance, is not always controlling[2] in the construction. So where property is given in trust, and certain sums from the income are devoted to separate charitable purposes, in such manner as to exhaust the whole income at the time when the property was first given to charity, and afterwards the income increases, so that there is a surplus not appropriated to any charity named, the court must resort to a construction of the instrument to determine what use to make of the surplus in accordance with the probable intention of the donor. No general rule can be laid down, but each case must depend upon the partic-

Wells *v.* Doane, 3 Gray, 201; Saltonstall *v.* Sanders, 11 Allen, 446, and Winslow *v.* Trowbridge, therein cited; Harvard Coll. *v.* Soc. for Promoting Theol. Educ., 3 Gray, 280; Baker *v.* Smith, 13 Met. 34; Trustees of Smith's Char. *v.* Northampton, 10 Allen, 498; Winslow *v.* Cummings, 3 Cush. 358; Bliss *v.* Amer. Bible Soc., 2 Allen, 334; Amer. Acad. *v.* Harvard Coll., 12 Gray, 582. In this last case, the decision was by Chief Justice Shaw; and the same principle was recognized or assumed in 4 Dane, Ab. 242, 243, and Sanderson *v.* White, 18 Pick. 333, and cases cited; 13 Met. 41; 3 Gray, 282, 298; 10 Allen, 501, 502.

There is a class of cases where the gift is distinctly limited to particular persons or establishments, and upon a change of circumstances the doctrine of *cy près* does not apply. Russell *v.* Kellett, 3 Sm. & Gif. 264; Clark *v.* Taylor, 1 Dr. 642; Incorp. Soc. *v.* Price, 1 Jon. & Lat. 498; 7 Ir. Eq. 260; *In re* Clergy Soc., 2 K. & J. 615; Marsh *v.* Att'y-Gen., 2 J. & H. 61; Winslow *v.* Cummings, 3 Cush. 358; Bliss *v.* Amer. Bible Soc., 2 Allen, 334; Easterbrooks *v.* Tillinghast, 5 Gray, 17; Att'y-Gen. *v.* Columbine, Boyle, Char. 204, 205; Potter *v.* Thurston, 7 R. I. 25; Dexter *v.* Gardner, 7 Allen, 243.

[1] Att'y-Gen. *v.* Glyn, 12 Sim. 84; Att'y-Gen. *v.* London, 3 Bro. Ch. 171; 1 Ves. Jr. 243; Att'y-Gen. *v.* Craven, 21 Beav. 392; Att'y-Gen. *v.* Boultbee, 2 Ves. Jr. 380; 3 Ves. 220; Att'y-Gen. *v.* Hicks, High. on Mort. 336–354; *In re* St. John's Church, 3 Ir. Eq. 335.

[2] Att'y-Gen. *v.* Ironmongers' Co., 2 Beav. 313; 1 Cr. & Ph. 308; 3 Bro. Ch. 166 n.; Att'y-Gen. *v.* Llandaff, 2 My. & K. 586, cited Mills *v.* Farmer, 19 Ves. 483; Martin *v.* Margham, 14 Sim. 230; Loscombe *v.* Winteringham, 13 Beav. 87; Coldwell *v.* Home, 2 Sm. & Gif. 31; Att'y-Gen. *v.* Lawes, 8 Hare, 32.

ular instrument and the facts. Thus, sometimes the money will be applied to increase the number of charitable objects, sometimes to increase the amount to be paid to the objects named, sometimes to founding new charities *cy prè s* the others named in the will, and sometimes the whole increase will go to one particular object of the testator's bounty.[1]

§ 726. It is further to be observed, that if the object of the testator's bounty is not a public benefit or charity, but some supposed private benefit to himself or his own soul, even the prerogative of the crown will not be interposed to apply such a gift to another purpose; but the bequest will fall into the residue.[2] So if it appears, from the construction of the whole instrument, that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift *cy prè s* the original purpose. If, therefore, it appears that the testator had but one particular object in mind, as to build a church at W., and his purpose cannot be carried out, the gift must go to the next of kin.[3] And if the gift cannot vest in the first

[1] Att'y-Gen. *v.* Minshull, 4 Ves. 11; Att'y-Gen. *v.* Coopers' Co., 19 Ves. 187; *Ex parte* Jortin, 7 Ves. 340; Att'y-Gen. *v.* Galway, 1 Beav. 298; 1 Moll. 95; Anon., 2 J. & W. 320, cited Att'y-Gen. *v.* Rochester, 5 De G., M. & G. 797; Ashton's Char., 27 Beav. 115; Att'y-Gen. *v.* Ironmongers' Co., 10 Cl. & Fin. 908; Hereford *v.* Adams, 7 Ves. 324; Wilkinson *v.* Malin, 2 Cr. & Jer. 636; Att'y-Gen. *v.* Bovill, 1 Phil. 762; Att'y-Gen. *v.* Drapers' Co., 2 Beav. 508; Att'y-Gen. *v.* Coopers' Co., 3 Beav. 29; Thetford School, 8 Rep. 130; Att'y-Gen. *v.* Skinners' Co., 2 Russ. 407; Mercers' Co. *v.* Att'y-Gen., 2 Bligh, (N. S.) 165; Att'y-Gen. *v.* Bristol, 2 J. & W. 294; Att'y-Gen. *v.* Southmalton, 14 Beav. 357; 27 Eng. L. & Eq. 17; Att'y-Gen. *v.* Gascoigne, 2 My. & K. 647; Att'y-Gen. *v.* Cordwainers' Co., 3 My. & K. 534; Att'y-Gen. *v.* Master of Catherine Hall, Jacob, 381; Att'y-Gen. *v.* Winson, 6 Jur. (N. S.) 833; Att'y-Gen. *v.* Christ Church, Jacob, 474; Att'y-Gen. *v.* Wisbert, 6 Jur. 655; Att'y-Gen. *v.* Marchant, 12 Jur. 957; L. R. 3 Eq. 424; Att'y-Gen. *v.* Trinity Church, 9 Allen, 422; Att'y-Gen. *v.* Fishmongers' Co., 2 Beav. 151; 5 My. & Cr. 11; Att'y-Gen. *v.* Guise, 2 Vern. 166; Att'y-Gen. *v.* Baliol Coll., 9 Mod. 407; Att'y-Gen. *v.* Glasgow Coll., 2 Coll. 665; 1 H. L. Ca. 800; Att'y-Gen. *v.* Dixie, 2 My. & K. 342; Att'y-Gen. *v.* Haberdashers' Co., 3 Russ. 530.

[2] Cherry *v.* Mott, 1 My. & Cr. 123; Clark *v.* Taylor, 1 Dr. 642; Att'y-Gen. *v.* Oxford, 1 Bro. Ch. 444 n.; Russell *v.* Kellett, 3 Sm. & Gif. 264; West *v.* Shuttleworth, 2 My. & K. 684; Att'y-Gen. *v.* Oxford, 4 Ves. 432; Att'y-Gen. *v.* Goulding, 2 Bro. Ch. 428.

[3] McAuley *v.* Wilson, 1 Dev. Ch. 276; Att'y-Gen. *v.* Hurst, 2 Cox, 354; Corbyn *v.* French, 4 Ves. 419; De Garcin *v.* Lawson, 4 Ves. 433, cited; De Themmines *v.* De Bonnevall, 5 Russ. 288; Att'y-Gen. *v.* Jolly, 2 Strob. 379.

instance in the donees, for the reason that no such donees can be found, the court cannot appoint other donees *cy près*.[1]

§ 727. From this review of the law it appears that the object of all the rules upon this subject is to ascertain and carry out, as nearly as may be, the true intention of the donor. As thus explained, the doctrine of *cy près* is only a liberal rule of construction to ascertain intention. The intention of the donor is the point steadily aimed at by all courts. Any arbitrary rule, that substitutes the arbitrary conjectures of a court for the intention of the donor, would be an outrage in a country governed by established laws; so, of course, any rule that failed to carry out the intention of a donor, when such intention was consistent with the law, would be a defect in the laws, that would require some remedy. It is proper to say, that the crown, in the exercise of its prerogative, always professes to be governed by the intention of the donor, and where such intention fails, the bequest is allowed to revert to the heir; though it is difficult to understand how an intention to aid a hospital for foundlings could be deduced from a declared intention to build a Jewish synagogue. From a few grotesque cases like this, discredit has been thrown upon the whole doctrine of *cy près*. The difference between the crown and the court is this: the court is governed by known judicial rules of interpretation; the crown is governed by its own good will and pleasure in deducing or imputing such intentions as it sees fit.

§ 728. When the *cy-près* doctrine is reduced to its elements, it becomes a very simple judicial rule of construction; and, as such, courts in all the States can, and do apply it without usurping any prerogative powers.[2] The same rule may be, and is applied in a great variety of cases. If a testator makes a gift to trustees in trust to invest the fund in United States bonds and pay the income to his wife, and there are no bonds by reason of the payment of the public debt, would the trust therefore fail and the gift revert to his heirs, or would the court say that the trust for the wife being

[1] Carter *v.* Balfour, 19 Ala. 814; Marsh *v.* Means, 3 Jur. (N. S.) 790; Att'y-Gen. *v.* Power, 1 Ball & B. 145.

[2] Dickson *v.* Montgomery, 1 Swan. 348; Jackson *v.* Phillips, 14 Allen, 539; Att'y-Gen. *v.* Wallace, 7 B. Mon. 611; Philadelphia *v.* Girard, 45 Penn. St. 27; Gilman *v.* Hamilton, 16 Ill. 231; Att'y-Gen. *v.* Jolly, 1 Rich. Eq. 99; 2 Strob. Eq. 395; Moore *v.* Moore, 4 Dana, 366; Gass *v.* Wilhite, 2 Dana, 177; Curling *v.* Curling, 8 Dana, 38. In Pennsylvania, the statute of 1855 now confers full power on the court to act in all cases. *Ante*, § 376.

the principal intention of the bequest, the particular manner of the investment of the funds is incidental, and that, the particular direction of the will having failed, an investment will be ordered *cy près* the original direction of the will? So if a fund is given in trust for a charity, with a direction to accumulate beyond the legal period, or with any other illegal or impossible direction as to the incidental management of the fund, the court will direct a management, that is legal and possible, *cy près* the original direction; and this on the ground that the donor did not intend his charity to fail because one of the incidental directions could not be carried out.[1]

§ 729. With these views in mind, it may now be said that a bequest for charity, generally; or to such persons in trust as shall be named thereafter, and none are named;[2] or if a fund is given for such charitable uses as shall be directed by a codicil or note in writing, and there are no such papers to be found;[3] or if a trust is created in a will for a school to be thereafter named, and none is named;[4] or to the poor generally; or to charity generally with no trustees appointed;[5] or to the advancement of religion;[6] or to such uses as the executor shall appoint, and the executor's appointment is revoked, or the executor renounces probate,[7] or refuses to appoint;[8] or if a gift is made for an object which has no existence,[9] or which is void in law,[10] or is impossible before the administration of

[1] Where the courts have said that the *cy près* doctrine did not prevail in this country, the cases have generally been of such a character that probably the prerogative power rather than the judicial power of construction was intended to be denied. Methodist Church *v.* Remington, 1 Watts, 226; Witman *v.* Lex, 17 S. & R. 93.

[2] Mills *v.* Farmer, 1 Mer. 55, 96; Moggridge *v.* Thackwell, 7 Ves. 36.

[3] Ibid.; Att'y-Gen. *v.* Syderfin, 1 Vern. 224; 2 Freem. 261; Cook *v.* Dunkenfield, 2 Atk. 56, 567; Commissioners *v.* Sullivan, 1 Dru. & War. 501.

[4] Ibid. Att'y-Gen. *v.* Syderfin, *ut supra.*

[5] Att'y-Gen. *v.* Mathews, 2 Lev. 167; Finch, 245; Att'y-Gen. *v.* Rance, Amb. 422; Clifford *v.* Francis, Freem. 330; Att'y-Gen. *v.* Herrick, Amb. 712.

[6] Powerscourt *v.* Powerscourt, 1 Mol. 616.

[7] White *v.* White, 1 Bro. Ch. 12; Att'y-Gen. *v.* Fletcher, 5 L. J. (N. S.) Ch. 75.

[8] Att'y-Gen. *v.* Boultbee, 2 Ves. Jr. 380; 3 Ves. 220.

[9] Att'y-Gen. *v.* London, 3 Bro. Ch. 171; 1 Ves. Jr. 143; Loscombe *v.* Wentringham, 13 Beav. 87; Att'y-Gen. *v.* Oglander, 1 Bro. Ch. 166.

[10] Att'y-Gen. *v.* Whorwood, 1 Ves. 534; Da Costa *v.* De Pas, Amb. 228; Att'y-Gen. *v.* Vint, 3 De G. & Sm. 704; Cary *v.* Abbott, 7 Ves. 490; Att'y-Gen. *v.* Goulding, 2 Bro. Ch. 428.

the charity begins;[1] or giving to an uncertain charity; or to trustees who refuse to accept and exercise the discretion, and there is no authority in the successors to exercise the power;[2] or to a particular charity by a description so uncertain that it is wholly uncertain what charity is intended;[3] or where the sums or the charities are wholly uncertain,[4]—in all these cases, courts in America could not interfere to establish the charities, appoint trustees, or decree a scheme by which the funds should be expended. Some prerogative power is necessary to give effect to such inchoate, imperfect, or illegal bequests. Courts in England do not profess to administer them in their judicial capacity,[5] and the courts in America, with a few exceptions, have declined to act in such cases.

§ 730. It is well settled, that a devise for a charitable use to church-wardens, although not a corporation capable in law of holding and transmitting property, will be sustained;[6] and so a devise to certain officers or their successors in office, or, if they are incapable of executing the trust, then to a corporation to be formed for the purpose, was held by the Supreme Court of the United States, to be a good devise and capable of being carried into effect.[7] A gift to a corporation by a misnomer is good for a charitable purpose, if the corporation can be identified;[8] gifts in trust to voluntary associations for charitable purposes have been upheld,[9]

[1] Att'y-Gen. *v.* Guise, 2 Vern. 266; Heyter *v.* Trego, 5 Russ. 113; Att'y-Gen. *v.* Ironmongers' Co., Cr. & Phil. 208; Cl. & Fin. 908; Att'y-Gen. *v.* Glyn, 12 Sim. 84; Martin *v.* Margham, 14 Sim. 230; Incorporated Soc. *v.* Price, 1 J. & Lat. 498.

[2] Att'y-Gen. *v.* Andrew, 3 Ves. 633; Denyer *v.* Druce, Taml. 32; Reeve *v.* Att'y-Gen., 3 Hare, 191; Fontain *v.* Ravenel, 17 How. 382; Att'y-Gen. *v.* Jackson, 11 Ves. 365.

[3] Simon *v.* Barker, 5 Russ. 112; Bennet *v.* Hayter, 2 Beav. 81.

[4] Pieschel *v.* Paris, 2 S. & S. 384; Hartshorne *v.* Nicholson, 26 Beav. 58.

[5] 1 Jarman on Wills, p. 224 (ed. 1861).

[6] Att'y-Gen. *v.* Oglander, 3 Bro. Ch. 166; Att'y-Gen. *v.* Green, 2 Bro. Ch. 492; Att'y-Gen. *v.* Boultbee, 2 Ves. Jr. 380; Frier *v.* Peacock, Finch, 245; Duke, 355; Att'y-Gen. *v.* Wansay, 15 Ves. 232.

[7] Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99; White *v.* White, 1 Bro. Ch. 12; Att'y-Gen. *v.* Downing, Amb. 550; Att'y-Gen. *v.* Bowyer, 3 Ves. 714.

[8] Tucker *v.* Seaman's Aid Soc., 7 Met. 188; Winslow *v.* Cummings, 3 Cush. 359; Minot *v.* Boston Asylum, 7 Met. 417; Anon., 1 Ch. Ca. 267; Att'y-Gen. *v.* Platt, Finch, 221; Hornbeck *v.* American Bible Soc., 2 Sandf. Ch. 183; Chapin *v.* School Dis., 35 N. H. 445; Tappan *v.* Deblois, 45 Me. 122.

[9] Duke *v.* Fuller, 9 N. H. 535; Volgen *v.* Yates, 2 Barb. Ch. 290; Burr *v.*

and so have gifts to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations.[1] These bodies, or *quasi* corporations, have been considered so far under the control of a court of equity that they would be compelled to execute the duties of the trust imposed upon them, and could be dealt with for a breach. But a gift to a corporation that may not be incorporated within the time limited for the vesting of estates, or to a corporation to come into existence that cannot be incorporated under the laws of a State, will fail.[2]

§ 731. If a testator creates a trust for a particular charitable purpose, as for a school, hospital, almshouse, church, or other institution, and points out all the details, so that there is certainty in the purposes and objects of the charity, and appoints no trustees, or if the trustees fail for any reason, courts will appoint other trustees, for such is the plain intention of the donor; and it is a maxim of courts never to allow a certain and valid trust to fail for want of a trustee. In such cases, the courts say that there is no ground to suppose that the diseretion of any particular trustee has any thing to do with the essence of the gift.[3] Again if a testator makes a bequest for a charitable use in the most general and indefinite terms, and appoints trustees to exercise their discretion in selecting the objects and in reducing the general intent to a particular and practical application, and such trustees fail for any reason, without having exercised their discretion or power of appointment in reducing the general and indefinite charity to a practical certainty of administration, courts will be governed by the intention of the donor, in determining whether they will appoint other trustees to

Smith, 7 Vt. 241; Antones *v.* Eslava, 9 Porter, 527; Washburn *v.* Sewell, 9 Met. 280; Zeisweiss *v.* James, 63 Penn. St. 465.

[1] Magill *v.* Brown, Brightly, 347; Shotwell *v.* Mott, 2 Sand. Ch. 46; Pickering *v.* Shotwell, 10 Barr, 23; Wright *v.* Linn, 9 Barr, 433; Beaver *v.* Filsom, 8 Barr, 327; Wright *v.* Methodist Church, 1 Hoff. Ch. 202; Hendrickson *v.* Decow, Saxt. 577; Att'y-Gen. *v.* Jolly, 1 Rich. Eq. 99; 2 Strob. Eq. 379; White *v.* Att'y-Gen., 4 Ired. Eq. 19; Banks *v.* Phelan, 4 Barb. 80; Williams *v.* Pearson, 38 Ala. 299; Missionary Soc., 30 Penn. St. 425; Price *v.* Maxwell, 28 Penn. St. 23; Preachers' Aid Soc. *v.* Rich, 45 Me. 552; Evangelical Association, 35 Penn. St. 316; Gass *v.* Wilhite, 2 Dana, 170.

[2] Zeisweiss *v.* James, 62 Penn. St. 465.

[3] Inglis *v.* Sailors' Snug Harbor, 3 Peters, 99; Reeve *v.* Att'y-Gen., 3 Hare, 191; Hayter *v.* Trego, 5 Russ. 113; Denyer *v.* Druce, Taml. 32; Soc. for the Prop. of Gos. *v.* Att'y-Gen., 3 Russ. 142; Walsh *v.* Gladstone, 1 Phil. Ch. 290.

exercise the power given to the first trustees named in the will. If the power given to the first trustees is a personal trust and confidence, the court should not appoint other trustees to exercise that power, contrary to the intention of the donor; but the court ought to act upon liberal principles of construction in finding such intention.[1] If a testator makes a general and indefinite bequest to charity, or to the poor, or to religion, and appoints no trustee, but plainly refers such appointment to the court, there would seem to be no impropriety in the court appointing a trustee, according to the plain intent of the donor, leaving such trustee to find his power in the will of the donor. But if a testator makes a vague and indefinite gift to charity, and names no trustee, and gives no power to the court to appoint, there is no power in the American courts to administer such an inchoate and imperfect gift.[2]

§ 732. It is, therefore, immaterial how uncertain, indefinite, and vague the *cestuis que trust* or final beneficiaries of a charitable trust are, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed. In other words, it is immaterial how uncertain the beneficiaries or objects are, if

[1] *Ante*, § 721; Lorings *v.* Marsh, 6 Wall. 337; Att'y-Gen. *v.* Gladstone, 13 Sim. 7; Fontain *v.* Ravenel, 17 How. 382; Down *v.* Warrall, 1 My. & K. 561; Green *v.* Allen, 5 Humph. 170; Griffin *v.* Graham, 1 Hawks, 96.

[2] In 2 Redf. on Wills, pp. 517, 518, 535 (2d ed.), it is asserted that the American courts exercise the ordinary chancery jurisdiction of the Court of Chancery in England, and also the prerogative power of the crown; that they carry into effect trusts where there is great indefiniteness in the objects, and that "the want of a trustee in such cases is never any obstacle in the way of a court carrying into effect any trust, and more especially one of a charitable character." In support of these assertions, Whitman *v.* Lex, 17 S. & R. 88; Moore *v.* Moore, 4 Dana, 354; McGirr *v.* Aaron, 1 Penn. 49; Methodist Church *v.* Remington, 1 Watts, 218; Morrison *v.* Beirer, 2 Watts & S. 81; Zimmerman *v.* Anders, 6 Watts & S. 218; Pickering *v.* Shotwell, 10 Penn. St. 23; State *v.* Gerard, 2 Ired. Eq. 210; Antones *v.* Eslava, 9 Porter, 527; Dickson *v.* Montgomery, 1 Swan, 348; Zanesville C. & M. Co. *v.* Zanesville, 20 Ohio, 483; Att'y-Gen. *v.* Jolly, 1 Rich. Eq. 99, are cited. It may be said, in regard to these statements and these authorities, that no court in America has ever supposed that it was exercising any thing more than its ordinary equity power, or that it possessed, or could exercise, any arbitrary or prerogative power of the crown of England, unless such power had been expressly conferred upon it by the legislature. It may be further said, that, if courts have appointed trustees to carry into effect trusts that were indefinite and vague, they have done so in pursuance of what they supposed to be the intention of the donors, arrived at by a liberal construction of the wills or deeds. If any cases are not within this proposition,

the court, by a true construction of the instrument, has power to appoint trustees, to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be.[1] Thus a gift to trustees to educate six orphan boys, to be selected and put to school by them, is uncertain, as the boys are uncertain until they are selected. To say that such a trust should not be executed, but that the heir should take the fund, because there is no orphan boy in the world that can come into court and claim the bequest, would be to subvert the foundation of all public charity. In all such cases, the heir or other person interested may bring his bill to test the legality of the charity, or the trustees may bring their bill for instruction, or the attorney-general may bring a bill or information to establish the trust; and the court, on such wills, can pass upon the validity of the bequest as a charitable use. If, after the charity is established and is in process of administration, there is any abuse of the trust or misemployment of the funds, and there are no individuals having the right to come into court and maintain a bill, the attorney-general, representing the sovereign power and the general public, may bring the subject before the court by bill or information, and obtain perfect redress for all abuses.[2] But where a gift is not a public charity, but is to a school that is not free and open to the general public, the attorney-general cannot maintain an information or bill.[3] So if there is a gift or dedication of land for a church or meeting-house, to be owned by the church, parish, society, or by pew-holders, who have vested rights and can sue, the attorney-general cannot sue in his official capacity, unless the gift is so public and indefinite that no individuals or corporations have the right to come into court

they probably would not be followed by courts that have no power to exercise any jurisdiction not of a judicial character. In 1855, the legislature of Pennsylvania conferred upon their courts the *cy-près* power of the English chancery, so that thereafter no property given to religious, charitable, literary, or scientific uses, should ever revert to the heir. Purd. Dig. 145.

[1] McLain *v.* School Directors, 51 Penn. St. 196; Zeisweiss *v.* James, 63 Penn. St. 465.

[2] Att'y-Gen. *v.* Garrison, 101 Mass. 223; Wellbeloved *v.* Jones, 1 S. & S. 40; Ludlow *v.* Greenhouse, 1 Bligh, (N. S.) 17; Lewin, 665–674.

[3] Att'y-Gen *v.* Heiner, 2 Vern. 387; Liley *v.* Hey, 1 Hare, 150; Wellbeloved *v.* Jones, 1 S. & S. 40; Att'y-Gen. *v.* Smart, 1 Ves. 72; Att'y-Gen. *v.* Jeanes, 1 Atk. 355; Att'y-Gen. *v.* Whiteley, 11 Ves. 241; Att'y-Gen. *v.* Parker, 1 Ves. 43; 2 Atk. 576; Att'y-Gen. *v.* Whorwood, 1 Ves. 534; Att'y-Gen. *v.* Brereton, 2 Ves. 426; Att'y-Gen. *v.* Middleton, 2 Ves. 328; Mayor *v.* Nixon, 2 Y. & Jer. 60.

for redress. Suits to regulate such trusts must be brought by the parties interested.[1] The church edifices of this country stand in a peculiar position. They are not free, open churches, as those words are used in describing a public charity. They are owned by societies, parishes, churches, trustees, or pew-holders, and can be controlled by these bodies as corporations or *quasi* corporations, and directed to such uses as they see fit; for these reasons the funds, given or contributed to build these edifices and keep them in repair, are not funds given for public charitable uses in the legal sense; consequently the attorney-general can seldom maintain an information for any alleged misuse or pretended perversion of these church edifices.[2]

§ 733. As a charitable use cannot be changed from the purposes declared by the donor, so long as there are any objects of such charity, or so long as it can be applied to the purposes named, and the courts, where the objects fail, construe the instrument creating the trust, to discover the charitable purpose of the donor, *cy près* the original purpose;[3] so a charitable gift must be accepted upon the same terms upon which it is given;[4] and the trustees, whether individuals or corporations, cannot convert the fund to other uses, so long as the uses declared by the donor are capable of execution.[5] Thus if the gift is to provide a preacher in Dale, it would be a breach of trust to provide one in Sale; or if it is to provide a preacher, it cannot be given to the poor;[6] or if it is for the poor of one parish, it cannot be extended to other parishes;[7] or if to repair a chapel, it cannot be mixed up with parochial funds or the poor-rates;[8] or if for erecting a hospital, it cannot be

[1] Att'y-Gen. *v.* Merrimack Manufacturing Co., 14 Gray, 586; Att'y-Gen. *v.* Federal St. Meeting-House, 3 Gray, 1.

[2] Ibid.; Dublin Case, 38 N. H. 459.

[3] See §§ 724–728.

[4] Gilman *v.* Hamilton, 16 Ill. 225.

[5] Att'y-Gen. *v.* Rochester, 5 De G., M. & G., 797; Att'y-Gen. *v.* Sherborne School, 18 Beav. 256; Att'y-Gen. *v.* Gould, 28 Beav. 485; Ward *v.* Hipwell, 3 Gif. 547; Att'y-Gen. *v.* Calvert, 23 Beav. 248; *In re* Stafford Charities, 25 Beav. 28; Att'y-Gen. *v.* Bourchette, 25 Beav. 116; Att'y-Gen. *v.* Platt, Finch, 221; Margaret *v.* Regius Professors in Cambridge, 1 Vern. 55; Mann *v.* Ballott, 1 Vern. 43; 1 Eq. Ca. Ab. 99; Att'y-Gen. *v.* Gleg, 1 Atk. 356; Amb. 373.

[6] Att'y-Gen. *v.* Newbury Cor., C. P. Cooper Ca. (1837, 1838), 72; Att'y-Gen. *v.* Goldsmiths' Co. (ib.), 292; Duke, 94, 116.

[7] Att'y-Gen. *v.* Brandreth, 1 Yo. & Col. Ch. 200.

[8] Att'y-Gen. *v.* Vivian, 1 Russ. 226–337; Att'y-Gen. *v.* Mansfield, 2 Russ. 501; *Ex parte* Greenhouse, 1 Mad. 92; 1 Bligh (N. S.), 17.

used for municipal purposes,[1] or if it is to support the preaching of a particular religious doctrine, it is a breach of trust to support the preaching of any other doctrine, though the difference is very slight.[2] And generally a charitable donation for religious purposes must be applied to sustain the purposes and doctrines of the donor, as indicated by him; and if the donor has not clearly stated the doctrines he intends to favor, courts will inquire into the doctrines held by him, and, when ascertained, will presume them to be the doctrines intended to be taught under the trust.[3] If there occurs a schism in the church or body to which the trust is given, the funds generally follow the old organization, unless it has made a material departure from the faith of the original founder.[4] A gift to a religious society, or to a charitable or educational institution, will be presumed to be a charitable gift, though no purposes are named, and such societies will be presumed to hold such gifts in trust for those religious and charitable purposes for which they exist.[5] Where there are numerous contributors to a charitable fund, the declaration of one of the contributors, long acted upon, will be taken *prima facie*, as a declaration of the purposes of the trust.[6]

§ 734. The proposition that charities must be accepted upon the terms upon which they are given, and that they cannot be altered by any new agreement between the heir of the donor, the trustees, beneficiaries, or any other parties thereto, is confined to charities

[1] Att'y-Gen. *v.* Kell, 2 Beav. 575; Att'y-Gen. *v.* Exeter, 2 Russ. 45; 3 Russ. 395; Att'y-Gen. *v.* Wilkinson, 1 Beav. 372; Att'y-Gen. *v.* Bovill, 1 Phil. 762; Att'y-Gen. *v.* Blizard, 22 Beav. 233.

[2] Combe *v.* Brazier, 2 Des. 431.

[3] Shore *v.* Wilson, 9 Cl. & Fin. 355; Att'y-Gen. *v.* Shore, 11 Sim. 592; Att'y-Gen. *v.* Pearson, 3 Mer. 353; Earle *v.* Wood, 8 Cush. 430; Dublin Case, 38 N. H. 459; Combe *v.* Brazier, 2 Des. 431; App *v.* Lutheran Congregation, 6 Penn. St. 201; Robertson *v.* Bullions, 1 Kern. 243; Att'y-Gen. *v.* Drummond, 1 Dr. & War. 353; Winebrenner *v.* Colder, 43 Penn. St. 244; Kniskern *v.* Lutheran Churches, 1 Sand. Ch. 439; Miller *v.* Gable, 2 Denio, 492; Princeton *v.* Adams, 10 Cush. 129; Att'y-Gen. *v.* Moore, 4 C. E. Green, 503; Att'y-Gen. *v.* Bunce, L. R. 6 Eq. 563; Att'y-Gen. *v.* Glasgow Coll., 2 Coll. Ch. 665; Potter *v.* Thornton, 7 R. I. 252; Att'y-Gen. *v.* Murdoch, 7 Hare, 445; 1 De G., M. & G. 86.

[4] Ibid.; Hendrickson *v.* Decow, Saxton, 577; Earle *v.* Wood, 8 Cush. 430.

[5] Incorporated Soc. *v.* Richards, 1 Dru. & W. 294; Evangelical Assoc. App., 35 Penn. St. 316; Att'y-Gen. *v.* Pearson, 7 Sim. 290; 3 Mer. 409; *Re* Ilminster School, 2 De G. & Jo. 535; 8 H. L. Ca. 495; *Re* Stafford Char., 25 Beav. 28; Att'y-Gen. *v.* Clifton, 32 Beav. 596.

[6] Att'y-Gen. *v.* Clapham, 4 De G., M. & G. 626.

established by the gift and bounty of some donor for a particular faith;[1] for if a religious society is endowed with funds by a donor for its general purposes, or if such society creates a fund by contribution thereto by its individual members, although such funds are charitable, yet such society may by agreement alter its faith and practice, and still retain its funds with which to teach its new faith.[2] So it has been held that a use for forty years will establish the right to appropriate the funds to an altered faith.[3] So where it cannot be discovered from documents what particular form of worship was intended to be established by the charity, long-continued usage by the congregation will be received as evidence of the original intent.[4] But if the original purpose of the donor is perfectly clear, the court cannot change the trust, although the congregation may have followed a different practice: the majority cannot say we have changed our opinions, and the fund shall hereafter be for the benefit of people of our faith and form of worship.[5] If the trustee is a corporation, having power to make *by-laws*, this franchise will not extend so far as to enable it to pervert the charity.[6] If the deed of investment contains a clause, authorizing a majority of trustees to make rules and orders from time to time when they think proper, such clause will not authorize the trustees to change the objects of the charity, or the doctrines to be promulgated.[7]

§ 735. Nor can the trustees, whether persons or corporations, appointed to administer a charity, be changed by the agreement of the parties, nor for mere convenience; as where funds were given to Harvard College by various donors for the purpose of promoting

[1] Att'y-Gen. *v.* Munro, 2 De G. & Sm. 163; Field *v.* Field, 9 Wend. 394; Miller *v.* Gable, 2 Denio, 525; People *v.* Steele, 2 Barb. 397; Craigdallie *v.* Aikman, 1 Dow, 1; 2 Bligh, 529; Milligan *v.* Mitchell, 3 My. & Cr. 72.

[2] Att'y-Gen. *v.* Prop. Federal St. Meeting-House, 3 Gray, 61; Dublin Case, 38 N. H. 459; Brendle *v.* German Ref. Cong., 33 Penn. St. 418; Att'y-Gen. *v.* Clergy Soc., 8 Rich. Eq. 190; Brent *v.* Sandwich, 9 Mass. 289; Avery *v.* Tyringham, 3 Mass. 182; Sheldon *v.* Easton, 24 Pick. 287; Hollis St. Meeting-House *v.* Pierpont, 7 Met. 499; Brown *v.* Lutheran Church, 23 Penn. St. 498.

[3] Att'y-Gen. *v.* Federal St. Meeting-House, 3 Gray, 64.

[4] Att'y-Gen. *v.* Hutton, 1 Dru. 530; Stat. 7 & 8 Vict. c. 45, § 2, fixes twenty-five years.

[5] Att'y-Gen. *v.* Munro, 2 De G. & Sm. 122; Milligan *v.* Mitchell, 3 M. & C. 73; Foley *v.* Wontner, 2 J. & W. 247; Craigdallie *v.* Aikman, 1 Dow, P. C. 1; Broom *v.* Summers, 11 Sim. 357; Att'y-Gen. *v.* Murdoch, 7 Hare, 445; 1 De G., M. & G. 86; Att'y-Gen. *v.* Rochester, 5 De G., M. & G. 797.

[6] Eden *v.* Foster, 2 P. Wms. 327. [7] Att'y-Gen. *v.* Pearson, 3 Mer. 411.

education at the college, by a school to be a branch of the university, the court held that the funds could not be withdrawn from the corporation of Harvard College, and intrusted to an independent board of trustees, to be applied to the support of a divinity school not connected with the college, although such separation would be convenient for all parties, and would produce greater vigor and efficiency in the administration of the funds. The court decided that the funds had been given to Harvard College as a known institution, and upon a personal trust and confidence; that the constitution of a charity could not be changed for reasons of mere expediency; and that a court of equity cannot remove trustees and appoint others, except for incapacity, unfaithfulness, or failure to perform their duties.[1] If a trustee is known to hold such opinions in relation to the trust as it is ordered to be administered by the court, that he cannot be expected cordially and faithfully to execute it, he may be removed and a proper person appointed.[2] If trustees who are to administer a trust cease, for any reason, to be subject to the jurisdiction of the court having jurisdiction over the charity, such trustees may be removed.[3] If the trustees, by a mistake, select or appoint the objects of a charity, courts will not remove the persons so appointed, if the trustees made the choice in good faith and without fraud or corruption.[4]

§ 736. Another particular in which charitable gifts are favored by the law is, that such gifts are not obnoxious to the common rule against perpetuities. For public convenience, the ownership of property cannot be suspended for a long time, nor will public policy allow property to be inalienable beyond a certain period. Thus if a testator gives land to his heir upon condition that he shall not alienate the same, the condition is void as against public policy: but a testator, by certain forms of gift, may tie up his property for a life or lives in being, and twenty-one years and nine months; as, if he gives land to be enjoyed by a certain person during such person's life, and then to some other person or purpose for twenty-one years and nine months, and then in fee to some

[1] Harvard College *v.* Soc. for Prom. Theo. Education, 3 Gray, 280; Att'y-Gen. *v.* Hartley, 2 J. & W. 382; Att'y-Gen. *v.* Mansfield, 2 Russ. 520.

[2] Att'y-Gen. *v.* Garrison, 101 Mass. 223.

[3] Att'y-Gen. *v.* College of Wm. & Mary, 1 Ves. Jr. 243. And see Provost of Edinburgh *v.* Aubrey, Amb. 236.

[4] *Re* Story's University Gift, 2 De G., F. & J. 529, 531, 540.

person or persons who will at that time answer a particular description. In reference to the last form of gift, it will be seen that such land cannot be sold and a title given for a life and twenty-one years and nine months, because until that time has elapsed it cannot be told with certainty who will come within the description of the last taker; consequently, though all the world joins in the conveyance, no title can be given until the final event is known. A testator is allowed to go thus far and no farther. If he makes his gift depend upon conditions, limitations, or events, that may require more than a life or lives in being and twenty-one years and nine months for their accomplishment, he has created what the law calls a perpetuity, which is void, and the first taker takes a fee discharged of all attempted limitations.[1] So if a testator ties up his property for a term, by possibility, longer than a life or lives in being and twenty-one years and nine months, and then gives it over to a charity, the gift to the charity is void, because of the perpetuity in the first taker.[2] But a gift may be made to a charity not *in esse* at the time, to come into existence at some uncertain time in the future, provided there is no gift of the property, in the first instance, or perpetuity in a prior taker.[3] So where property was given to one charity, to go over to another in a certain event, it was allowed to go over to the second charity after a lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in another.[4]

§ 737. As it is forbidden to create perpetuities by common-law conveyances, so it is equally illegal to attempt to create perpetuities through the creation of trusts. A perpetuity will no more be tolerated when it is covered by a trust, than when it displays itself undisguised in a conveyance of the legal estate.[5] Thus a trust cannot be created that will suspend the absolute ownership

[1] Church in Brattle St. *v.* Grant, 3 Gray, 143.

[2] Company of Pewterers *v.* Christ's Hosp., 1 Vern. 161; Att'y-Gen. *v.* Gill, 2 P. Wms. 369; Wells *v.* Heath, 10 Gray, 25; Com'rs of Donations *v.* De Clifford, 1 Dru. & War. 254; Att'y-Gen. *v.* Hall, W. Kel. 13.

[3] Att'y-Gen. *v.* Downing, Wilmot, 1; Dick. 14; Amb. 550; Att'y-Gen. *v.* Bowyer, 3 Ves. 714; 5 Ves. 300; 8 Ves. 256; Att'y-Gen. *v.* Chester, 1 Bro. Ch. 464; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99; Sanderson *v.* White, 18 Pick. 336.

[4] Christ's Hosp. *v.* Granger, 16 Sim. 83; 1 Mac. & Gor. 533; 1 Hall & Twells, 539; Soc. for Prop. of the Gospel *v.* Att'y-Gen., 3 Russ. 142; McDonough *v.* McDonough, 15 How. 367; Potter *v.* Thornton, 7 R. I. 252.

[5] Norfolk's Case, 3 Ch. Ca. 20–28, 35–48; 1 Vern. 164.

of the property for a time longer than that allowed at law. A perpetual trust cannot be created for an individual and his heirs in succession for ever;[1] and herein a charity differs, for a trust may be established which contemplates the payment of the income of a certain fund to some charitable purpose for ever. Indeed, it is always hoped, where funds are given in trust, the income to be applied to some church, almshouse, hospital, or school, that such institution will exist indefinitely, and that the donor's bounty will be a perennial spring for generations.[2] At the same time, it is to be observed that this rule, applied to charities, does not render any particular property inalienable; for the court can decree the sale of any trust property when an exigency arises; and even the soil upon which a church, hospital, almshouse, or schoolhouse is built, can be sold by a decree in equity, when it is desirable to remove from that particular place to another.[3]

§ 738. Analogous to the rule against perpetuities is the rule against accumulation, which does not permit a testator to give his estate to trustees to be accumulated by them for a time longer than a life or lives in being and twenty-one years and nine months. Public policy is said to be the foundation of this rule. Even accumulations for such a limited time have been found inconvenient, and statutes have been passed in England and in several of the United States establishing a still shorter period during which trust estates may accumulate. In all those States where there are statutes limiting the time of accumulation, charities will be governed by the statute, unless they are specially excepted from its operation.[4] But where there are no statute provisions, a trust to accumulate for charitable purposes will not be held to be within the rule. There is no limit named beyond which such accumulations cannot

[1] Thellusson *v.* Woodford, 4 Ves. 227; 11 Ves. 112; Hooper *v.* Hooper, 9 Cush. 122; Thorndike *v.* Loring, 15 Gray, 391; Hawley *v.* James, 5 Paige, 445; *ante*, §§ 377–400.

[2] Franklin *v.* Armfield, 2 Sneed, 305; Grissom *v.* Hill, 17 Ark. 483; Bristol *v.* Whitton, Dwight, Cha. Ca. 171; Magdalen Coll. *v.* Att'y-Gen., 6 H. L. Ca. 205; Perrin *v.* Carey, 24 How. 465; Williams *v.* Williams, 4 Seld. 533; King *v.* Parker, 9 Cush. 82; Dexter *v.* Gardner, 7 Allen, 246; Odell *v.* Odell, 10 Allen, 1; Dartmouth Coll. *v.* Woodward, 4 Wheat. 641; Paschal *v.* Acklin, 27 Texas, 173.

[3] Wells *v.* Heath, 10 Gray, 17; Shotwell *v.* Mott, 2 Sandf. Ch. 55; Tudor on Char. 298; Franklin *v.* Armfield, 2 Sneed, 305.

[4] Martin *v.* Margham, 14 Sim. 230; Kilpatrick *v.* Johnson, 15 N. Y. 322; *ante*, §§ 393–400.

go; but a bequest of a hundred dollars to be paid into a savings-bank yearly for fifty years from the income of real estate, to be accumulated during the fifty years by adding interest to principal semiannually, and at the expiration of the term to be appropriated to a home for indigent old people, was held to be a good *devise*, and not within the rule against accumulations.[1] But if an estate given to trustees for charity is once vested in them for a lawful purpose, all unlawful conditions, limitations, powers, trusts, or restraints annexed thereto, as directions for the management of the fund, and not of the essence of the gift, will fall away and be simply void, leaving the estate still vested in the trustees to be managed in a legal manner for the purposes of the charity.[2] As where a testator gave a fund to a town in its corporate capacity to establish a school, on condition that the children of nine families named were excluded for one hundred years, the court held the bequest a good charitable bequest for a school, and that it vested in the town in its corporate capacity; but that, as a town could not make distinctions between its citizens in administering any public property which it had a right to hold, the limitations and conditions upon the gift fell away from it as illegal and repugnant.[3]

§ 739. Another particular in which courts have favored charities was to supply all defects in conveyances or bequests to charitable uses; as, where the will of a married woman, utterly void at law, was held good as an appointment to charitable uses; and a will, utterly void before the statute, was held to be made good by the passage of the statute; and though the statute of Hen. VIII. forbids devises of land to corporations, yet such wills were held good, as appointments.[4] This doctrine has not of late received

[1] Odell v. Odell, 10 Allen, 1; Philadelphia v. Girard, 45 Penn. St. 1; Williams v. Williams, 4 Selden, 537; State v. Girard, 2 Ired. Ch. 210. A different rule was held in Hillyard v. Miller, 10 Penn. St. 326; but the case was overruled in the case of Philadelphia v. Girard. See Odell v. Odell, *sup.*, for a full and able discussion of the cases.

[2] Philadelphia v. Girard, 45 Penn. St. 1; Williams v. Williams, 4 Seld. 538. Since the case of Williams v. Williams, the courts of New York have subjected charities to all the rules and the statute against perpetuities. Levy v. Levy, 33 N. Y. 97; Bascomb v. Albertson, 34 N. Y. 504; Wilson v. Lynt, 30 Barb. 124, 6 How. (N. Y.) 348.

[3] Nourse v. Merriam, 8 Cush. 11.

[4] Duke, 84, 85; Bridgman's Duke, 355; Damon's Case, Moore, 822; Smith v. Stowell, 1 Ch. Ca. 195; Collinson's Case, Hob. 136; Att'y-Gen. v. Combe, 2 Ch. Ca. 18; Griffith Flood's Case, Hob. 136; Christ's College, 1 W. Black.

the cordial assent of the English courts ;[1] and, as it never prevailed in America, it is not necessary to state it in detail.[2] Courts will supply defects in conveyances to charitable purposes only so far as relates to uncertainty in the trustees or in the *cestuis que trust*, as before stated.

§ 740. There are many English cases upon marshalling the assets of a testator for the payment of debts, legacies, and charitable bequests. The statute of mortmain has been construed to forbid the payment of charitable legacies from the proceeds of the sale of real estate, if the will was made within a year of the death of the testator. This circumstance, with other peculiarities in the English law, has given rise to much litigation, and to many nice distinctions and rules which are inapplicable to the jurisprudence of America. Here the debts of a deceased person must first be paid; and the entire estate, real and personal, is held for that purpose. Legacies are then paid out of the personal assets, or out of the real estate if the personal fails; and they are charged upon the personalty. If the fund is not sufficient for the payment of all in full, they must all abate in proportion, whether they are charitable legacies or otherwise.[3]

§ 741. Bequests to be paid over to trustees in a foreign country, for the establishment in such country of a charitable institution, will be paid over to such trustees, by order of court, to be administered by them under the jurisdiction of the courts of their own country.[4] But if the bequest is contrary to law in the country where it is made, or contrary to public policy, as a bequest in Eng-

90; Att'y-Gen. *v.* Bowyer, 3 Ves. Jr. 714; 1 Dru. & War. 308; Mills *v.* Farmer, 1 Mer. 55; Att'y-Gen. *v.* Rye, 2 Vern. 453; Rivett's Case, Moore, 890; Att'y-Gen. *v.* Burdett, 2 Vern. 755; Christ's Hospital *v.* Hames, Bridgman's Duke, 371; Tuffnell *v.* Page, 2 Atk. 37; Fay *v.* Slaughter, Pr. Ch. 16; Kenson's Case, Hob. 136.

[1] Moggridge *v.* Thackwell, 7 Ves. 87; Jenner *v.* Hooper, Pr. Ch. 389; Att'y-Gen. *v.* Bain, Pr. Ch. 271; Adlington *v.* Cann, 3 Atk. 141.

[2] Harvard Coll. *v.* Soc. for Promoting Education, 3 Gray, 283.

[3] It is not necessary to pursue this subject further. The reader will find the cases carefully collected and discussed in 2 Story, Eq. Jur. §§ 1180, 1180 a, 1 Jarman on Wills, 213 (3d Eng. ed.).

[4] Washburn *v.* Sewell, 9 Met. 280; Provost of Edinburgh *v.* Aubery, Amb. 336; Collyer *v.* Burnett, Taml. 79; Att'y-Gen. *v.* Lepine, 2 Swans. 181; 19 Ves. 389; Mitford *v.* Reynolds, 1 Phil. 185; Emery *v.* Hill, 1 Russ. 112; Mayor of Lyons *v.* East India Co., 1 Moore, P. C. 273; Minet *v.* Vulliamy, 1 Russ. 113 n.; Att'y-Gen. *v.* London, 3 Bro. Ch. 171; 1 Ves. Jr. 243; Oliphant *v.* Hendrie, 1 Bro. Ch. 571 n.; Soc. for Prop. Gospel *v.* Att'y-Gen., 3 Russ. 142;

land to found nunneries in a foreign country, it is void, and the court will not order it to be paid over.[1] A trust for charity, so created by a testator in his will as to be void in the State where it is created, will be void, although it is a legal trust in the State where the charity is to be established.[2] So if the trustees in the foreign country refuse to receive the funds, the trust will be void, and the money will go to the next of kin; as, where a devise was made in England to the President and Vice-President of the United States and the Governor of Pennsylvania for establishing a college in Pennsylvania, for the purposes, among others, of vindicating the rights of the colored people to an equality with whites, the trustees named refusing to receive the funds and execute the trust, it was held to have failed, the court having no power to enforce its performance in a foreign jurisdiction.[3] Mr. Smithson, an Englishman, gave the funds for the Smithsonian Institution at Washington by his last will, and they were paid over upon the suit of the President of the United States *v.* Drummond, executor.[4] If there is sufficient reason arising out of the terms of the will or otherwise, the court can order the principal fund to be invested within their jurisdiction, and the income only to be paid over to the foreign trustees.[5]

§ 742. The trustees of a charity frequently procure an act of incorporation, in order to carry out the intention of their donor with more convenience. Care should be taken in such cases that the act of incorporation does not alter or change the true objects of the donor. These charitable corporations are called eleemosynary corporations; and the trustees of such a corporation have such vested rights under the gift of the donor and the act of incorporation, that they cannot be controlled by subsequent legislation made to affect that particular case.[6] On the institution of such a charity, a visitatorial jurisdiction arises of common right to

Campbell *v.* Radnor, 1 Bro. Ch. 171; Att'y-Gen. *v.* Chester, 1 Bro. Ch. 444; Curtis *v.* Hutton, 14 Ves. 537; Mackintosh *v.* Townsend, 16 Ves. 330.

[1] De Garcin *v.* Lamson, 4 Ves. 433 n.; De Themmines *v.* De Bonneval, 5 Russ. 292.

[2] Bascomb *v.* Albertson, 34 N. Y. 584.

[3] New *v.* Bonaker, L. R. 4 Eq. 654; Levy *v.* Levy, 33 N. Y. 97.

[4] Cited in Whicher *v.* Hume, 7 H. L. Ca. 124.

[5] Att'y-Gen. *v.* Lepine, 2 Swans. 181; Att'y-Gen. *v.* Sturge, 19 Beav. 597.

[6] Dartmouth College *v.* Woodward, 4 Wheat. 518; see Webster's speech, 5 Webster's Works, 462, and cases cited; St. John's College *v.* State, 15 Md. 330; Brown *v.* Hummel, 6 Penn. St. 86. As an illustration of an act incorporating the trustees of a charity, see c. 119 of the Acts of Massachusetts, 1868.

the founder and his heirs, or to those whom the founder has substituted in the place of himself and his heirs.[1] The duty of the visitor is to hear and determine all differences of the members of the company among themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed.[2] The visitor must take, as his guide, the regulations or statutes originally propounded by the founder;[3] and so long as he does not exceed his province, his decision is final, and cannot be questioned by way of appeal.[4] With this visitatorial power, the Court of Chancery has nothing to do: it is only as respects the administration of the corporate property that the court has any jurisdiction. Chancery cannot interfere with the elections or any other internal arrangements of such corporations, although they may be irregular;[5] but whenever there is any complaint of a perversion of the funds of the institution, equity will immediately interfere and correct and remedy the abuse.[6]

§ 743. If an estate is given to an old corporation, it is not regarded in the same light as the property with which the charity was originally endowed, and the new gift will not be subject to the old visitatorial power, unless such is the plain or implied intention of the donor.[7] If the property is given generally, and no *special* purpose is named, the donor will be presumed to intend that the

[1] Eden *v.* Foster, 2 P. Wms. 326; Att'y-Gen. *v.* Gaunt, 3 Swans. 148.

[2] Phillips *v.* Bury, Skin. 478; Att'y-Gen. *v.* Crook, 1 Keen, 126; Att'y-Gen. *v.* York, 2 R. & M. 468; *In re* Birmingham School, Gilb. Eq. R. 180.

[3] St. John's College *v.* Toddington, 1 Burr. 200; Att'y-Gen. *v.* Locke, 3 Atk. 165; Att'y-Gen. *v.* Master of Catharine Hall, Jac. 392.

[4] Att'y-Gen. *v.* Foundling Hosp. 2 Ves. Jr. 47; *In re* Chertsey Market, 6 Price, 272; Att'y-Gen. *v.* Locke, 3 Atk. 165; *Ex parte* Berkhampstead School, 2 Ves. & B. 138; Poor of Chelmsford *v.* Mildmay, Duke, 83; Att'y-Gen. *v.* Clarendon, 17 Ves. 499; Eden *v.* Foster, 2 P. Wms. 326; Att'y-Gen. *v.* Dixie, 13 Ves. 533; Att'y-Gen. *v.* Bedford, 2 Ves. 505; 5 Sim. 578; Att'y-Gen. *v.* Browne's Hosp., 17 Sim. 137; Att'y-Gen. *v.* Dedham School, 23 Beav. 350; Dougars *v.* Rivaz, 28 Beav. 233; Att'y-Gen. *v.* Dulwich College, 4 Beav. 255.

[5] Att'y-Gen. *v.* Clarendon, 17 Ves. 498; Whiston *v.* Rochester, 7 Hare, 532; Att'y-Gen. *v.* Dixie, 13 Ves. 519; Att'y-Gen. *v.* Middleton, 2 Ves. 327; Att'y-Gen. *v.* Dulwich College, 4 Beav. 255; Att'y-Gen. *v.* Magdalen College, 10 Beav. 402; Att'y-Gen. *v.* Bedford, 10 Beav. 505; *In re* Bedford Charity, 5 Sim. 578.

[6] Att'y-Gen. *v.* St. Cross Hosp., 17 Beav. 435; Att'y-Gen. *v.* Foundling Hosp., 2 Ves. Jr. 48; Att'y-Gen. *v.* Clarendon, 17 Ves. 499.

[7] Green *v.* Rutherford, 1 Ves. 472; Corp. of Sons of Clergy *v.* Mose, 9 Sim. 610; Phillips *v.* Bury, 1 Ld. Raym. 5; Comb. 265; Holt, 715; 1 Show. 360; 4 Mod. 106; Skin. 447.

property shall be regulated by the general rules of the corporation;[1] but if a particular trust is annexed to the gift in the hands of the corporation, the visitatorial power of the original founder will be excluded, and the court will treat the corporation in respect to this fund as an ordinary trustee, or as an individual intrusted with the fund for a particular purpose.[2] If a private person founds a charity, and the crown grants a charter, the presumption is that the crown intended to carry out the intentions of the donor, and the jurisdiction of the Court of Chancery will be continued.[3] If the legislature makes a grant of land to a charitable corporation, for a school or college or for a religious or charitable purpose, such grant cannot be repealed.[4]

§ 744. If the trustees of a charity abuse the trust, misemploy the charity fund, or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor; but the redress is by bill or information by the attorney-general or other person having the right to sue. If a good public charity is created by gifts upon condition or with limitations, or by gifts for particular purposes, or to a certain end, the heir cannot defeat the charity by reason of a breach of the trust or perversion of the charity; but the courts upon proper proceeding will correct all abuses, and restore the charitable gift to its original purpose. Heirs and personal representatives of a donor have no beneficial interest, reverting or accruing to themselves, from the breach or non-execution of a trust for a charitable use.[5]

§ 745. Ordinary private trusts are not subject to the statute of limitations like other interests; for, so long as the relation of trustee and *cestui que trust* continues, no length of time can bar the rights of the beneficiary, as the rights of a creditor may be barred.

[1] Ibid.; *Ex parte* Inge, 2 R. & M. 596; Att'y-Gen. *v.* Clare Hall, 3 Atk. 675; Hadley *v.* Hopkins, 14 Pick. 240.

[2] Green *v.* Rutherford, 1 Ves. 462; Corp. Sons of Clergy *v.* Mose, 9 Sim. 610.

[3] Att'y-Gen. *v.* Dedham School, 23 Beav. 350. See, also, *Ex parte* Wrangham, 2 Ves. Jr. 609; Att'y-Gen. *v.* Clarendon, 17 Ves. 498; Att'y-Gen. *v.* Black, 11 Ves. 191; Case of Queen's College, Jac. 1; King *v.* St. Catharine's Hall, 4 T. R. 233–244; *Re* Queen's College, 5 Russ. 64; *Re* University College, 2 Phil. 521.

[4] University *v.* Fay, 2 Hayw. 310; Terrett *v.* Taylor, 9 Cranch, 43; Pawlett *v.* Clark, 9 Cranch, 292.

[5] Sanderson *v.* White, 18 Pick. 328; Dublin Case, 38 N. H. 459; Chapin *v.* School District, 35 N. H. 445; Hadley *v.* Hopkins, 14 Pick. 241.

But where the relation is denied, and circumstances have occurred that render it impossible to do equity between the parties, lapse of time may be a bar.[1] Still less will the statute of limitations apply to a charitable trust, there being "no limitation against God and religion."[2] Where a corporation held the property of a charity for one hundred and fifty years adversely under a deed of purchase, but with notice of the charitable use, it was decreed that the property should be reconveyed upon the original trusts;[3] nor will lapse of time be allowed to establish any perversion or abuse of a charitable trust, if the original purpose can be clearly determined.[4] But great lapse of time is frequently a controlling element in disposing of charity suits; for if a charity has been administered for a long time without question, the court will not interfere to change it without conclusive evidence that the charity has been perverted.[5] A continued use, with the assent of all parties, for a great length of time must have an influence in the construction of all written instruments, especially if there is any doubt as to their true meaning.[6] If such use was contemporaneous with the foundation, and has continued uninterrupted and uncorrected for a great length of time, where there was opportunity for complaint and correction, the arrangement will not be disturbed.[7] A statute now bars the attorney-general from interfer-

[1] Prevost *v.* Gratz, 6 Wheat. 481; Wedderburn *v.* Wedderburn, 4 My. & Cr. 41; Portlocke *v.* Gardner, 1 Hare, 594; Bridgman *v.* Gill, 24 Beav. 302; Michoud *v.* Girod, 4 How. 561; Att'y-Gen. *v.* Fishmongers' Co., 5 My. & Cr. 16; Knight *v.* Bowyer, 2 De G. & J. 421; Watson *v.* Saul, 5 Jur. (N. S.) 404; Att'y-Gen. *v.* Bristol, 2 J. & W. 321; Shelford, 498.

[2] Att'y-Gen. *v.* Coventry, 2 Vern. 399; Att'y-Gen. *v.* Bristol, 2 J. & W. 321; Att'y-Gen. *v.* Exeter, Jac. 448; Att'y-Gen. *v.* Brewers' Co., 1 Mer. 498; Incorp. Soc. *v.* Richards, 1 Con. & Law. 58; 1 Dru. & War. 258.

[3] Att'y-Gen. *v.* Christ's Hosp., 3 My. & K. 344.

[4] Att'y-Gen. *v.* Munro, 2 De G. & Sm. 122; Mulligan *v.* Mitchell, 3 M. & Cr. 73; Att'y-Gen. *v.* Beverly, 6 De G., M. & G. 256.

[5] Att'y-Gen. *v.* Rochester, 5 De G., M. & G. 822; Att'y-Gen. *v.* Ref. Prot. Dutch Church, 33 Barb. 303; Att'y-Gen. *v.* St. John's Hosp., 11 Jur. (N. S.) 629.

[6] Att'y-Gen. *v.* Rochester, 5 De G., M. & G. 822; Att'y-Gen. *v.* Beverly, 6 De G., M. & G. 268; Att'y-Gen. *v.* Bristol, 2 J. & W. 321; *In re* Chertsey Market, 6 Price, 261–285.

[7] Att'y-Gen. *v.* Skinners' Co., 5 Sim. 596; Att'y-Gen. *v.* Brazen Nose College, 2 Cl. & Fin. 295; Att'y-Gen. *v.* Winsor, 6 Jur. (N. S.) 833; Att'y-Gen. *v.* Catharine Hall, Jur. 381; Mayor of South Moulton *v.* Att'y-Gen., 27 Eng. L. & Eq. 17; Att'y-Gen. *v.* Coventry, 2 Vern. 397; Att'y-Gen. *v.* Scott, 1 Ves. 413.

ing, after an acquiescence of twenty years.[1] On the same principle, long-continued use in applying the funds of a religious society to the teaching of a particular form of doctrine will have great weight in giving a construction to the instrument under which the funds were settled.[2] It was held in Attorney-General *v.* Federal Street Meeting-house, that a trust to maintain public worship in the Presbyterian form, in a particular meeting-house, might be terminated by the unanimous consent of all the worshippers and pew-holders of that house, and that where there had been a use of the funds for forty years under a claim of right, adversely to the first use, it was too late to attempt to restore the funds to the original use.[3]

§ 746. In a private suit in equity, whether to enforce or regulate a trust, or to obtain any other private redress, the pleadings must be so framed that a decree can be made upon the statement in the bill or answer, and upon the prayer for relief, if the plaintiff prevails; but in suits for establishing, regulating, controlling, or correcting charitable trusts, courts disregard all technicalities. If the case is brought before the court by bill or information, it takes jurisdiction over the administration of the charity, and makes the proper orders and decrees for the right administration of the fund, whether the pleadings are formal or informal, and whether the proper relief is prayed for or not.[4] In charity cases, the most expeditious and least expensive methods should be adopted;[5] and a proper decree for relief will be made, although relief of an entirely different character is prayed for.[6] Courts are not bound by the strict rules of practice in granting injunctions or stay of proceedings at law in such cases.[7] It cannot be objected to a proceeding by the attorney-general in equity, in the

[1] 3 & 4 Wm. IV. c. 27; Att'y-Gen. *v.* Payne, 27 Beav. 168.

[2] Dublin Case, 38 N. H. 459.

[3] Att'y-Gen. *v.* Federal Street Meeting-house, 3 Gray, 1.

[4] Att'y-Gen. *v.* Hartley, 2 J. & W. 370; Att'y-Gen. *v.* Jackson, 11 Ves. 372; Att'y-Gen. *v.* Whitely, 14 Ves. 241; Att'y-Gen. *v.* Stamford, 2 Swans. 591; Att'y-Gen. *v.* Jeans, 1 Atk. 355; Att'y-Gen. *v.* Brooks, 13 Ves. 318; Att'y-Gen. *v.* Smart, 1 Ves. 72; Att'y-Gen. *v.* Oglander, 1 Ves. Jr. 246; Att'y-Gen. *v.* Bucknall, 2 Atk. 328; Att'y-Gen. *v.* Middleton, 2 Ves. 327; Att'y-Gen. *v.* Brereton, 2 Ves. 425; Att'y-Gen. *v.* Parker, 1 Ves. 43; Att'y-Gen. *v.* Vivian, 1 Russ. 226.

[5] Rochester *v.* Att'y-Gen., 4 Bro. P. C. 643.

[6] Att'y-Gen. *v.* Whitely, 14 Ves 241. [7] Att'y-Gen. *v.* Pearson, 3 Mer. 396.

matter of a charity, that there is an adequate remedy at law.[1] But if there are any such informalities in the record as will be prejudicial to the defendants, the court will not proceed until such informalities are corrected.[2] The only manner in which courts can administer charities is to give directions to the trustees; but courts will not retain an information in order to make decrees from time to time.[3] The proper method is to apply anew. But in one case where an information charged a state of facts inconsistent with the true state of the case as set forth in the answer, and the relators set the case down for hearing without amendment, with a prayer for relief founded upon an untrue statement of the case, and without having applied to the trustees to correct the alleged abuse, the information was dismissed with costs, although some relief might have been granted upon a proper statement of the case, and upon fair conduct towards the trustees.[4] The parties to be bound by the decree should be made parties to the suit at the time the decree is made. This is a formality that will not be dispensed with; as, where during the pendency of a suit new trustees in part had been chosen, but had not been made parties at the time the decree was entered, upon a new information brought to enforce the decree, the new trustees, though a minority of the number, were adjudged not to be bound by the decree; and they were allowed to plead other facts to show that the decree ought not to be carried into effect against any of the trustees.[5]

§ 747. Courts of equity have entire control over the matter of costs between the parties to a private suit. Costs in all cases in equity are within the sound discretion of the court, though they are usually allowed to the prevailing party.[6] If a suit arises between the trustees of a charity fund and strangers, the ordinary rules as to costs will be applied, and if there is a decree against the trustees they may be ordered to pay taxable costs as between parties;[7] but if it was a proper suit for the trustees to

[1] Att'y-Gen. *v.* Galway, 1 Mol. 95. [2] Att'y-Gen. *v.* Warren, 2 Swans. 310.

[3] Att'y-Gen. *v.* Haberdashers' Co., 1 Ves. Jr. 295.

[4] Att'y-Gen. *v.* Grocers' Co., 1 Keen, 506.

[5] Att'y-Gen. *v.* Foster, 13 Sim. 262; 2 Hare, 81.

[6] Twisleton *v.* Thelwell, Hard. 165; Uvedale *v.* Uvedale, 3 Atk. 119; Bartlett *v.* Johnson, 9 Allen, 537.

[7] Burgess *v.* Wheate, 1 Eden, 251; Edwards *v.* Harvey, G. Cooper, 40; Hill *v.* Morgan, 2 Moll. 460; Elsey *v.* Lutyens, 8 Hare, 164; Rashleigh *v.* Master, 1

prosecute or defend, they will be allowed the costs so paid by them, together with reasonable counsel fees, in their accounts.[1] Where a suit arises between the heir and the trustees whether there is a proper bequest to a charitable use, and whether the charity can be established; or where a suit arises between the trustees and the *cestuis que trust* if there are any that can come into court; or the attorney-general and the trustees as to the establishing and administering of the charity, — costs will be allowed to all parties, together with reasonable counsel fees or costs as between solicitor and client, out of the charity fund or estate.[2] But the allowance of costs will depend upon the question, whether the issues raised were fit and proper to be raised and determined by the court. If the issues are immaterial or trifling, or if the conduct of a party is vexatious and litigious, or if he raises improper points, or in any way creates unnecessary delay or expense, the court will not only refuse him costs, but will order him to pay costs.[3] Although proper relief may be granted upon very defective pleadings, yet the court will consider the state of the record upon the question of costs.[4] Where one fund is apportioned among several charities, and a suit arises in relation to one charity, the costs, as a general rule, will come out of the fund apportioned to that charity;[5] but in some cases they may come out of the whole fund. The courts use this absolute power over costs as a means of checking improper suits or defences.[6]

§ 748. The distinctive principles of equity, which courts apply to the enforcement and regulation of trusts for charitable uses, are

Ves. Jr. 201; Brodie v. St. Paul, 1 Ves. Jr. 326; Mohun v. Mohun, 1 Swans. 201.

[1] Hill on Trustees, 551.

[2] Currie v. Pye, 17 Ves. 462; Bliss v. Amer. Bible Soc., 2 Allen, 334; Att'y-Gen. v. Moor's Ex'rs, 4 C. E. Green, 509, where it is said that it is the right of the trustees to come into court for instructions and directions, and that it is the practice to allow the costs and expenses of all parties as between attorney and client. 3 Daniels, Ch. Prac. 1554. But no such rule prevails in New York. In such cases, the prevailing party will be allowed his legal costs, but no allowance out of the estate for counsel fees will be made to either party. Rose v. Rose, 28 N. Y. 184.

[3] East v. Ryall, 2 P. Wms. 284; Att'y-Gen. v. Munro, 2 De G. & Sm. 122; Att'y-Gen. v. Grocers' Co., 1 Keen, 506; Att'y-Gen. v. Cullum, 1 Keen, 104; Att'y-Gen. v. Mercers' Co., 2 My. & K. 654; Att'y-Gen. v. Vivian, 1 Russ. 226.

[4] Att'y-Gen. v. Hartley, 2 J. & W. 370.

[5] Att'y-Gen. v. Kerr, 4 Beav. 297.

[6] Att'y-Gen. v. Merchant Tailors' Co., 5 L. J. (N. S.) Ch. 62.

confined to those States which have adopted the Statute, 43 Eliz. c. 4, or the principles of the common law in regard to trusts, as they existed prior to the statute. In some States, the statute is expressly repealed; and such repeal has been held to carry with it all the distinctive doctrines of public charities, as they are held in England. In other States, the statute is said to have been adopted, or to be in force. The law of other States is founded upon what is supposed to have been the common law, or the ordinary jurisdiction and practice of the Court of Chancery prior to the statute. It is not very material whether courts of equity, in the several States, trace their jurisdiction to the statute itself as in force in their State, or whether they exercise the jurisdiction as original and inherent in courts of equity by common law, anterior to the statute. Substantially the same principles are applied, and the same results are reached, in either case.[1]

[1] In Alabama, the general principles of the statute of 43 Eliz. are acted upon by courts of equity, as a part of their inherent jurisdiction. The cases in which the doctrines are discussed are Antones *v.* Eslava, 9 Porter, 527; Carter *v.* Balfour, 19 Ala. 814; Williams *v.* Pearson, 38 Ala. 299. From the principles announced by the court, there is no reason why they should not exercise all the equity powers of the English Court of Chancery.

In Arkansas, the court has determined that public charity is not controlled by the rules against perpetuities. Grissom *v.* Hill, 17 Ark. 433.

In Connecticut, the statute was substantially re-enacted in 1702. Greene *v.* Dennis, 6 Conn. 293; Bull *v.* Bull, 8 Conn. 47; Chatham *v.* Brainard, 11 Conn. 60; Amer. Bible Soc. *v.* Wetmore, 17 Conn. 188; Hampden *v.* Rice, 24 Conn. 350. In Fiske *v.* White, 22 Conn. 32, the court declined to establish a trust in which the trustees were to expend the gift in educating young men studying for the ministry at New Haven, on account of the uncertainty of the beneficiaries. But in Treat's App., 30 Conn. 113, a very indefinite and vague trust was established. The later case will be more likely to be followed in the great majority of States. See also Brewster *v.* McCall, 15 Conn. 274.

In Georgia, the courts exercise an original and inherent jurisdiction over public charities upon the principles of the statute, and apply liberal rules of construction to carry out the intention of the donor. Beal *v.* Fox, 4 Ga. 404; Walker *v.* Walker, 25 Ga. 420.

In Illinois, the statute is said to be in force, and courts will carry out the intention of the donor in establishing a charity. They disclaim the power to change the objects, *cy près*, and decide that a charity must be accepted as given. All of which is undoubted law; but from the principles of interpretation laid down there is no reason why they should not carry out the intention of the donor *cy près*, if there fail to be any objects of his charity, as originally given and administered. Gilman *v.* Hamilton, 16 Ill. 225; Heuser *v.* Harris, 42 Ill. 425.

In Indiana, courts act upon the statute, and enforce general and indefinite charities, according to the intention of the donors and upon the principles of courts of equity. McCord *v.* Ochiltree, 8 Blackf. 15; Sweeny *v.* Sampson, 5 Ind. 465; Indianapolis *v.* Grand Master, 25 Ind. 518.

In Iowa, the courts act on an original and inherent jurisdiction over charitable bequests, and lay down the rule that courts are acting judicially as long as they effectuate the intention of a donor. Miller *v.* Chittenden, 4 Iowa, 252. They also hold that if the object of a trust is certain, but there is no trustee, the court will appoint one. Johnson *v.* Mayne, 4 Iowa, 180. But if the objects are uncertain, and no trustee is appointed, the trust will fail. Le Page *v.* Macnamara, 5 Iowa, 146.

In Kentucky, the statute of Eliz. is in full force by adoption, and the courts have carried their equity jurisdiction to the extreme verge of the law in establishing charities. Church *v.* Church, 18 B. Mon. 635; Hadden *v.* Chorn, 8 B. Mon. 78; Gass *v.* Wilhite, 2 Dana, 170, discuss special cases. In Moore *v.* Moore, 4 Dana, 354, a charity was established by which the judges of the county courts were to select the objects. In Att'y-Gen. *v.* Wallace, 7 B. Mon. 611, a general gift to charitable and religious purposes, without trustees and without any machinery pointed out or referred to by which trustees were to be appointed, was sustained. This case goes further than any other case observed in the United States. Other cases have been sustained where the appointment of trustees was in terms referred to the court. And cases have been sustained where trustees, incapable of taking, were nominated in the will, whereby it appeared that the donor intended that his trustees should reduce his general and indefinite intent to a practical certainty. Att'y-Gen. *v.* Wallace is an exception to the general rule that courts in England and America act upon, when they do not profess to exercise any extraordinary or prerogative powers.

Louisiana has a liberal system of charitable trusts under its code, which was derived from the civil law. The statute of Eliz. was never in force in the State, as their laws were derived from France and Spain. See Soc. of Orphan Boys *v.* New Orleans, &c., &c., 12 La. An. 62; New Orleans *v.* McDonogh, 12 La. An. 240; Fink *v.* Fink, 12 La. An. 201.

In Maine, the statute is in force, or rather the courts act upon the doctrine that the equity jurisdiction of chancery over charities was original and inherent in courts of equity before the statute. Their courts carry out the intention of donors by establishing charitable gifts made to voluntary societies for indefinite purposes. Shapleigh *v.* Pilsbury, 1 Me. 271; Tappan *v.* Deblois, 45 Me. 222; Preachers' Aid Soc. *v.* Rich, 45 Me. 55; Howard *v.* Amer. Peace Soc., 49 Me. 228; Swazey *v.* Amer. Bible Soc., 57 Me. 526; Kimball *v.* Universalist Soc. in Sweden, 34 Me. 434.

In Maryland, neither the statute nor the principles of the statute have ever had any recognition in their courts. No trust for charity can be established, unless the beneficiaries are so certain that they can maintain an action in court in their own names for the benefit of the fund. Of course, under such a rule, no trust for the poor of a city, or of the wards of a city, to be relieved according to the discretion of the trustees, can be maintained; and such are the decisions. Wilderman *v.* Baltimore, 8 Md. 550; Methodist Church *v.* Warren, 28 Md. 338; Dashiel *v.* Att'y-Gen., 5 Harr. & J. 392; 6 Harr. & J. 1; Murphy *v.* Dallam, 1 Bland, 529; Beaty *v.* Kurtz, 2 Pet. 566.

In Massachusetts, the statute is in full force, and the courts have established a great variety of charitable bequests. A very liberal rule of interpretation has been adopted to ascertain the intention of donors, and such intention has been carried into effect as near as may be. Bartlett *v.* King, 12 Mass. 536; Going *v.* Emery, 16 Pick. 107; Sanderson *v.* White, 18 Pick. 328; Burbank *v.* Whitney, 24 Pick. 146; Washburn *v.* Sewell, 9 Met. 280; Bartlett *v.* Nye, 4 Met. 378; Brown *v.* Kelsey, 2 Cush. 243; Winslow *v.* Cummings, 3 Cush. 358; Tucker *v.* Seamen's Aid Soc., 7 Met. 188; Sohier *v.* St. Peter's Church, 12 Met. 250; North Adams *v.* Fitch, 8 Gray, 241; Wells *v.* Doane, 3 Gray, 201; Easterbrooks *v.* Tillinghast, 15 Gray, 17; Nourse *v.* Merriam, 8 Cush. 11; Earle *v.* Wood, 8 Cush. 445; Dexter *v.* Gardner, 7 Allen, 246; Wells *v.* Heath, 10 Gray, 17; Att'y-Gen. *v.* Old South Soc., 13 Allen, 477; Fairbanks *v.* Sampson, 99 Mass. 533; Hadley *v.* Hopkin's Acad., 14 Pick. 240; Tainter *v.* Clark, 5 Allen, 66; Att'y-Gen. *v.* Trinity Church, 9 Allen, 422; Baker *v.* Smith, 13 Met. 41; Parker *v.* May, 5 Cush. 336; Bliss *v.* Amer. Bible Soc., 2 Allen, 334; Drury *v.* Natick, 10 Allen, 169. In Odell *v.* Odell, 10 Allen, 1, it was determined that the common-law rule against perpetuities and accumulations did not apply to trusts for public charities. In Saltonstall *v.* Sanders, 11 Allen, 447, it was determined that the word "benevolence" meant "charitable," and in Amer. Acad. *v.* Harvard College, 12 Gray, 582, and in Jackson *v.* Phillips, 14 Allen, 540, it was determined that the intention of the donor, to be ascertained by liberal rules of construction, would be carried into effect, *cy près*, if the original objects of the charity failed. In Harvard Coll. *v.* Soc. Prom. Theo. Educ., 3 Gray, 281, it was determined that the court could not transfer the funds of a charity from one board to another, or remove trustees for the mere convenience of parties; and in Att'y-Gen. *v.* Garrison, 101 Mass. 223, it was determined that the court would remove a trustee, when he did not sympathize with the scheme of administering the charity, as settled by the court upon a reference to a master, and there was danger that he would not carry out the scheme with proper energy and efficiency. It will be seen that the court has dealt with a great variety of cases. It professes to adhere to the strict chancery jurisdiction of courts of equity, without invoking any of the extraordinary powers of the chancellor as keeper of the king's conscience. Some of the cases that enforce gifts in trust to voluntary and defunct associations reach the extreme verge of the law; but it is probable that the English chancery would have enforced every one of these trusts without calling in the extraordinary aid of prerogative power. It is proper to say that unincorporated religious societies are clothed with very considerable legal power. See Gen. Stat. ch. 30, §§ 24, 25.

In Mississippi, courts exercise the inherent jurisdiction of equity over public trusts for charity. Wade *v.* Amer. Colonization Soc., 7 Sm. & M. 663; State *v.* Prewett, 20 Miss. 165.

In Missouri, the court administers trusts for public charities upon the general principles of the statute, and with a liberal interpretation of its powers. Chambers *v.* St. Louis, 29 Mo. 543.

In New Hampshire, the courts have recognized the general principles of charitable trusts; but there are no direct decisions indicating how far the court will go in enforcing trusts for vague and indefinite purposes. Duke *v.* Fuller, 9 N. H. 538; Chapin *v.* School Dist., 35 N. H. 454; Sec. Cong. Soc. *v.* First Cong. Soc.,

14 N. H. 315; Brown *v.* Concord, 33 N. H. 285; Dublin Case, 38 N. H. 459; New Market *v.* Smart, 4 Amer. Law Reg. (N. S.) 390.

In New Jersey, the statute was never in force; but the Court of Chancery exercises an inherent and extensive jurisdiction over charities, on principles acted upon in England and many of the States. In Morris *v.* Thompson, 4 C. E. Green, 307, an interpretation was given to the word "benevolence," used in connection with the words "religious" and "charitable," following the cases of Ommanney *v.* Butcher, and Williams *v.* Kershaw, and differing from the case of Saltonstall *v.* Sanders, in Massachusetts. In Att'y-Gen. *v.* Moore, 4 C. E. Green, 503, the court speaks of the ordinary powers of the court, which are exercised in the ordinary equity jurisdiction in chancery, and the extraordinary power or jurisdiction which the court is called upon to exercise, and will exercise in establishing and regulating public charitable trusts. It is somewhat difficult to understand what is meant when an extraordinary power and jurisdiction is referred to, which will be exercised in establishing charitable trusts for public and vague purposes. If these words mean, that any prerogative or sovereign function can be exercised in performing judicial duties, it is certainly a mistake, unless the legislature has clothed the court with this part of the sovereign power which belongs to the *parens patriæ*, whether king, crown, people, or legislature. If it is simply intended that an ordinary equity jurisdiction will be exercised in applying rules of interpretation and of law adapted to the subject-matter, — that is, to charitable trusts of a public nature, and therefore, of necessity, vague, indefinite, and uncertain at times, — there is no occasion to find fault; for it is a mere use of words to describe the rules that will be applied. If it is meant, that the rules to be applied to the judicial construction and administration of public charitable trusts are different from the rules applied to private trusts for individuals, and are in that sense extraordinary, there is no objection to the language. But if it is meant that any function, not strictly judicial within the ordinary and inherent jurisdiction of courts of equity over charities, can be exercised, the power is misapprehended. It must be a fundamental rule in America, that no public trust for charity can be established, unless the judges can establish it by strictly judicial determinations. If the gift is too imperfect or too indefinite to be established by the courts acting judicially, the legislature alone can establish it by special act, or the legislature may clothe the courts with such powers as it sees fit to confer.

In New York, many of the earlier cases decided that the courts had full jurisdiction over charitable bequests, to enforce them according to judicial rules. In one case, it was held that the jurisdiction of the chancellor was as extensive as the commission under the privy seal in England. Wright *v.* Trustees of Meth. Epis. Church, 1 Hoff. Ch. 202. This was carrying their power too far, and it was denied in Ayers *v.* Trustees of Meth. Epis. Church, 3 Sandf. S. C. 351. In King *v.* Woodhull, 3 Edw. Ch. 79, the common English judicial principles were applied; and cases have been sustained where gifts were made to unincorporated societies for charitable purposes. Shotwell *v.* Mott, 2 Sandf. Ch. 46; Potter *v.* Chapin, 6 Paige, 639; Banks *v.* Phelan, 4 Barb. 80; Coggeshall *v.* Pelton, 7 John. Ch. 292; Newcomb *v.* St. Peter's Church, 2 Sandf. 636; 2 Kent, 286; 4 Kent, 508; People *v.* Steele, 2 Barb. 397; Miller *v.* Gable, 2 Denio, 492; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. 439. Inglis *v.* Sailors' Snug Harbor, 3 Pet. 112, in the Supreme Court of the United States, decided,

upon the law, as it was understood to exist in New York, that a devise to the chancellor, mayor, and recorder of New York, and several other persons by their official description for the time being, and their successors in office, adding "if this cannot be done without an act of incorporation they should apply for one," was a good devise for a charitable use. Williams *v.* Williams, 4 Seld. 525, proceeded upon a very moderate and cautious rule, but there was very considerable dissent. Trustees of Theo. Sem. *v.* Kellogg, 16 N. Y. 83, was decided the same way. But the later cases have decided that no charitable trust can be established in that State, where the trustee named cannot take the legal title to all intents and purposes. There is a statute in New York forbidding a corporation to take lands for any purpose not germane to the purposes for which it was incorporated. So if a gift is made to a corporation for a charitable purpose other than that for which the corporation exists, the gift fails, for the reason that the court will appoint no other trustee. McCarter *v.* Orphan Asylum Soc., 9 Cow. 437; Robertson *v.* Bullions, 9 Barb. 64; 11 N. Y. 243. So if a bequest is made to a voluntary association in trust for a charity, the gift fails because the voluntary association is not capable of taking the property. Owens *v.* Mission Soc., 14 N. Y. 380. The reasoning is, that the jurisdiction of the court attaches only where there is a trust, and there is a trust only where there is a trustee capable of taking. The general rule in private trusts is, that where a clear trust is created, but the trustee is not named, the court will not allow the clear intention to create a trust to fail for want of a trustee. And so it would appear that the clear intention of the testator that trustees should carry out his purpose might be carried into effect by the courts. A bequest to such five persons as the judges of the Supreme Court of Vermont should appoint to establish a school, was held void. Bascomb *v.* Albertson, 34 N. Y. 584. In this case, the ground is taken that the statute of Elizabeth was repealed by the New York statute of 1788; and that if the jurisdiction over charities existed before the statute of Elizabeth, still in 1788 it was universally supposed that the jurisdiction in England depended upon the statute; therefore, when the assembly repealed the statute in 1788, it must have intended to repeal the whole system of charitable uses; that since that time a new system, peculiar to the institutions of the State, has grown up, and the courts of New York will not now enforce charitable trusts, not in harmony with the New York system, unless they are as definite as private trusts. Although trustees are certain and capable of taking the legal estate, the trust cannot be established, if there is any uncertainty in respect to the beneficiaries or any discretion in the trustees; thus where a fund was given to executors to be applied by them, according to their judgment, in founding a college in Liberia, it was held that the gift was void for uncertainty in the application of it. Phelps *v.* Phelps, 28 Barb. 121; Beekman *v.* People, 27 Barb. 260; Beekman *v.* Bonsor, 23 N. Y. 290; Owens *v.* Mission Soc., 14 N. Y. 380; Yates *v.* Yates, 9 Barb. 324; King *v.* Rundle, 15 Barb. 139; Wilson *v.* Lynt, 16 How. (N. Y.) Prac. R. 348; 30 Barb. 124; Dodge *v.* Pond, 23 N. Y. 69; Goddard *v.* Pomeroy, 36 Barb. 546; Levy *v.* Levy, 33 N. Y. 97; Sherwood *v.* Amer. Bible Soc., 1 Keyes, 566. These are the principal cases. It is now conceded that the law of charitable uses was not founded upon the statute of Elizabeth; and neither the courts nor the bar of New York understood, for more than half a century, that the statute of 1788 repealed the statute of Elizabeth. And it might well have been assumed

after such a length of time, that the repeal did not extend further than the statute of 1788 itself went, and that if the statute of 1788 repealed the statute of Elizabeth, the system which was independent of it still remained. It would not be becoming to criticise the jurisprudence of a great State upon so important a subject; but the question arises in every mind conversant with this branch of the law, whether the new system, that has taken the place of the old, is more certain in its application and more satisfactory, and better adapted to the wants of a great and growing people. Does the new system carry out the intention of charitable donors with more efficiency than did the old and tried system, which had grown up with time, and had been modified by the wisdom of so many judges, and still satisfies the wants of so many States? Another observation may be made. The cases, thus far decided, evince great learning, research, and ability; but there seems to be a want of confidence in the stability of the system, and a want of agreement among both the lawyers and the judges: so that the whole matter is yet in a transition state. If certainty is an element of safety and security in the law, the attempt to substitute one system for another has as yet only reached the point of rendering both systems uncertain.

In North Carolina, the statute was declared to be in force in its general principles, and courts applied very liberal rules in dealing with this kind of trusts. Griffin *v.* Graham, 1 Hawks, 96; State *v.* McGowen, 2 Ired. Eq. 9; State *v.* Gerard, 2 Ired. Eq. 210. But, since those cases, the courts have declined to apply the rules applicable to public trusts and have confined themselves to the rules applicable to trusts for private individuals. Wilson *v.* McAuley, 1 Dev. Eq. 276; Trustees *v.* Chambers, 3 Jones, Eq. 253; Holland *v.* Peck, 2 Ired. Eq. 255; Haywood *v.* Craven, 2 Car. L. R. 557; White *v.* Att'y-Gen. 4 Ired. Eq. 19. Perhaps some of these trusts were too uncertain to be established by the most liberal judicial rules, and certainly it would be hard to convict a trustee of breach of trust in applying a fund for the good of "poor saints." There might be so great a difficulty in determining who were "saints" and "poor," and what should be done for them, in other States as well as North Carolina, that the trust might well fail, although there was a trustee to exercise his discretion in selecting them. Bridges *v.* Pleasants, 4 Ired. Eq. 26; White *v.* University, 4 Ired. Eq. 19.

In Ohio, the statute is in full force, and the general rules of equity applicable to public trusts are applied by the courts. Perin *v.* Carey, 24 How. 465; Hullman *v.* Honcomp, 5 Ohio St. 237; Zanesville Canal *v.* Zanesville, 2 Ohio, 483; M'Intire's School *v.* Zanesville, 9 Ohio, 203; Amer. Bible Soc. *v.* Marshall, 15 Ohio St. 537; Urmey's Ex'rs *v.* Wooden, 1 Ohio St. 160.

In Pennsylvania, the statute is not directly in force, and the courts are not confined to the statute for an enumeration of charitable uses; but in other respects the principles of the statute are a part of the common law of the State. In 1855, an act was passed declaring that when gifts are made to religious, charitable, educational, literary, or scientific purposes, in no event whatever shall they revert to the heir, but the courts are to apply them to the purposes for which they were intended. Previous to this statute, the courts had applied most liberal judicial rules to the establishment and regulation of public charities. Whitman *v.* Lex, 17 S. & R. 88; Wright *v.* Linn, 9 Barr, 435; Soohan *v.* Philadelphia, 33 Penn. St. 9; Price *v.* Maxwell, 28 Penn. St. 23; Pickering *v.* Shotwell, 10 Barr, 23; Griffiths *v.* Cope, 17 Penn. St. 96; McLain *v.* School Directors, 51

Penn. St. 196; Evangelical Asso. App., 35 Penn. St. 316; Mission. Soc. App., 30 Penn. St. 425; Cresson's App., 30 Penn. St. 437; Meth. Church v. Remmington, 1 Watts, 218; Gregg v. Irish, 9 S. & R. 211; Browers v. Fromm, Add. 365; McGirr v. Aaron, 1 Penn. 49; Martin v. McCord, 5 Watts, 494; Barr v. Weld, 24 Penn. St. 84; Brender v. German Ref. Cong., 33 Penn. St. 418; Philadelphia v. Wills, 3 Rawle, 170; Cassell's App., 3 Watts, 440; Morrison v. Beirer, 2 W. & S. 81; Zimmerman v. Anders, 6 W. & S. 218; Magill v. Brown, Brightly, 347; Blenon's Estate, Brightly, 345; Vidal v. Girard's Ex'rs, 2 How. 128. In Hillyard v. Miller, 10 Penn. St. 326, it was determined that accumulations for charity could not be allowed beyond the legal period; but in Philadelphia v. Girard, 45 Penn. St. 9, this point was substantially overruled. McLean v. Wade, 41 Penn. St. 266. In Zeisweiss v. James, 63 Penn. St. 465, it was determined that uncertainty in the objects of a trust is no objection, if there are trustees who can select the objects and render them certain; but if there are no trustees to select the objects, the court cannot appoint trustees and clothe them with the power of selection. It was further determined, that an unincorporated society may take under a charitable devise; but that a gift to a corporation to be incorporated, but which might not be incorporated within the time for limiting estates, is void. And so if the gift is to a corporation to be created, but which cannot exist according to the laws of the State, it must fail. It was further determined, that the laws and institutions of Pennsylvania are built on the foundation of reverence for Christianity, and that the religion revealed in the Bible is not to be openly reviled, ridiculed, or blasphemed to the annoyance of sincere believers; and that trusts attempted to be created, tending to that end, are illegal and void.

In Rhode Island, the jurisdiction of the courts is founded upon an old statute very similar to the statute of Eliz., and rules, appropriate to charitable trusts where the statute is in force, are applied by the court to such cases. Derby v. Derby, 4 R. I. 414; Potter v. Thornton, 7 R. I. 252.

In South Carolina, the courts exercise an original jurisdiction over charitable trusts, whether the statute is in force in the State or not, and rules proper for such trusts are applied as in other States. Att'y-Gen. v. Jolly, 1 Rich. Eq. 99; 2 Strob. 379; Combe v. Brazier, 2 Des. 431; Att'y-Gen. v. Clergy Soc., 8 Rich. Eq. 190; Gibson v. McCall, 1 Rich. L. 174.

In Tennessee, the court exercises an original jurisdiction over charitable trusts, and the common rules applicable to public charities are approved; but there is a slight uncertainty in their application. Green v. Allen, 5 Humph. 170. The later cases, Franklin v. Armfield, 2 Sneed, 305, and Dickson v. Montgomery, 1 Swan, 348, proceed with more confidence and firmness. The court refers to an extraordinary jurisdiction and power which it may exercise in charity cases. See remarks upon this matter under New Jersey in this note. See also White v. Hall, 2 Cold. 77; Gass v. Ross, 3 Sneed, 211.

In Texas, the court exercises an original and inherent jurisdiction over charities upon the principles of the statute. Hopkins v. Upshur, 20 Tex. 89; Ball v. Alexander, 22 Tex. 355; Paschal v. Acklin, 27 Tex. 173.

In Vermont, the statute is substantially the law of the State in relation to charitable trusts. Stone v. Griffin, 3 Vt. 400; Burr v. Smith, 7 Vt. 241; Penfield v. Skinner, 11 Vt. 296.

In Virginia, the statute was repealed; and the courts will establish no public

trust for a charitable use except it comes within the strict rules of private trusts. This, of course, destroys all trusts in which a trustee has any discretion in selecting the objects of the charity. Gallego *v.* Att'y-Gen., 3 Leigh, 451; Seaburn *v.* Seaburn, 15 Grat. 243; Baptist Association *v.* Hart, 4 Wheat. 1; Wheeler *v.* Smith, 9 How. 55; Carter *v.* Wolf, 13 Grat. 301; Richmond *v.* Tayloe, Gil. 336. And see Venable *v.* Coffman, 2 West Va. 310; Janey *v.* Latane, 4 Leigh, 327.

In the other States, no cases have been observed.

CHAPTER XXIV.

TRUSTEES FOR BONDHOLDERS OF RAILWAYS AND OTHER CORPORATIONS.

§ 749. WITHIN the last few years it has become common in this country to create trusts for bondholders. The development of railways has been rapid, and to operate and extend them often requires large sums of money in excess of their capital stock, or their ordinary floating debt. As it is impossible to obtain these large sums in the ordinary course of business from one source and without security, the bonds of the corporation are issued, under authority of the legislature, and sold in the market, and the franchise and property of the corporation conveyed in mortgage to one or more persons in trust to secure the purchasers and holders of the bonds. The bonds may amount to millions of dollars, and be scattered through the country, and even in foreign lands; but the trustees hold the conveyance of the property in trust for all who have the bonds described or referred to in the mortgage. The corporation itself issues the bonds, and promises to pay the principal and interest at a time named. So long as the corporation pays the interest or the principal of the bonds, as agreed, the trustees have little or nothing to do. The general principles of the law of trusts apply to them.[1] They hold the security in trust for the bondholders, as *cestuis que trust;* and they must act in good faith,

[1] Sturges *v.* Knapp, 31 Vt. 1.

and for the best interests of all. They must take care that the property is not wasted, or depreciated, or rendered worthless as security. They should not acquire interests, or put themselves in positions or relations, which are antagonistic or hostile to the interests of the bondholders. Doubtless they can purchase the bonds for which the mortgage stands as security in the open market: but they could not go among the bondholders and solicit the purchase of the bonds; for, holding the security for the bonds in their own hands, their position and influence would be such, and the danger of fraud so great, that a court of equity would not allow the bargain to stand. Their duty in all such respects would be governed by the general rules that affect all trustees, modified to meet the exigencies of the case. It is only where there is a default made by the corporations in the payment of the bonds or the interest, and it is necessary for the bondholders to have recourse to the mortgage security, that their peculiar duties begin.[1]

§ 750. The usual practice in England is to mortgage only the tolls, accruing profits, or future calls of the corporation.[2] If the act of parliament only authorizes such a mortgage, or if the deed itself extends only to the tolls, profits, and future calls, receivers may be appointed to receive the tolls, profits, or other income of the corporation; but an action of ejectment cannot be maintained for the possession against the corporation.[3] But, of course, there may be a mortgage authorized and made, which will give the mortgagee a right to the possession of the property: in such case the mortgagee entitled to the possession may maintain an action against the mortgagor, or subsequent mortgagees.[4]

§ 751. If a mortgagee of the tolls and income is in possession of the property of the corporation, receiving the tolls and income, he will hold the receipts in trust for the holders of the bonds, claims, or debts for which the mortgage was made as security; and upon payment of all such claims or debts he will hold the income in trust for subsequent incumbrancers.[5] So where the mortgage is of

[1] Ibid.

[2] 8 & 9 Vict. c. 16.

[3] Fairtitle *v.* Gilbert, 2 T. R. 169; Banks *v.* Booth, 2 B. & P. 219; Myatt *v.* St. Helen's and Runcorn Gap Railw., 2 Q. B. 364; 2 Railw. C. 756. See comments of Lord Chelmsford, in Wickham *v.* New B. & Canada Railw., 12 Jur. (N. S.) 34.

[4] Thompson *v.* Lediard, 4 B. & Ad. 137; Watton *v.* Penfold, 3 Q. B. 757; Levy *v.* Horne, 3 Q. B. 757.

[5] Ibid.

an aliquot part of the income, the trustees will receive the toll or income for those entitled; but no action at law can be maintained against them for such moneys. They can be called to an account only in equity.[1] It sometimes happens that a mortgage of the tolls and income contains a power of sale of the whole undertaking. If a sale is made under such power in a first mortgage, it is a bar to all subsequent mortgages; and subsequent mortgagees can only claim the surplus in the hands of the first mortgagee after paying off all the claims for which the first mortgage stands as security.[2]

§ 752. Where the act of parliament confers upon corporations their only power of borrowing, they can borrow in no other manner;[3] and if the act of parliament authorizes a mortgage of the tolls or income, or of the corporate property, and a mortgage is executed in conformity with the act, no power is given to enter into personal covenants; therefore no action lies against the company upon the deed to recover the money loaned, but proceedings are confined to remedies against the property or tolls mortgaged.[4] But if there is no restriction in the act of parliament upon the power of borrowing, and the company has the usual power of borrowing money, and of securing payment by personal covenants, actions will lie against the corporation to recover the money,[5] and bondholders may maintain actions upon the covenants in the bonds.[6]

§ 753. If a mortgage is made to one person to secure several notes or bonds made to him, and the mortgagee assigns the notes or bonds to different persons, but continues to hold the mortgage security in his own name, he will hold it in trust for the several persons to whom he has assigned the mortgage notes, bonds, or other evidences of the debt due to him. So if a mortgage of a

[1] Pardoe *v.* Price, 11 M. & W. 427; 13 M. & W. 267; 16 M. & W. 451.

[2] South-eastern Railway Co. *v.* Jortin, 31 Law Times, 44.

[3] Chambers *v.* Manchester & Milford Railw., 10 Jur. (N. S.) 700; Lowndes *v.* Garnett & Mosely Co., 33 L. J. Ch. 418.

[4] Furness *v.* Caterham Railw., 25 Beav. 614; 27 Beav. 358; Pontet *v.* Basingstoke Canal Co., 3 Bing. N. C. 433; Long *v.* Mathieson, 2 Gif. 71.

[5] Hill *v.* Manchester Water Works, 2 B. & Ad. 544; Balckow *v.* Herne Bay Pier Co., 16 Eng. L. & Eq. 159; 1 El. & Bl. 74; Hart *v.* Eastern Union Railw., 8 Eng. L. & Eq. 544; 14 Eng. L. & Eq. 535; 7 Exch. 246; Perkins *v.* Pritchard, 3 Railw. C. 95; Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & Jones, 123.

[6] Price *v.* Great Western Railw., 16 M. & W. 244; White *v.* Carmarthen, &c., Railw., 1 H. & M. 786.

railway is made to a person to secure a large number of bonds given to him, and he assigns or sells the bonds to various persons, he becomes a trustee, by equitable construction, of the mortgage security for the several holders of the bonds, and such constructive trust is governed by the common rules that apply to such transactions. But such mortgages are not within the statutes in force in many States in relation to mortgages of railways in trust, as security for bonds to be issued by the corporation. In the case first stated, the bondholders cannot appoint a new trustee, nor have they any statute powers over such trust; but they must apply to the courts, and take such action, for the enforcement of it, as is necessary in the ordinary case of a private trust.[1]

§ 754. In the United States, the power of corporations to mortgage their property has been much considered. The discussions in courts have been prolonged upon the question, What can trustees take under a mortgage by a corporation? It seems to be well established, that corporations have a general right and power to mortgage their real and personal property to secure the payment of the purchase-money of such property,[2] or to secure their general debts.[3] And even if the charter of a railway or other corporation provides that the money to construct the road or other works of the corporation shall be raised by subscription or by the sale of a determined number of shares, or that new shares may be issued for additional funds, or that the shares shall not be assessed beyond one hundred dollars per share, the power of mortgaging is not excluded, but the corporations may raise money by a mortgage to trustees or otherwise.[4] The mortgage in such cases must be

[1] *In re* Bondholders of the York and Cumberland R.R. Co., 50 Me. 565.

[2] Susquehanna Bridge Co. *v.* General Ins. Co., 3 Md. 30; Lucas *v.* Pitney, 3 Dutch. 221; White *v.* Carmarthen & Cardigan Railw., 33 L. J. Ch. 93; Mobile & Cedar Point Railw. *v.* Tolman, 15 Ala. 472; Joy *v.* J. & M. Plank R. Co., 11 Mich. 155; Australian Auxil. S. Clipper Co. *v.* Mounsay, 4 K. & J. 733; Scott *v.* Colburn, 26 Beav. 276.

[3] Gordon *v.* Preston, 1 Watts, 385; *In re* Magdalena Steam Nav. Co., 1 John. (Eng.) 690; Coe *v.* Columbus, &c., Railw., 10 Ohio St. 372, 412; Coe *v.* Peacock, 14 Ohio St. 187; 23 How. 117; Bardstown & Louisville Railw. *v.* Metcalfe, 4 Met. (Ky.) 199; Jackson *v.* Brown, 5 Wend. 590; De Ruyter *v.* St. Peter's Church, 2 Comst. 238; Central Bridge *v.* Baily, 8 Cush. 319; Jowitt *v.* Lewis, 4 Lit. 160; Enders *v.* Board of Public Works, 1 Grat. 364.

[4] Union Bank *v.* Jacobs, 6 Humph. 515; Junction Railw. *v.* Ruggles, 7 Ohio St. 1.

executed according to the rules and by-laws of the corporation, if there are any, or it will be void.[1]

§ 755. Upon general principles, as before stated, a corporation, being the absolute owner of its property, may sell, convey, and mortgage it. Such rights are among the essential incidents to property, and they are inherent in property whether owned by corporations or private individuals. But when the legislature of a State charters corporations for public purposes, and authorizes them to take lands and build roads, to run trains of cars and receive tolls, such corporations undertake, in return for the privileges granted, to perform the duties for which they are chartered. The general right and ownership of property carries with it the right to sell it, or to convey it in mortgage, which may become an absolute sale by foreclosure. If the corporation makes a mortgage of all its property simply, without naming its franchise, can the mortgagee by foreclosure remove the property to another place, and prevent the corporation from performing its duties, or can the mortgagee use the property as the corporation used it? It is apparent that the removal of the property to another place would destroy the larger part of its value, as well as deprive the corporation of the power of exercising its franchise.

§ 756. It is said that the franchise of a corporation consists of two parts, or rather of two franchises distinct and independent of each other in their nature; the one is the franchise to be a corporation, to have a legal entity, a corporate name, and the right and power of suing and being sued, and of performing other acts requiring a legal existence as an independent being; the other is the franchise or privilege of doing a particular business in a certain manner, and of collecting or receiving tolls, fees, or compensation for doing such acts. It is conceded by all, that the right, privilege, or franchise to be a corporation cannot be sold, mortgaged, or assigned to any other person or body of persons. The State having granted this privilege to a particular body, it cannot be transferred to another body without the sanction of the power that granted it.[2]

[1] Gordon *v.* Preston, 1 Watts, 385; Richards *v.* Railway, 14 N. H. 135.

[2] Bowman *v.* Wathen, 2 McLean, 393; Bardstown, &c., Railw. *v.* Metcalfe, 4 Met. (Ky.) 200; 2 Redf. on Railw. 514 (3d ed.) n.; Coe *v.* Columbus, &c., Railw., 10 Ohio St. 372; State *v.* Boston, &c., Railway Co., 25 Vt. 433; Hall *v.* Sullivan Railw. Co., 21 Law Rep. 138; 2 Redf. on Railw. 517; Commonwealth *v.* Smith, 10

§ 757. It is well established that a corporation, like an individual, may mortgage its real and personal property, and the mortgagees acquire by foreclosure the absolute ownership of such property. If such property is disconnected from the general purposes of the corporation, no questions can arise. The mortgagees or trustees can enter upon and occupy and improve the property in the same manner that other property is improved. But if the property is essential to the business of the corporation, can the mortgagees or trustees enter and take such property and remove it, so far as it is personal, and sell the real estate? Or can they remove the rails and superstructure of the road-bed, and take away the power of the corporation to perform its duties to the public? If the mortgagees cannot do these things, can they use the property in the position in which it is placed? Can they operate the railway? Can they run trains of cars, carry passengers and freight, and receive fares or tolls? If the legislature has expressly authorized the corporation to execute a mortgage of all its property, including the franchise of operating the railway and receiving tolls, there can be little or no trouble in a legal point of view; but if the mortgage is executed without the special authority of the legislature, can the corporation mortgage its franchise to operate its road or receive tolls, and what are the rights and powers of trustees under such mortgages? On the one side, the opinion has been expressed that a railway corporation may mortgage all its property, including its road-bed and the superstructure and the franchise of operating or using it as a railway, although the legislature granted

Allen, 456. Mr. Justice Curtis in Hall *v.* Sullivan Railway Co., *ut supra*, said: "Among the franchises of the company is that of being a body politic with rights of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being only the law can create; and, when created, it cannot transfer its own existence into another body; nor can it enable natural persons to act in its name, save as its agents, or as members of the corporation acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railway, and to take tolls thereon, are not necessarily corporate rights: they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable. Peter *v.* Kendall, 6 B. & C. 703; Com. Dig. Grant, C.

no such power to the corporation in terms.[1] On the other hand, the opinion has been very largely entertained that a corporation cannot transfer the franchise of operating its road to another person or corporation, and thus escape the burden assumed by it towards the public.[2] The preponderance of authority would seem to be against the power of a corporation to convey its franchise in mortgage, unless specially authorized to do so by the legislature. It is, however, worthy of observation that there is no case where the franchise of a corporation has been decreed to pass to trustees by a mortgage of its franchise, not authorized by the legislature either

[1] Allen *v.* Montgomery Railw., 11 Ala. 437; Mobile & Cedar Point Railw. *v.* Tolman, 15 Ala. 472; Pollard *v.* Maddox, 22 Ala. 321; Dunham *v.* Isett, 15 Io. 284; Hall *v.* Sullivan Railw., 21 Law Rep. 138; Pierce *v.* Emery, 32 N. H. 484; Miller *v.* Rutland, &c., Railw., 36 Vt. 452; Bowman *v.* Walker, 2 McLean, 393; Dinsmore *v.* Racine, &c., Railw., 12 Wis. 649; Platt *v.* New York Railw., 26 Conn. 544; Union Bank *v.* Jacobs, 6 Humph. 515; Macon, &c., Railw. *v.* Parker, 9 Ga. 377; Briggs *v.* Terrell, 12 Ired. 1; Watertown *v.* White, 13 Mass. 477; Fay Petitioner, 15 Pick. 243; Felton *v.* Deal, 22 Vt. 170; McCauly *v.* Givens, 1 Dana, 261; 1 Green (Io.), 498; Clark *v.* Corporation of Washington, 12 Wheat. 40; Bingham *v.* Weiderwax, 1 Comst. 509; 2 Kent, 305, 307; 1 Redf. Railw. 588; Enfield Toll Bridge *v.* Hartford, &c., Railw., 17 Conn. 40.

[2] Commonwealth *v.* Smith, 10 Allen, 456; Opinion of Justices, 9 Cush. 611; Salem Mill Dam *v.* Ropes, 6 Pick. 32; Treadwell *v.* Salisbury Mills, 7 Gray, 404; Whittenton Mills *v.* Upton, 10 Gray, 582; Arthur *v.* Commercial, &c., Bank, 9 Sm. & M. 394; State *v.* Commercial Bank, 13 Sm. & M. 569; Richards *v.* Merrimack, &c., Railw., 44 N. H. 127; Atkinson *v.* Marietta, &c., Railw., 15 Ohio St. 21; State *v.* Mexican Gulf Railw., 3 Rob. (La.) 513; Hall *v.* Sullivan Railw., 21 Law Rep. 138; Pierce *v.* Emery, 32 N. H. 484; Tippetts *v.* Walker, 4 Mass. 495; Worcester *v.* Western Railw., 4 Met. 564; Troy, &c., Railw. *v.* Kerr, 17 Barb. 581; States *v.* Rives, 5 Ired. 297; Winch *v.* Railw. Co., 13 Eng. L. & Eq. 506; 5 De G. & Sm. 562; 7 Railw. Cas., 384; South Yorkshire, &c., Railw. *v.* Great Northern Railw., 19 Eng. L. & Eq. 513; 3 De G., M. & G. 576; Beman *v.* Rafford, 6 Eng. L. & Eq. 106; 1 Sim. (N. S.) 550; Wheelock *v.* Moulton, 15 Vt. 519; Bennington Iron Co. *v.* Isham, 19 Vt. 230; Shrewsbury, &c., Railway *v.* London & N. W. Railw., 21 Eng. L. & Eq. 319; 4 De G., M. & G. 115; 6 H. L. Ca. 113. It has been determined, in a great number of cases, that the franchise of a corporation cannot be seized, sold, and transferred on execution against the corporation. Commonwealth *v.* Smith, 10 Allen, 456; States *v.* Rives, 5 Ired. 267; Seymour *v.* Milford, &c., Railw., 10 Ohio, 476; Winchester, &c., Turnpike Co., 5 B. Mon. 1; Ammont *v.* New Alexandria, &c., Turnpike Co., 13 S. & R. 212; Leedom *v.* Plymouth Railw., 5 W. & S. 266; Susquehanna Canal Co. *v.* Bonham, 9 W. & S. 27; Tippetts *v.* Walker, 4 Mass. 596. But a statute may authorize an execution to be levied on such franchise. Mass. Gen. Stat. c. 68, §§ 26–34; Commonwealth *v.* Tenth Mass. Turn., 5 Mass. 509.

in terms or by implication; and, on the other hand, there is no case where a mortgage of the franchise to trustees has been held invalid by reason of a want of power in the corporation to convey its franchise.

§ 758. The grant of power or authority to a corporation to mortgage its franchise need not be contained in its charter, as a subsequent act of the legislature will confer full power. And such grant of power is not required to be made in express terms. It is sufficient if the sovereign power assents to such mortgage. If, therefore, the mortgage is recognized by the legislature in any way as an existing and valid mortgage, it will be sufficient.[1] So a right of way may be mortgaged; and, upon default of payment, may be sold and transferred: but the original purpose for which such right of way was granted cannot be defeated.[2]

§ 759. When a mortgage to trustees is made by a railway corporation of its franchise and all its property, it frequently becomes an interesting question to determine what is embraced in the mortgage. In some cases, it has been determined that the rolling stock of a railway, such as cars and locomotives, is accessory to the road-bed, station-houses, and franchise, and belongs to the real estate or road-bed of the corporation as fixtures, and cannot be seized, on execution against the company, and sold or removed.[3] In other cases, it has been held that where a mortgage of the franchise and property of a railway was authorized, and the deed in terms included all the property then owned by the company, or thereafter to be acquired, a creditor could not levy an execution upon property acquired after the execution of the mortgage, if such property was necessary to the use and enjoyment of the road and the other property accessory to it; and it was referred to a master to hear and report whether the property seized was necessary to the operation of the road.[4] In other cases, the personal

[1] Shaw *v.* Norfolk County Railw., 5 Gray, 179; Hall *v.* Sullivan, &c., Railw., 21 Law Reporter, 138; Pierce *v.* Emery, 32 N. H. 484; Richards *v.* Merrimack River Railw., 44 N. H. 127; Chapin *v.* Vermont, &c., Railw., 8 Gray, 575.

[2] Junction Railw. Co. *v.* Ruggles, 7 Ohio St. 1.

[3] Farmers' Loan & Trust Co. *v.* Hendrickson, 25 Barb. 484; Palmer *v.* Forbes, 2 Ill. 300; Hunt *v.* Bullock, 23 Ill. 320; Pennock *v.* Coe, 23 How. 117; State *v.* Northern Railw., 18 Md. 193; Farmers' Loan, &c., Co. *v.* Commercial Bank, 11 Wis. 207.

[4] Ludlow *v.* Hurd (Superior Court, Cincinnati), 2 Redf. on Railw. 542–545; Willink *v.* Morris Canal, &c., Co., 3 Green, Ch. 377; Pierce *v.* Emery, 32 N. H.

property of a railway corporation, although necessary for the operation of the road, is held to be mere personal property, in no way attached or accessory to the road-bed or to the franchise, and that such personal property can be seized on execution, and sold like any other personal property, or like the personal property of any other owner.[1] But, however this may be finally determined, there seems to be no reason, upon principle, why a mortgage to trustees may not embrace all property subsequently acquired, if such property is absolutely essential to the operation of the road. The rule at law, that property not at the time owned by a mortgagor cannot be mortgaged by him, is a technical rule; and there is no reason why a railway mortgage to trustees for bondholders should not cover and embrace all the property necessary for the business of the corporation, although such property may have been acquired by the corporation after the date of the mortgage. Consequently it has been held, whenever the question has arisen, that, if the deed embraced subsequently acquired property, such property passed to the trustees.[2]

§ 760. Trustees for bondholders are governed by the general rules that govern trustees in the ordinary performance of the duties of a trust. They must consult the wishes and interests of the *cestuis que trust* or bondholders, and they may be removed, or enjoined, or ordered to proceed in the performance of their duties, as the exigencies of the case may require. Thus, if they refuse to take steps to foreclose the mortgage after the bonds have matured, they may be removed, and others appointed in their place.[3]

484; Coe *v.* Pennock, 6 Am. Law. Reg. 27; 23 How. 117; Ammont *v.* New Alexandria, &c., Turnp., 13 S. & R. 212; Phillips *v.* Winslow, 18 B. Mon. 431; Londenschlager *v.* Benton, 3 Grant's Ca. 384.

[1] Stevens *v.* Buffalo & N. Y. Railw., 31 Barb. 590; Beardsley *v.* Ontario Bank, 31 Barb. 619.

[2] Phillips *v.* Winslow, 18 B. Mon. 431; Howe *v.* Freeman, 14 Gray, 566, as to the point of after-acquired property. Coe *v.* Peacock, 14 Ohio St. 187; Coe *v.* Columbus, &c., Railw., 10 Ohio St. 372; Coe *v.* Knox Co. Bank, 10 Ohio St. 412; Coe *v.* McBrown, 22 Ind. 252; Pierce *v.* Emery, 32 N. H. 484; State *v.* Northern Railway Co., 18 Md. 193; First Mortgage Bondholders *v.* Maysville, &c., Railw., 9 Am. Railw. Times, No. 31; Smith *v.* Atkins, 18 Vt. 461. A somewhat different doctrine was held in Beardsley *v.* Ontario Bank, 31 Barb. 619; Stevens *v.* Buffalo & N. Y. Railw., 31 Barb. 590. And see State *v.* Somerville, &c., Railway, 4 Dutch. 21; State *v.* Mexican Gulf Railw., 3 Rob. (La.) 513.

[3] In matter of Mechanics' Bank, 2 Barb. S. C. 446.

§ 761. If the deed to the trustees is a mere trust for sale in case the bonds are not paid according to their terms, the trustees can do nothing but sell the property at public or private sale as the provisions of the trust-deed direct;[1] but if the trust-deed is a mortgage of the road-bed franchise and other property, the trustees may take possession of the property and foreclose the mortgage by strict foreclosure, according to the rules of law, although the mortgage contains a power of sale, and full directions as to the manner in which the trustees shall proceed in the sale. In this respect, the mortgage of a railway with its franchise and other property does not differ from mortgages of real estate. The power to sell contained in the deed does not exclude other modes of foreclosure provided by law, but is in addition to them; and trustees may proceed to foreclose in the manner which they may judge to be most beneficial to the interests committed to their charge. So, if the deed provides that they shall sell in a certain manner, they may apply to the court for a decree of sale.[2]

§ 762. It sometimes becomes the duty of trustees to take possession of the mortgaged property and franchise of a railway, and to operate and use the same for the accommodation of the public, and for the benefit of the bondholders, until a sale can be effected to another corporation authorized to take the property, or until the bondholders can be organized into a body capable of managing such an interest. In such cases, the trustees will be subject to all the liabilities of carriers of passengers and freight, and in case of loss or damage by accidents, they will be in the same situation as any other owners and managers of a railroad. This rule is carried to the extent of making receivers appointed by the court liable for such losses as other managers of railways are responsible for. There can be no other rule, since persons having no control can be guilty of no negligence. If, therefore, redress must be had anywhere, it must be had against those who have the management and direction of the business, and who may be guilty of neglect or carelessness.[3]

[1] Jenkins *v.* Row, 11 Eng. L. & Eq. 297; 5 De G. & S. 107; 16 Jur. 1131.

[2] Hall *v.* Sullivan Railw., 21 Law Rep. 138; Shaw *v.* Norfolk Co. Railw., 5 Gray, 162; Chapin *v.* Vermont & Mass. Railw., 8 Gray, 575; Balfe *v.* Lord, 2 D. & W. 480; Slade *v.* Rigg, 3 Hare, 35; Wayne *v.* Hanham, 4 Eng. L. & Eq. 147; 9 Hare, 62; 15 Jur. 506; Croton, &c., Co. *v.* Ryder, 1 John. Ch. 611; Newberg, &c., Co. *v.* Miller, 5 John. Ch. 111; Boston, &c., Co. *v.* Boston, &c., Railw., 16 Pick. 625.

[3] Rogers *v.* Wheeler, 2 Lansing, 486; Lamphear *v.* Buckingham, 3 Conn.

§ 763. Notwithstanding the liabilities thus assumed by trustees for bondholders, if they accept the office, they must perform the duties of the trust. When they consent to accept a conveyance or mortgage in trust, they take the office with the possibility of being called upon to perform such duties. They must take care that the security is not depreciated or destroyed by a stopping of the operations of the corporation; and courts of equity will compel them to take such steps as the safety of the bondholders requires. On the other hand, the court will sustain any reasonable arrangement that they make for continuing the operations of the corporation, and for the security of the bondholders; as, where they make a lease to a connecting road, or to other persons experienced in such matters, and capable of running a railroad.[1]

237; Sprague *v.* Smith, 29 Vt. 421; Paige *v.* Smith, 99 Mass. 395; Blumenthal *v.* Brainard, 38 Vt. 408; 1 Chitty Plead. 38.

[1] Burges *v.* Knapp, 25 Vt. 1.

CHAPTER XXV.

TRUSTEES FOR SALE.

§ 764. A TRUSTEE is seldom justified in selling the trust estate without an express or implied authority conferred upon him by the instrument of trust. If no power of sale is contained in the instrument, courts of equity, upon cause shown, may decree a sale. If the instrument of trust contains an express or implied power, the trustee may enter into contracts of sale without the sanction of the court;[1] but if the trust is before the court by a bill filed for its execution, the whole matter of the trust is within its jurisdiction, and the trustee cannot sell without the sanction of the court, even if the instrument of trust gives him an express power.[2]

§ 765. The power of sale given to trustees is either appendant to the legal estate, and takes effect out of it; or it is a mere collateral authority, unaccompanied with any interest in the property.[3] As,

[1] Bath *v.* Bradford, 2 Ves. 590.

[2] Walker *v.* Smallwood, Amb. 676; Raymond *v.* Webb, Lofft, 66; Drayson *v.* Pocock, 4 Sim. 283; Culpepper *v.* Aston, 2 Ch. Ca. 116.

[3] Stafford *v.* Buckley, 2 Ves. 179; Warneford *v.* Thompson, 3 Ves. Jr. 513; Forbes *v.* Peacock, 11 Sim. 152.

where a testator devises lands to his executors or trustees to sell, the lands pass to them coupled with the power to sell; but if he directs that his *executors shall* sell the lands, they take a mere naked power to sell, and the freehold descends to the heir to be divested by the execution of the power.[1] So if there is no direct gift of the land to the executors or trustees, vesting the title in them, but a simple devise of the land to be sold by the executors, the land descends to the heir, and the executors have but a naked power. In all such cases, the heirs are entitled to the rents and profits until the power is executed, and their title divested.[2] The same rule applies where a trustee is the devisee.[3]

§ 766. No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee.[4] Thus an assignment in trust to pay debts will necessarily imply a power of sale, though none is given in words.[5] A devise and direction to divide and pay

[1] Year Book, 9 Hen. VI. 13 b; 24 b; Lit. § 169; Co. Lit. 113 a; 181 b; Howell *v.* Barnes, Cro. Car. 382; Yates *v.* Compton, 2 P. Wms. 308; Bergen *v.* Rennall, 1 Cain. Ca. Er. 16; Jackson *v.* Schauber, 7 Cow. 187; Peck *v.* Henderson, 7 Yerg. 18; Peter *v.* Beverly, 10 Pet. 532; 1 How. 132; Ferebere *v.* Proctor, 2 Dev. & Bat. 439; 1 Ired. Eq. 143; Jackson *v.* Burr, 9 John. 104; Tainter *v.* Clark, 13 Met. 220; Haskell *v.* House, 3 Brevard, 242; Zebach *v.* Smith, 3 Bin. 69.

[2] Thompson *v.* Gaillord, 3 Rich. 418; Allen *v.* Dewitt, 3 Comst. 276; Bradshaw *v.* Ellis, 2 Dev. & B. Eq. 20; Lindenberger *v.* Matlock, 4 Wash. C. C. 278; Marsh *v.* Wheeler, 2 Edw. Ch. 156; Taylor *v.* Benham, 5 How. 269; Braman *v.* Stiles, 2 Pick. 474.

[3] Schwartz's Estate, 14 Penn. St. 49; Guyer *v.* Maynard, 6 Gill & J. 420. In Pennsylvania, the rule is changed by statute 1834, Purdon, Dig. 282, and a power of sale vests the title in the trustee or executor, and he may collect the rents. Carpenter *v.* Cameron, 7 Watts, 51; Cobb *v.* Biddle, 14 Penn. St. 444; Blight *v.* Ewing, 26 Penn. St. 135. In New York, the rule is established the other way, unless they are specially authorized to take the rents and profits. Rev. Stat. pt. ii., c. 1, tit. 2, art. 2, § 56. In all the United States, there are provisions for sale of real estate by administrators and executors for payment of debts and legacies by application to courts of probate; and so guardians may sell by decree of probate courts. In all these cases, the heirs, devisees, or wards hold the lands until the decree of the court is executed by a sale. Mr. Kent seems to think, that the distinction between a devise of land to a trustee to sell, and a devise of a power to a trustee to sell land, is shadowy. 4 Kent, 321 n.

[4] Going *v.* Emery, 16 Pick. 11.

[5] Wood *v.* White, 4 M. & Cr. 481.

over the shares to legatees, where a division is impracticable, implies a power to sell. A mere direction to divide is not enough, there must be some further active duty to perform.[1]

§ 767. If a will directs an estate to be settled "to uses in strict settlement," a power of sale cannot be introduced into the settlement, even with the consent of the tenant for life. If the will gives direction for the insertion of all proper powers and authorities for *making leases*, and doing other acts according to circumstances, a power of sale cannot be inserted.[2] But where marriage articles contained a provision for a settlement "with all the usual and proper powers," it was held that powers of sale and exchange were properly introduced.[3] In such articles, if there is no positive direction for the insertion of powers of sale, or at least no direction for the insertion of all usual and proper powers, powers of sale cannot be introduced.

§ 768. A trust with a power of sale "out and out" will not authorize a mortgage;[4] and a trust for sale, with nothing to negative the settlor's intention to convert the estate absolutely, will not authorize the trustees to execute a mortgage.[5] But where an estate is devised to trustees, charged with debts, and subject thereto upon trust for certain parties, so that a sale, though it may be authorized and required, is not the testator's sole object, the trustees may, for the purpose of paying the debts, more properly mortgage than sell.[6] Where the sale is for the purpose of raising a particular charge, and the estate is settled subject to that charge, it may be proper to raise the money by mortgage, and the court will support a mortgage as a *conditional* sale within the power, and as a proper mode of raising the money.[7] Where an estate is devised to apply the rents for a term of years, in discharging incumbrances, and if, for any reason whatever, in the opinion of the trustees a sale

[1] Winston *v.* Jones, 6 Ala. 550; Craig *v.* Craig, 3 Barb. Ch. 76; Moore *v.* Lockett, 2 Barr, 69; Clark *v.* Riddle, 11 S. & R. 311; Scott *v.* Steward, 27 Beav. 369.

[2] Brewster *v.* Angell, 1 J. & W. 625; Horn *v.* Barton, Jac. 437.

[3] Peake *v.* Penlington, 2 V. & B. 311; Hill *v.* Hill, 6 Sim. 136; Williams *v.* Carter, 2 Sugd. Pow. App., 23; 2 Sugd. Pow. 484.

[4] Stroughill *v.* Anstey, 1 De G., M. & G. 645; Page *v.* Cooper, 16 Beav. 400.

[5] Ibid.; Haldenby *v.* Spofforth, 1 Beav. 390; Devaynes *v.* Robinson, 24 Beav. 86; Eland *v.* Baker, 29 Beav. 137; Davey *v.* Durant, 1 De G. & Jo. 535.

[6] Bell *v.* Harris, 4 M. & Cr. 264.

[7] Stroughill *v.* Anstey, 1 De G., M. & G. 645; Page *v.* Cooper, 16 Beav. 400.

was necessary, "they were authorized to sell;" a purchaser cannot object that the amount of the incumbrances did not justify a sale of the whole; for the necessity depended upon the opinion of the trustees, and the conveyance is evidence that they thought it necessary.[1] On the other hand, a trust to raise money by mortgage will not authorize a sale, though it would be more beneficial to the estate; nor can the court substitute the one for the other.[2] In the absence of any direction, a power to mortgage will not authorize a mortgage with a power of sale, since a trustee cannot authorize another to do what he cannot do himself.[3] But a power to raise money *by sale or mortgage*, has been held to authorize a mortgage with a power of sale. The want of power in the trustee to delegate his authority to sell is an objection to this; for, if it is assumed that the power of sale is an incident to the mortgage, it follows that a power to mortgage alone authorizes a power of sale mortgage.[4] In all cases where the court may order money to be raised out of an estate for the payment of debts, legacies, or portions, it may direct a sale or a mortgage with a power of sale.[5] But where trustees have power to sell an equity of redemption, and are directed to apply the proceeds to the discharge of the mortgage and pay the balance to the settlor, they may sell subject to the mortgage, notwithstanding the direction.[6]

§ 769. A power to sell does not authorize an exchange;[7] nor does a power to trustees to sell authorize a partition,[8] and whether a power to sell and exchange will do so is as yet doubtful.[9] An exchange or partition may be effected circuitously, under a power of sale only, by using the form of a sale instead of a partition or

[1] Rendlesham *v.* Meux, 14 Sim. 249.

[2] Drake *v.* Whitmore, 5 De G. & Sm. 619.

[3] Clarke *v.* Royal Panopticon, 4 Drew. 26; Russell *v.* Plaice, 18 Beav. 21; Leigh *v.* Lloyd, 2 De G., Jo. & F. 330.

[4] Bridges *v.* Longman, 24 Beav. 27. But it is said that a sale of part of the land, or a mortgage, does not exhaust the power of sale. Asay *v.* Hoover, 5 Barr, 21; Pratt *v.* Oliver, 2 McLean, 309.

[5] Selby *v.* Cooling, 23 Beav. 418.

[6] Manser *v.* Dix, 8 De G., M. & G. 703.

[7] Ringgold *v.* Ringgold, 1 H. & Gill, 11; Taylor *v.* Galloway, 1 Hem. 232.

[8] McQueen *v.* Farquar, 11 Ves. 467. Although it is an undivided share. Brassey *v.* Chalmers, 4 De G., M. & G. 528; 16 Beav. 223; Bradshaw *v.* Fane, 3 Drew. 536.

[9] Abel *v.* Heathcote, 4 Bro. Ch. 278; 2 Ves. Jr. 98; Att'y-Gen. *v.* Hamilton, 1 Mad. 214; 2 Sugd. Pow. 506.

exchange; nor can the transaction be impeached as an improper execution of the power if made *bona fide*.[1] Trustees, with a power of sale and exchange, may pay money as owelty of exchange without any express authority for the purpose.[2] Leases cannot be granted by trustees under mere powers of sale.[3] And so executors, as *quasi* trustees for sale, would be justified in granting a lease only under special circumstances. Such an act is not within their duties, and it would be incumbent on the parties taking the lease to show that it was for the interest of the parties entitled to the property.[4] Where property is given to trustees with a power to sell, and an implied or express power of management in the mean time, they have the power to lease and to rent houses until the sale is made;[5] but where the land descends to the heir or is devised, and a naked power of sale is given to a trustee or executor, the heir or devisee is entitled to the profits and possession until the sale, and the trustees can neither enter upon the land nor grant leases.[6]

§ 770. Trustees for sale may enter into contracts without the previous sanction of the court;[7] but if the administration of the trust is already before the court, the trustees cannot proceed without the sanction of the court.[8] The trustees are bound by their office to sell the estate under every possible advantage for the beneficiaries,[9] and if there are different *cestuis que trust*, they must act with a fair and impartial attention to the interest of all.[10] If the trustees or their agents fail in reasonable diligence in inviting competition,[11] or in their management in relation to the sale: as, if they contract under circumstances of haste and improvidence; or

[1] Ibid.; Marshall *v.* Sladden, 7 Hare, 438; Leigh *v.* Ashburton, 11 Beav. 478.

[2] Bartram *v.* Whichcote, 6 Sim. 86; 2 Sugd. Pow. 507.

[3] Evans *v.* Jackson, 8 Sim. 217; Mitchells *v.* Corbett, 34 Beav. 376.

[4] Hachett *v.* McNamara, Ll. & Goo. t. Plunk. 283; Keating *v.* Keating, Ll. & Goo. t. Sugd. 133.

[5] Hedges *v.* Ricker, 5 John. Ch. 163; Burr *v.* Sim, 1 Whart. 266.

[6] Seymour *v.* Bull, 3 Day, 389.

[7] Bath *v.* Bradford, 2 Ves. 590.

[8] Walker *v.* Smallwood, Amb. 676; Raymond *v.* Webb, Lofft, 66; Drayson *v.* Pocock, 4 Sim. 283; Culpepper *v.* Aston, 2 Ch. Ca. 116, 223.

[9] Downs *v.* Grazebrook, 3 Mer. 208; Matthie *v.* Edwards, 2 Coll. 480.

[10] Ord *v.* Noel, 5 Mad. 140; Anon., 6 Mad. 11; Pechel *v.* Fowler, 2 Anst. 590.

[11] Ibid.; Harper *v.* Hayes, 2 Gif. 216. No particular form of advertisement is required; but it should be sufficient to identify the land.

if they contrive to advance the interest of one party at the expense of another, — they will be personally responsible to the injured party for the loss;[1] and the court will refuse to decree a specific performance, though the purchaser was without fault.[2] But if a contract is once fairly made, a court of equity would not invalidate it, because another person came forward and offered a larger price.[3] If there are two offers equally advantageous, and one is preferred by the *cestui que trust*, the trustee is not bound for that reason to accept that offer, but he may act upon his own opinion.[4] The *cestui que trust* usually obtains the best offer he can, and communicates it to the trustee, who, when satisfied, ought to make a sale which is advantageous to the beneficiary.[5] The trustee should inform himself of the value of the property, if necessary, by the estimate of some experienced person;[6] and if he sells at a grossly inadequate price, it is a breach of trust which affects the title in the hands of the purchaser.[7] In no case will the court enforce the specific performance of a contract, which amounts to a breach of trust.[8] A trustee who takes no active part in the sale is equally responsible, for he cannot delegate his power to a cotrustee; and where a trust is confided to several, they are all equally responsible, and cannot excuse themselves for neglecting any of their duties.[9]

§ 771. Trustees will be allowed a reasonable time for disposing of the estate even when directed to sell with all convenient speed; for such direction is implied by law, and does not render a sale

[1] Pechel *v.* Fowler, 2 Anst. 550; Quackenbush *v.* Leonard, 9 Paige, 347; Ringgold *v.* Ringgold, 1 H. & Gill, 11; Osgood *v.* Franklin, 2 John. Ch. 27; 14 John. 527.

[2] Ord *v.* Noel, 5 Mad. 440; Turner *v.* Harvey, Jac. 178; Bridger *v.* Rice, 1 J. & W. 74; Mortlock *v.* Buller, 10 Ves. 292; Hill *v.* Buckley, 17 Ves. 394; White *v.* Cuddon, 8 Cl. & Fin. 766.

[3] Harper *v.* Hayes, 2 De G., F. & J. 542, reversing 2 Gif. 210.

[4] Selby *v.* Bowie, 4 Gif. 300.

[5] Palairet *v.* Carew, 32 Beav. 568.

[6] Oliver *v.* Court, 8 Price, 165; Campbell *v.* Walker, 5 Ves. 680; Connolly *v.* Parsons, 3 Ves. 628; Sugd. V. & P. 55.

[7] Stevens *v.* Austen, 7 Jur. (N. S.) 873; Wormeley *v.* Wormeley, 1 Brock. 330; 8 Wheat. 421.

[8] Wood *v.* Richardson, 4 Beav. 176; Fuller *v.* Knight, 6 Beav. 205; Thompson *v.* Blackstone, 6 Beav. 470; Sneesby *v.* Thorne, 7 De G., M. & G. 399; Mucholland *v.* Belfast, 9 Ir. Ch. 204.

[9] Berger *v.* Duff, 4 John. Ch. 368; Oliver *v.* Court, 8 Price, 166; *In re* Chertsey Market, 6 Price, 285.

imperative.[1] On the other hand, where there is no immediate emergency, it would be a breach of trust to force on the sale at a manifestly disadvantageous time.[2] If the power is "to sell at such times and in such manner as they shall think fit," they are not authorized, as affecting the *cestuis que trust*, to postpone the sale arbitrarily for an indefinite period.[3] Such postponement might vary the rights of the tenant for life and remainder-men, and so interfere with the settlor's intention. If, therefore, they neglect to sell without sufficient reason, they would be answerable for any depreciation, and would be decreed to account for interest instead of rents.[4] A trust "to sell with all convenient speed and within five years" is directory only, and the trustees can sell and make a good title after five years.[5]

§ 772. But a power of sale or mortgage to raise portions should not be exercised until the money is wanted; as, a power to raise a specific sum for A., payable at twenty-one or at her marriage, cannot be exercised until the interest is vested; for should the money be lost or the investment prove deficient, A. might call upon the estate again for her portion.[6] So where there was a trust of a term to raise £3000 for children, payable at their respective ages of twenty-one or marriage, it was held that the money could not all be raised when the eldest arrived at twenty-one, as the younger children could not be deprived of the security of the estate for their portions.[7] But from the inconvenience of several sales or mortgages, the court will lean to such construction of the instrument, if possible, that there shall be but one exercise of the power; as, where the trustees of a marriage settlement were directed after the husband's death to raise by sale or mortgage, if there should be more than three children, the sum of £10,000 for their por-

[1] Buxton *v.* Buxton, 1 M. & C. 80; Garrett *v.* Noble, 6 Sim. 504; Fry *v.* Fry, 27 Beav. 144; Fitzgerald *v.* Jervoise, 5 Mad. 25; Vickers *v.* Scott, 3 M. & K. 500.

[2] Hunt *v.* Bass, 2 Dev. Eq. 297; Johnston *v.* Eason, 3 Ired. Eq. 330; Quarles *v.* Lacy, 4 Munf. 251. If necessary, on good cause shown, the court will give the trustee leave to postpone a sale. Morris *v.* Morris, 4 Jur. (N. S.) 802–804.

[3] Walker *v.* Shore, 19 Ves. 391; Hawkins *v.* Chappell, 1 Atk. 623.

[4] Fry *v.* Fry, 27 Beav. 144; Pattenden *v.* Hobson, 1 Eq. R. 28. In Wightwick *v.* Lord, 6 H. L. Ca. 217, the trustees were made answerable for the value of the property of a mine, as they should have sold a year after the testator's death.

[5] Pearce *v.* Gardner, 10 Hare, 287; Cuff *v.* Hall, 1 Jur. (N. S.) 973.

[6] Dickenson *v.* Dickenson, 3 Bro. Ch. 19. [7] Wynter *v.* Bold, 1 S. & S. 507.

tions, the shares to be payable at twenty-one or marriage, and "no mortgage was to be made until some one of the portions should become payable," the Lord-Chancellor said, that, on the whole instrument, the whole sum of £10,000 was to be raised at once.[1]

§ 773. If an estate is vested in trustees for A. for life, and then to sell, they cannot sell during the life of A., however beneficial it may be for all parties interested.[2] But if the devise is to A. for life, and after her decease to trustees, "to sell as soon as conveniently may be after the testator's decease," the trustees, joining with A., can convey a good title.[3] If the tenant for life and the trustees of the remainder join in a sale for a gross sum, the purchaser takes a good title, and the tenant for life and the trustees may apportion the purchase-money: if they cannot agree, the court may do it.[4] Generally, trustees for the sale of an aliquot part of an estate may join in a sale of the whole for an entire sum, and the purchase-money may be apportioned by the parties or the court.[5] But a purchaser cannot be compelled to take such a title, if the interest of the *cestui que trust* has not been sold under the most advantageous circumstances, nor if the nature of the case is such that the purchase-money cannot be apportioned upon an intelligible principle.[6]

§ 774. A trustee, like any other vendor, must make a good title to the purchaser;[7] therefore the most prudent course is to provide for the title before selling, either by an examination or stipulation, as the court in a suit for specific performance might order the trustee to pay costs if the title is defective.[8] Trustees under a power of sale have no power to split up the estate into land, timber, and mines; and therefore they cannot sell the timber separate from the land, nor the land, reserving the timber; and this although there is a tenant for life without impeachment of waste, who might cut the timber;[9] and there is no distinction between timber

[1] Gillibrand *v.* Goold, 5 Sim. 149.
[2] Johnstone *v.* Baker, 8 Beav. 233.
[3] Mills *v.* Dugmore, 30 Beav. 104.
[4] Clark *v.* Seymour, 7 Sim. 67.
[5] McCarogher *v.* Whieldon, 34 Beav. 107.
[6] Rene *v.* Oakes, 32 Beav. 555.
[7] White *v.* Folgambe, 11 Ves. 343; McDonald *v.* Hanson, 12 Ves. 277.
[8] Edwards *v.* Harvey, G. Coop. 40.
[9] Cholmeley *v.* Paxton, 3 Bing. 207; 5 Bing. 48; 10 B. & Cr. 564; 3 Russ. 565; 1 Russ. & My. 418; 1 Cl. & Fin. 60.

and minerals.[1] But the trustees may divide the surface into lots, and sell part at one time, and part at another.[2]

§ 775. Though trustees may employ the tenant for life, or *cestui que trust*, as agents to effect a sale, yet they should remember that they are interposed to protect the estate from the tenant for life; if, therefore, the tenant for life, by consent of the trustees, sells the estate, receives the purchase-money, and invests it in another estate in his own name, he would be held to act throughout as the agent of the trustees, and the purchased estate would be subject to the original trusts,[3] and at the same time the trustees would be guilty of a breach of trust.[4]

§ 776. If the trust is for a tenant for life without impeachment of waste, it would be a breach of trust for the trustee to sell the land without the timber, and allow the tenants for life to take it, or the money for which it was sold; for although the tenant might have cut the timber, yet the land and the timber constitute the whole estate, and it is the duty of the trustee to sell all together and to reinvest the purchase-money upon the trusts of the settlement.[5] So if trustees may sell for payment of debts, and the lands subject to that charge are given over to a tenant for life without impeachment of waste, the trustees ought not to raise the money for the debts by a fall of the timber, for that is a hardship upon the tenant for life; and if they resort to the timber, the tenant would in equity have a charge upon the lands for the proceeds.[6] Nor should a sum, to be invested in lands for a tenant for life without impeachment of waste, with remainders over, be invested by the trustees in the purchase of wood or timber lands; for the tenant might fell the timber and get possession of the greater part of the estate: but the trustees would be justified in purchasing an ordinary wooded estate, as it is not to be supposed that it was intended they should purchase lands with no trees upon it.[7]

[1] Buckley *v.* Howell, 29 Beav. 546; *Re* Malins, 3 Gif. 126.

[2] Ord *v.* Noel, 5 Mad. 438; *Ex parte* Lewis, 1 Gl. & J. 69; State *v.* Macalester, 9 Ohio, 19; Gray *v.* Shaw, 14 Mo. 341; Delaplaine *v.* Lawrence, 3 Comst. 301; Ewing *v.* Higby, 7 Ohio, 98; Thomas *v.* Townsend, 16 Jur. 736.

[3] Price *v.* Blakemore, 6 Beav. 507.

[4] Mortlock *v.* Buller, 10 Ves. 313.

[5] Cholmeley *v.* Paxton, 3 Bing. 207; 5 Bing. 48; 3 Russ. 565; 2 Moore & P. 127; 10 B. & Cr. 564; Cockerell *v.* Cholmeley, 1 Russ. & M. 418; 1 Cl. & Fin. 60; Waldo *v.* Waldo, 12 Sim. 107; Doran *v.* Wiltshire, 3 Swans. 699; Wolf *v.* Hill, 1 Swans. 149 n.

[6] Davies *v.* Wescombe, 2 Sim. 425.

[7] Burges *v.* Lamb, 16 Ves. 174.

§ 777. Where trustees had a power of sale, to be exercised with the consent of the tenant for life, with a direction to invest the proceeds in another purchase with all convenient speed, and in the mean time to invest them upon some proper security, Lord Eldon said: "The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses, and the trustees are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or, at least, this court would expect some strong purpose of family convenience, justifying the conversion, if it is likely to continue money."[1] So the trustees would not be justified in selling, as between themselves and the *cestuis que trust*, to gratify caprice, or to promote the exclusive interest of the tenant for life. Particular circumstances might happen which would call for an immediate sale, as an extremely advantageous offer, or a prospect of great depreciation or deterioration: but generally the trustees ought not to convert the estate into money without having another specific purchase in view; and then not for the purpose of conversion, but in the honest exercise of their discretion for the benefit of all parties claiming under the settlement.[2] The power of investing the proceeds in some security, in the mean time, was not intended to authorize the continuance of the property in money, but only to meet some contingency, as where the trustees were disappointed in a contemplated purchase, or there was some necessary delay in completing the title to it. The sale will be void, if the trustees appear to have been influenced by private or selfish purposes.[3]

§ 778. Where trustees have a power of sale at the written request and direction of another party, they cannot obtain a decree for specific performance of a sale contracted by them without showing such writing; nor will proof of a part performance of the contract by the parties, so as to take the sale out of the statute of frauds, be sufficient.[4]

§ 779. A trustee cannot delegate the trust or power of sale to a

[1] Mortlock *v.* Buller, 10 Ves. 308; Mahon *v.* Stanhope, cited 2 Sugd. Pow. 512.

[2] Cowgill *v.* Oxmantown, 3 Y. & Col. 369; Watts *v.* Girdlestone, 6 Beav. 188; Marshall *v.* Sladden, 4 De G. & Sm. 468; Wormley *v.* Wormley, 1 Brock. 330; 8 Wheat. 421.

[3] Ibid.

[4] Adams *v.* Broke, 1 Y. & Col. Ch. 627; Sykes *v.* Sheard, 33 Beav. 114; Blackwood *v.* Burrowes, 2 Con. & Law. 459; Phillips *v.* Edwards, 33 Beav. 440.

third person;[1] especially if it is a naked power, coupled with no interest.[2] A sale executed by such delegated agent is void.[3] Nor can one trustee delegate his power to a cotrustee.[4] But such trustees for sale may employ a solicitor or agent, according to the usage of business, if they use proper prudence;[5] the agent's authority should be in writing, in order to make a binding contract,[6] or it should be ratified in writing,[7] and all the trustees should join in the appointment or ratification.[8] The proper proceeding is for the trustees to keep the business in their own hands; to employ agents, if necessary, to negotiate the details of the sale, subject to the approval of the trustees; and the deeds should be executed by them, and not by attorney.[9] If, however, the *fee* is in the trustees, so that they have an estate coupled with a power, they may act by attorney duly appointed in writing.[10] And it has been said that trustees for creditors may convey by attorney.[11]

§ 780. In the absence of express directions in the power, trustees may sell at public auction or private sale, as circumstances may render it most for the advantage of the trust estate.[12] Even when assignees for creditors were required to sell at public auction, it was held that, after an ineffectual attempt to sell at auction, they

[1] Hardwick *v.* Mynd, 1 Anst. 109; Newton *v.* Bronson, 3 Kern. 587; Hawley *v.* James, 5 Paige, 487.

[2] Black *v.* Erwin, Harp. L. 411.

[3] Pearson *v.* Jamison, 1 McLean, 197.

[4] Berger *v.* Duff, 4 John. Ch. 368.

[5] *Ex parte* Belchier, Amb. 218; Ord *v.* Noel, 5 Mad. 498; Rossiter *v.* Trafalgar Life Ass. Co., 27 Beav. 377; Sinclair *v.* Jackson, 8 Cow. 582; Hawley *v.* James, 5 Paige, 487.

[6] Mortlock *v.* Buller, 10 Ves. 311.

[7] Newton *v.* Bronson, 3 Kern. 587.

[8] Mortlock *v.* Buller, 10 Ves. 311; Sinclair *v.* Jackson, 8 Cow. 582.

[9] Hawley *v.* James, 5 Paige, 487.

[10] May's Heirs *v.* Frazer, 4 Lit. 391; Telford *v.* Barney, 1 Io. 591.

[11] Blight *v.* Schenck, 10 Barr, 285. The power of trustees, executors, and others, acting in a fiduciary capacity, to contract and execute their powers by attorney is regulated by statute in some of the States. The reader will examine the statutes of his own State.

[12] *Ex parte* Dunman, 2 Rose, 66; *Ex parte* Hurley, 1 D. & Ch. 631; *Ex parte* Ladbroke, 1 Mont. & A. 384; *Ex parte* Goding, 1 D. & Ch. 323; Davey *v.* Durant, 1 De G. & J. 535; Huger *v.* Huger, 9 Rich. Eq. 217; Harper *v.* Hayes, 2 Gif. 210; 2 De G. & J. 542. In Pennsylvania, a private sale, under a power, was held void. McCreery *v.* Hamlin, 7 Barr, 87; Ellet *v.* Paxson, 2 W. & S. 418. But it is now altered by statute. See Ashhurst *v.* Ashhurst, 13 Ala. 781; Burr *v.* McEwen, Bald. C. C. 154.

might sell by private contract.[1] If the power directs a sale at public auction, it must be followed;[2] but where trustees, directed to sell at auction, were not able to effect a sale after unusual efforts, it was held that a private sale, made in good faith, though for less than a public offer, was valid.[3] And it has been held, that a power to sell at auction or otherwise, in whole or in parcels, on giving three weeks' notice, authorized a private sale without any notice.[4] Under a power to sell at auction, and where there is an advertisement and an auction, the highest bid, sent by letter and accepted, is valid.[5]

§ 781. A sale at auction is always the safest, as it is the usual, form of sale; for a sale at a regularly advertised and conducted auction cannot be questioned, and no question can be raised as to the adequacy of the price. But in case of a private sale, if the price procured is less than the estimated value, the trustee incurs great responsibility and some danger.[6]

§ 782. If the trustees sell at auction, they must see that proper advertisements are made and due notice given to all parties;[7] and the court will enjoin the sale, if there is any want of diligence in this respect.[8] No particular form of notice or advertisement is required; but it must be sufficient to identify the land and to invite competition.[9] If the manner of the sale is in express terms left to the discretion of the trustee, no advertisement is necessary:[10] but if the power or a statute requires a certain number of days' notice before the sale, the advertisement must be made every day;[11] and if a certain number of weeks are required, the advertisement must be made that number of weeks successively. The trustees may adjourn a duly advertised sale from time to time, and the notice of the ad-

[1] Mathers v. Prestman, 9 Sim. 352. [2] Greenleaf v. Queen, 1 Pet. 145.

[3] Tyson v. Mickle, 2 Gill, 383; Gibbs v. Cunningham, 1 Md. Ch. 44; Gibson's Case, 1 Bland, 138; Beebe v. De Baun, 3 Eng. (Ark.) 567.

[4] Minuse v. Cox, 5 John. Ch. 441. [5] Tyree v. Williams, 3 Bibb, 367.

[6] Ord v. Noel, 5 Mad. 440; Taylor v. Tabrum, 6 Sim. 281; Connolly v. Parsons, 3 Ves. 628 n.; Mortlock v. Buller, 10 Ves. 292, 309; Johnson v. Dorsey, 7 Gill, 269; Hintze v. Stingel, 1 Md. Ch. Dec. 283.

[7] Anon., 6 Mad. 10; Blennerhassett v. Day, 2 B. & B. 133.

[8] Ibid; Matthie v. Edwards, 2 Coll. 465; 11 Jur. 504; Jenkins v. Jones, 2 Gif. 99; Pechel v. Fowler, 2 Anst. 549, has not been followed.

[9] Newman v. Jackson, 12 Wheat. 570.

[10] McDermot v. Lorillard, 1 Edw. Ch. 273.

[11] Stine v. Wilkson, 10 Mo. 75.

journments need not be as formal as the first notices appointing the time of sale.[1] If notice is required by the power, those persons relying upon the validity of the sale must show that the power was complied with.[2] Chancellor Kent was of opinion, that want of notice would not affect the title, but that the trustee would be personally responsible; and so it is said that a purchaser cannot raise this objection to avoid fulfilling his contract.[3] Whatever may be the rule as to notice of sales under a power in wills, it is certain that trustees, executors, and guardians, who sell under statute powers, and under decrees and licenses of the courts in which they are administering estates, must strictly comply with all the statutes as to notice, oath, and bonds, or their acts will be void; and a purchaser is not compelled to complete the contract, if there is any irregularity in the proceedings. A stranger or wrong-doer cannot object to any irregularity in the proceedings of the sale;[4] nor can a purchaser or other person make any objection to the completion of the contract, where the *cestuis que trust*, being competent to act for themselves, waive all irregularities.[5] In the first instance, there is always a general presumption in favor of meritorious parties, as purchasers for value, that the power has been properly exercised.[6]

§ 783. A power of sale, like all other powers, can be exercised only in the mode, and subject to the conditions prescribed in the instrument of trust;[7] as, where a trust is to sell after the death of the tenant for life,[8] or when the *cestui que trust arrives* at his majority,[9] a sale before the time is bad, although made by decree of court,[10] or act of the legislature.[11] But the execution of the

[1] Richards *v.* Holmes, 18 How. 143. Otherwise in Illinois. Thornton *v.* Boyden, 31 Ill. 200.

[2] Gibson *v.* Jones, 5 Leigh, 370.

[3] Minuse *v.* Cox, 5 John. Ch. 447; Greenleaf *v.* Queen, 1 Pet. 145; Beebe *v.* De Baun, 3 Eng. 567; Johnson *v.* Dorsey, 7 Gill, 269; Gibbs *v.* Cunningham, 1 Md. Ch. Dec. 44.

[4] Hilleglass *v.* Hilleglass, 5 Barr, 97; Gary *v.* Colgin, 11 Ala. 514; Wightman *v.* Doe, 24 Miss. 675; Herbert *v.* Hanrick, 16 Ala. 518.

[5] Greenleaf *v.* Queen, 1 Pet. 145; Schenck *v.* Ellenwood, 3 Edw. Ch. 175.

[6] Marshall *v.* Stephens, 8 Humph. 159.

[7] Wright *v.* Wakeford, 17 Ves. 454; Rodman *v.* Munson, 13 Barb. 63; Sweigart *v.* Berk, 8 S. & R. 304; *In re* Vandervoot, 1 Redfield, N. Y. Sur. 270; Alley *v.* Lawrence, 12 Gray, 373.

[8] Blacklow *v.* Laws, 2 Hare, 40; Styer *v.* Freas, 15 Penn. St. 339; Davis *v.* Howcote, 1 Dev. & Bat. Ch. 460; Jackson *v.* Lignon, 3 Leigh, 161.

[9] Loomis *v.* McClintock, 10 Watts, 274.

[10] Blacklow *v.* Laws, 2 Hare, 40. [11] Ervin's App., 16 Penn. St. 256.

power of sale may be accelerated by the tenant for life surrendering the life-estate to the remainder-man, if capable of acting;[1] or by joining with the trustees in effecting the conveyance; for, the postponement of the sale being for the benefit of the tenant for life, such tenant may, by executing the deed of conveyance, waive such benefit.[2] If, however, the postponement of the sale is not for the benefit of the tenant for life, but for the benefit of the remainder-men, as by preserving real security for them, or with the expectation of securing a rise in value for them, the sale of the estate cannot be accelerated, even with the concurrence of the tenant for life.[3] Where the direction was to sell as soon as convenient, and within five years, it was held to be monitory, and a sale after five years was held good.[4] Where trustees were authorized to postpone sales, but not beyond ten years, it was held that, on proof that a sale within that time would have been mischievous to the estate, the trustees might be ordered after that time to sell.[5] A power to sell, if the income of the real and personal estate is not sufficient to support the testator's wife comfortably, can only be exercised in that event.[6] A power to sell, after redeeming from a sale for taxes, cannot be exercised before such redemption;[7] and a power to sell, to discharge the instalment of a debt then due, cannot be exercised by selling to pay that instalment, and also another not due.[8] Where the power is to sell before a certain period expires, a sale within the period is good, though the deed is dated afterwards, and the actual time of the contract of sale may be shown by parol.[9] Where the trustee may exercise his own discretion as to the time and manner of sale, his discretion cannot generally be questioned, except in the absence of good faith.[10] But even a discretionary power cannot be exercised after all the purposes of the power and of the trust have been satisfied; as, where

[1] Truell v. Tysson, 21 Beav. 439. But if a widow is made tenant for life, and waives the provisions of the will and claims dower, the sale cannot be accelerated. Jackson v. Lignon, 3 Leigh, 161.

[2] Styer v. Freas, 15 Penn. St. 339; Gast v. Porter, 13 Penn. St. 533. Davis v. Howcote, 1 Dev. & Bat. Ch. 460 is the other way.

[3] Gast v. Porter, 13 Penn. St. 535; Pearce v. Gardner, 10 Hare, 290; Cuff v. Hall, 19 Jur. 973.

[4] Pearce v. Gardner, 10 Hare, 287.

[5] Cuff v. Hall, 1 Jur. (N. S.) 973.

[6] Minot v. Prescott, 14 Mass. 495.

[7] Devinney v. Reynolds, 1 W. & S. 332.

[8] Ormsby v. Tarascon, 3 Lit. 411.

[9] Harlan v. Brown, 2 Gill, 475.

[10] Bunner v. Storm, 1 Sand. Ch. 357; Champlin v. Champlin, 3 Edw. Ch. 571; 7 Hill, 245.

all the persons for whom the trust was created are dead, and the property in specie, goes to the remainder-men.[1] So a power to executors to sell, *virtute officii*, ceases when all the purposes of the power are accomplished; as when the estate is fully administered, or the debts are all paid, or barred by lapse of time, or the purpose of the power has become impossible of accomplishment.[2] The court may enjoin a sale when the purposes of the trust are satisfied.[3]

§ 784. If the sale is directed to be made with the consent of the tenant for life, or any other person, such consent is indispensable to a valid exercise of the power.[4] Where the sale is to be made with the consent of the tenant for life, his consent to a decree of sale is sufficient;[5] and if the tenant for life sells and conveys his life-estate to a third person, he must consent to a sale by the trustees.[6] If the tenant for life becomes bankrupt or insolvent, his power to consent or dissent is not taken away; but his assignees must join with him in assenting to the sale.[7] Where there was a trust for sale, but no sale was to be made without the consent "of my sons and daughters," and a daughter had died, leaving a husband absolutely entitled to her share, and all the surviving children and the husband consented to the sale, it was held to be too doubtful a title to force upon a purchaser.[8] But where there was a power to sell with the consent of a majority of the testator's children, the consent of the majority *living* at the time of the sale was held sufficient, although one had died;[9] and the same doctrine was held where all had died.[10] Where a testator

[1] Slocum *v.* Slocum, 4 Edw. Ch. 613.

[2] Jackson *v.* Jansen, 6 John. 73; Sharpsteen *v.* Tillon, 3 Cow. 651; Ward *v.* Barrows, 22 Ohio, 241; Stroughill *v.* Anstey, 1 De G., M. & G. 635.

[3] Neely *v.* Steele, 1 Barb. Eq. 240.

[4] Mortlock *v.* Buller, 10 Ves. 308; Bateman *v.* Davis, 3 Mad. 98; Wright *v.* Wakeford, 17 Ves. 454; Rickett's Trusts, 1 John. & H. 70.

[5] Tyson *v.* Mickle, 3 Gill, 376.

[6] Warburton *v.* Farn, 16 Sim. 625; Vincent *v.* Ennys, 3 Vin. Ab. 433; Ren *v.* Bulkeley, Doug. 292; Long *v.* Rankin, 2 Sugd. Pow. 539; Tyrrell *v.* Marsh, 3 Bing. 31; Davies *v.* Bush, McClel. & Y. 58.

[7] Holdsworth *v.* Goose, 29 Beav. 111; Eisdell *v.* Hammersley, 31 Beav. 255; Jones *v.* Winwood, 10 Sim. 150; 3 M. & W. 653, overruling Badham *v.* Mee, 1 My. & K. 32; 1 Sugd. Pow. 80.

[8] Sykes *v.* Sheard, 2 De G., J. & Sm. 6; Co. Lit. 113 a; Dame *v.* Annas, Dyer, 219; Atwaters *v.* Burt, 2 Cro. Eliz. 856; Mansell *v.* Mansell, Wilm. 36; Green *v.* Green, 2 Jo. & Lat. 529; Sugd. Pow. 126, 128, 252.

[9] Sohier *v.* Williams, 1 Curtis, 479. [10] Leeds *v.* Wakefield, 10 Gray, 514.

gave his "executor" power to sell with the consent of his wife, and then appointed his wife executrix, it was held that she could sell without any concurrence from anybody.[1] If the power to sell depends upon the consent of any person or persons, their death, or the death of one of them, generally defeats the power.[2] But where the power depends upon the consent of persons filling a particular office or bearing a particular character, the consent of such persons will be sufficient, though they may have been appointed in the place of those who had died or resigned.[3] The persons whose consent is necessary will not be allowed to withhold it for improper and selfish purposes.[4] Where the required consent must be in writing, any writing signed by the party implying his consent, will be sufficient, whether it is a deed, mortgage, or other paper, by which his consent is given or implied.[5]

§ 785. Upon the same principles, where the power is to be exercised only upon some condition or contingent event, such as the deficiency of another estate to pay certain charges,[6] or to pay debts, or upon the purchase and settlement of another estate to the same uses,[7] the power cannot be executed except upon the performance of the conditions.[8] If it is a power to sell to pay debts upon a "deficiency of personal assets," there must be a deficiency to justify the exercise of the power.[9] Such conditions are precedent to the right to exercise the power, and may be traversed; therefore the right to exercise the power must be shown.[10] If the executors have power to sell, if "in *their opinion* a sale is necessary to pay debts and legacies," the sale is conclusive proof of their opinion that it was necessary, if they act in good faith.[11] So, if the per-

[1] 1 Duv. Ky. 221.

[2] Sykes *v.* Sheard, 2 De G., J. & Sm. 6; Alley *v.* Lawrence, 12 Gray, 373.

[3] Barber *v.* Cary, 1 Kern. 397. [4] Norcum *v.* D'Oench, 2 Ben. (Mo.) 98.

[5] Montefiore *v.* Browne, 7 H. L. Ca. 241.

[6] Dike *v.* Ricks, Cro. Car. 335; Culpepper *v.* Ashton, 2 Ch. Ca. 221; 2 Sugd. Pow. 497; 2 Sugd. V. & P. 48.

[7] Doe *v.* Martin, 4 T. & R. 39; Cox *v.* Chamberlain, 4 Ves. 631; Burgoigne *v.* Fox, 1 Atk. 575; Hougham *v.* Sandys, 2 Sim. 95, 145.

[8] 2 Sugd. Pow. 497.

[9] Roseboom *v.* Mosher, 2 Denio, 61, per Bronson, Ch. J.; Graham *v.* Little, 5 Ired. Eq. 407; Bloodgood *v.* Bruen, 2 Brad. Sur. 8.

[10] Ibid.; Minot *v.* Prescott, 14 Mass. 495.

[11] Roseboom *v.* Mosher, 2 Denio, 61; Rendlesham *v.* Meux, 14 Sim. 249. It is said in Silverthorn *v.* McKinster, 2 Penn. St. 67, and Coleman *v.* McKinney, 3

sonal estate is insufficient, the executors with such powers *must* sell whether they deem it expedient or not.[1] If the debts are all paid or barred, the trustee will no longer be justified in exercising the power of sale.[2] Where a sale, under such a power, is made after a great length of time, and the heirs and devisees are in the occupation of the land, a purchaser will be held to inquire into the necessity of the sale, and to see to the application of the purchase-money.[3] There is a material difference between conditions precedent and subsequent annexed to powers. If it is a condition precedent, no sale can be sustained under the power unless the condition is performed. Thus in the case of a deed with power of sale for the payment of any balance that might be due, the trustees to make oath before a justice of the peace, or, in case of the death of one, the survivor to make oath as to the amount due, the provision was held to be a condition precedent; to be strictly complied with, and the oath of one, the other being alive, was held to be insufficient to justify a sale.[4] So if the deficiency of the personal estate or any other property is the condition upon which the power of sale is to be exercised, it is a *condition precedent* upon which the power is to arise; and the purchaser must ascertain the right to exercise it.[5] But where the condition is *subsequent*, the power of sale will attach independently of the performance of the condition. As, where the purchase-money is to be reinvested, it being a condition subsequent, a *bona fide* purchaser will not be affected by its non-performance if the trustees had power to give receipts for the money.[6]

§ 786. Trustees may propose any reasonable conditions of sale;[7] but they must not dampen the sale by clogging it with unnecessary

J. J. Marsh. 251, that a deficiency of the personal estate need not be shown, and that the conveyance under the power raises the presumption that it existed. The cases hardly seem consistent with principle.

[1] Colman *v.* McKinney, 3 J. J. Marsh. 246.

[2] Jackson *v.* Jansen, 6 John. 73; Sharpsteen *v.* Tillon, 3 Cow. 651; Ward *v.* Barrows, 22 Ohio, 241; Stroughill *v.* Anstey, 1 De G., M. & G. 635.

[3] Stroughill *v.* Anstey, 1 De G., M. & G. 635. This would seem to be the reasonable rule; but in Sabin *v.* Heape, 27 Beav. 553, a sale after twenty-seven years was held not to impose such precautions upon the purchaser.

[4] Mason *v.* Martin, 4 Md. 125.

[5] 2 Sugd. V. & P. 48; Hill on Trustees, 178.

[6] Roper *v.* Halifax, Sugd. Pow. App., No. 3; Hill on Trustees, 178.

[7] Hobson *v.* Bell, 2 Beav. 17.

conditions and restrictions.[1] They may do all reasonable acts which are necessary for clearing and perfecting the title and completing the sale.[2] The word *grant* was formerly supposed to imply a covenant, for that reason it was left out of trustees' deeds, and they merely *bargained* and *sold;* but it was an unnecessary caution.[3] Still they are not justified in covenanting against any thing but their own acts;[4] but if they have any beneficial interest in the trust estate they may enter into full covenants.[5] If the purchaser abandons the bargain, and forfeits his deposit, the trustees must account for the forfeit money to the *cestui que trust;*[6] and they are accountable for any unnecessary delay in recovering the deposit money from the auctioneer.[7]

§ 787. Where the trustees have the legal title and a power of sale, they alone are competent to contract and make a good title to the purchaser.[8] So if they take a mere power which operates under the statute of uses, by revoking the old uses and appointing new ones, they alone can make a good title to the purchaser.[9] So if executors have a power of sale by implication,[10] they may compel the purchaser to a specific performance of the contract without joining the *cestuis que trust* as parties to the suit,[11] and courts will enforce the specific performance of a proper contract of sale,[12]

[1] Downs *v.* Grazebrook, 3 Mer. 208; Wilkins *v.* Frye, 2 Rose, 375; 1 Mer. 268; Rede *v.* Oakes, 10 Jur. (N. S.) 1246; Falkner *v.* Equitable Soc., 4 Drew. 352.

[2] Forshaw *v.* Higginson, 8 De G., M. & G. 827.

[3] Co. Lit. 384 a, note 1.

[4] White *v.* Foljambe, 11 Ves. 345; Onslow *v.* Londesborough, 10 Hare, 74; Worley *v.* Frampton, 5 Hare, 560; Stephens *v.* Hotham, 1 Kay & J. 571; Page *v.* Broom, 3 Beav. 36; Copper Mining Co. *v.* Beach, 13 Beav. 478; Hodges *v.* Blagrave, 18 Beav. 405; Phillips *v.* Everard, 5 Sim. 102; Sugd. V. & P. 61.

[5] Staines *v.* Morris, 1 V. & B. 12; Stephens *v.* Hotham, 1 K. & J. 580.

[6] Campbell *v.* Johnston, 1 Sand. Ch. 148.

[7] Edmonds *v.* Peake, 7 Beav. 239.

[8] Sowersby *v.* Lacy, 4 Mad. 142; Keon *v.* Magawley, 1 Dr. & War. 401.

[9] Sugd. Pow. *passim.*

[10] Tylden *v.* Hyde, 2 S. & S. 238; Forbes *v.* Peacock, 11 Sim. 152. But the heir may be directed to join in the conveyance. Blatch *v.* Wilder, 1 Atk. 420.

[11] Binks *v.* Rokely, 2 Mad. 227; Keon *v.* Magawly, 1 Dr. & War. 401; Drayson *v.* Pocock, 4 Sim. 283; *In re* London Bridge, 13 Sim. 176; Wakeman *v.* Rutland, 3 Ves. 233, 504; 8 Bro. P. C. 145; *Re* William's Estate, 5 De G. & Sm. 515; Cottrell *v.* Cottrell, L. R. 2 Eq. 330; Lloyd *v.* Griffiths, 3 Atk. 264; Duffy *v.* Calvert, 6 Gill, 487.

[12] Mortlock *v.* Buller, 10 Ves. 315; 2 Sugd. Pow. 511.

even if the power was ended before the conveyance, if the trustees had the power to make the contract;[1] but any contract that is a breach of the trust will not be enforced, although the purchaser was without fault; he will be left to his remedy at law.[2] If the trustees sell with an agreement that the purchaser may retain a private debt due from them, the court will not enforce the sale.[3] Trustees themselves cannot purchase the estate;[4] but the tenant for life may,[5] and trustees of other estates may purchase.[6] If the contract turns out to be one of great hardship against the trustees, from any misapprehension of all the circumstances of the estate, the court will not enforce its specific performance against them, but will leave the purchaser to his suit at law.[7]

[1] Mortlock *v.* Buller, 10 Ves. 315.

[2] Ord *v.* Noel, 5 Mad. 438; Wood *v.* Richardson, 4 Beav. 174; Mortlock *v.* Buller, 10 Ves. 315; Thompson *v.* Blackstone, 6 Beav. 470; Dawes *v.* Betts, 12 Jur. 709; Johnston *v.* Eason, 3 Ired. Eq. 334.

[3] Thompson *v.* Blackstone, 6 Beav. 470.

[4] *Ante*, §§ 195-199.

[5] Howard *v.* Duncone, T. & R. 81.

[6] Ibid.

[7] Wedgewood *v.* Adams, 6 Beav. 600; 8 Beav. 103.

CHAPTER XXVI.

RIGHTS AND DUTIES OF THIRD PERSONS IN RELATION TO THE TRUST ESTATE, AND THEIR DUTY OF SEEING TO THE APPLICATION OF THE PURCHASE-MONEY.

§ 788. Immediately connected with the power of trustees to sell the trust property and receive the money, is the inquiry, What are the rights and duties of third persons in dealing with the trustees and purchasing the property? This inquiry embraces two heads: (1.) How far the trustees are authorized to sell; and (2) if authorized to sell, how far are the purchasers required to see that the purchase-money is applied to the purposes of the trust?

§ 789. There is a wide difference between the gift of an estate to trustees with a power to sell, and the gift of a power over an estate, as a power to sell upon a certain event happening. Thus if

a testator gives an estate to trustees for the payment of debts, if the personal assets prove insufficient, the trustees should not sell the estate until it appears that the personal assets are insufficient, or until the estate is wanted for the purposes for which it was given. But a purchaser has no means of investigating the accounts, and determining the amount of the debts due, the amount of the personal assets, or the disposition that has been made of them. All that he can do is to inquire of the executor, and if the executor and trustee are the same person, he would make no progress in the investigation beyond the representations of the trustee. In this case the legal title being in the trustees, they can sell and transfer it, and the title of the purchaser cannot be impeached, if he has acted without fraud or collusion, even though the personal assets prove sufficient to pay the debts.[1] But if the estate itself is not given to the trustees, but a mere power is conferred upon them to sell in case the personal assets are insufficient, the purchaser must act at his peril, and ascertain whether such facts exist that the power to make the sale is complete, or that the events have happened which justify the exercise of the power.[2] In all cases, if the trust is in course of administration in court, the purchaser must consult the proceedings and decrees of the court.[3] But in no case is the purchaser bound to ascertain, whether the trustees are not offering *more* of the estate for sale than is necessary; for the purchaser cannot know the exact sum wanted, together with all the incidental costs, charges, and expenses.[4] If, however, the sale is delayed for a great number of years, and there are circumstances naturally leading to a suspicion that there are no debts after such a length of time, the purchaser will be affected by such suspicious circumstances, and put upon his inquiry.[5]

§ 790. If a person holds money or other property in his hands belonging to another, he cannot discharge himself from liability, except by transferring the property or money to the true owner.

[1] Culpepper *v.* Aston, 2 Ch. Ca. 115; Greetham *v.* Colton, 1 Jur. (N. S.) 848; Shaw *v.* Borrer, 1 Keen, 159; Keane *v.* Robarts, 4 Mad. 356; Co. Lit. 290 b.; Butl. n. 14.

[2] Culpepper *v.* Aston, 2 Ch. Ca. 116, 221; Dike *v.* Ricks, Cro. Car. 335; W. Jones, 327.

[3] Culpepper *v.* Aston, 2 Ch. Ca. 116, 223; Walker *v.* Smallwood, Amb. 676.

[4] Spalding *v.* Shalmer, 1 Vern. 301.

[5] Pierce *v.* Scott, 1 Y. & Col. 257.

At *law* the trustee is the true owner of property that is vested in him, but in *equity* the *cestui que trust* is the true owner. Hence the complications and doubts that have arisen concerning trustees' receipts, and the duty of purchasers to look to the application of the purchase-money. Thus if an estate is vested in trustees to sell and divide the purchase-money between B. and C., a court of law treat the trustees as the true owners, and their receipts for the purchase-money as valid discharges; but courts of equity treat B. and C., the *cestuis que trust*, as the true owners, and the trustees as mere instruments. Courts of equity, therefore, require that the receipts for the purchase-money shall be signed by the rightful owners, or the purchase-money must be properly applied to their use, according to the terms of the trust, or there can be no such conveyance of the estate as to bar their beneficial interest.[1] The purchaser must, therefore, hold the estate, subject to their equities, although he may have paid the money to the trustee. Thus the application of the purchase-money, or the power of the trustees to sign receipts for it, becomes, in equity, *a question of title*,[2] or rather a question of the equitable title, which is the principal thing; for the legal title, without the beneficial use, is of little consequence. Thus the general rule is, that *prima facie* the *cestuis que trust* must sign receipts for the purchase-money, or the purchaser must look to its application. But this rule may be controlled by a great number of circumstances and considerations.

§ 791. First, it may be controlled by the *express* terms of the trust. For if the settlor expressly provides that the receipts of the trustees shall be sufficient discharges of the purchase-money,[3] the *cestuis que trust* cannot claim in opposition to the instrument that confers upon them all their rights; in other words, they cannot claim under one part of the instrument, and reject the other parts.

§ 792. Words in a power of attorney or other instrument, authorizing the attorney or trustee "to sign discharges in the name of the assignor or *otherwise*, and to do all other acts, as the *principal might have done*," have been held to make receipts signed in pursuance thereof valid;[4] unless such words are controlled by some

[1] Weatherby *v.* St. Giorgio, 2 Hare, 624.

[2] Forbes *v.* Peacock, 12 Sim. 521.

[3] Duffy *v.* Calvert, 6 Gill, 487.

[4] Binks *v.* Rokeby, 2 Mad. 527; Desborough *v.* Harris, 5 De G., M. & G. 439; Ottley *v.* Gray, 16 L. J. Ch. 512; Curton *v.* Jellicoe, 14 Ir. Ch. 180.

other part of the instrument.[1] Where, however, trustees were entitled to receive a sum of *stock*, and had power to vary the securities, a receipt signed by them for *cash*, was held to be no discharge; though the court intimated, that if there had been any indication that the receiving of cash was intended as a part of the power to vary the securities, the decision might have been the other way.[2] This seems to be a harsh and unnecessary application of the rule. If the receiving of cash, in the process of varying the securities, was no breach of the trust, the receipts of the trustees ought to have been sufficient.[3]

§ 793. In the second place, the rule may be controlled by an implied intention that the trustees shall have the power to give valid receipts for the purchase-money. Thus if a settlor creates a trust for an *immediate* sale, it is clearly implied that a legal and equitable receipt for the purchase-money shall be *signed by some one*, at the time of the sale. There can be no conveyance without payment of the purchase-money, and there can be no payment without a complete discharge. If, therefore, a sale is directed when the *cestuis que trust*, or some of them, are not in existence, or *sui juris*, or of age, or of sufficient capacity to act, there must be an implied intention that the receipts of the trustees shall be valid releases of the purchase-money. It has been held, where an immediate sale was contemplated, and some of the *cestuis que trust* were infants, that the trustees had an implied power of giving valid discharges for the purchase-money.[4] But the mere fact that the *cestuis que trust* are out of the jurisdiction raises no presumption that the settlor intended that the trustees should sign receipts.

§ 794. Again, the general rule is controlled, if a sale is directed, but the proceeds are not to be paid over to the *cestuis que trust*, but are to be held by the trustees upon some special trusts. In such case the implication is plain, that the settlor intended to confide the execution of the trust to the trustees, and that they have power and authority to receive the trust fund and to give receipts.[5] The

[1] Brasier *v.* Hudson, 9 Sim. 1.

[2] Pell *v.* De Winton, 2 De G. & J. 13.

[3] Lewin, 333 (5th ed.).

[4] Sowarsby *v.* Lacy, 4 Mad. 142; Lavender *v.* Stanton, 6 Mad. 46; Breedon *v.* Breedon, 1 R. & M. 413; Balfour *v.* Welland, 16 Ves. 151; Cuthbert *v.* Baker, Sugd. V. & P. 842 (11th ed.).

[5] Doran *v.* Wiltshire, 3 Swans. 699; Balfour *v.* Welland, 16 Ves. 157; Wood *v.* Harman, 5 Mod. 368; Locke *v.* Lomas, 5 De G. & Sm. 326; Glynn *v.* Locke,

earlier English lawyers were of opinion, that, in such cases, the purchasers were only required to see to the investment of the trust fund or purchase-money, and that they could not be responsible for any subsequent misapplication.[1]

§ 795. If the trust is to pay debts generally, the purchaser cannot be subject to the rule that he shall see to the application of the purchase-money;[2] or if the trust is to pay debts and legacies,[3] or to pay a *particular* debt and all other debts,[4] or to pay legacies,[5] there can be no obligation to see to the payment of debts and legacies. Such a trust must necessarily require time, and the investigation of long accounts and vouchers: the purchaser could know neither the creditors nor the amounts. Where debts and legacies are to be paid, the debts must first be paid, and as the

3 Dr. & W. 11; Ford *v.* Ryan, 4 Ir. Ch. 342. See Cox *v.* Cox, 1 K. & J. 251; Wormley *v.* Wormley, 8 Wheat. 421, 423; Lining *v.* Peyton, 2 Des. 375; Redheimer *v.* Pyson, 1 Spears, Eq. 135; Nichols *v.* Peak, 1 Beasl. Ch. 69; Coonrod *v.* Coonrod, 6 Ham. 114; Sims *v.* Lively, 14 B. Mon. 433; Steele *v.* Levisay, 11 Grat. 454; Potter *v.* Gardner, 12 Wheat. 499; Clyde *v.* Simpson, 4 Ohio St. 445; Hauser *v.* Shore, 5 Ired. Eq. 357; Dalzell *v.* Crawford, 1 Pars. Eq. 37; Garnett *v.* Macon, 6 Call, 308; 2 Brock. 185; Williamson *v.* Morton, 2 Md. Ch. 91.

[1] Booth's Cas. and Opin. 114.

[2] Forbes *v.* Peacock, 11 Sim. 152; 12 Sim. 528; 1 Phil. 717; Stroughill *v.* Anstey, 1 De G., M. & G. 635; Dowling *v.* Hudson, 17 Beav. 248; Culpepper *v.* Aston, 2 Ch. Ca. 223; Watkins *v.* Cheek, 2 S. & S. 205; Hardwick *v.* Mynd, 1 Anst. 109; Anon., Moseley, 96; Johnson *v.* Kennett, 3 M. & K. 630; Rogers *v.* Skillicorne, Amb. 189; Walker *v.* Smallwood, Amb. 677; Barker *v.* Devonshire, 3 Mer. 310; Abbot *v.* Gibbs, 1 Eq. Ca. Ab. 358; Binks *v.* Rokeby, 2 Mad. 238; Dunch *v.* Kent, 1 Vern. 260; Elliott *v.* Merryman, Barn. 78; 1 Lead. Ca. Eq. 40; Eng. and Amer. notes; Garnett *v.* Macon, 2 Brock. 185, 186; 6 Call, 308; Bruch *v.* Lantz, 2 Rawle, 392; Dalzell *v.* Crawford, 1 Pars. Eq. 57; Smith *v.* Guyon, 1 Bro. Ch. 186; Ithell *v.* Beane, 1 Ves. 215; Lloyd *v.* Baldwin, 1 Ves. 215; Dalton *v.* Hewen, 6 Mad. 9; *Ex parte* Turner, 9 Mod. 418; Gosling *v.* Carter, 1 Coll. 644; Eland *v.* Eland, 1 Beav. 235; 4 M. & Cr. 420; Jones *v.* Price, 11 Sim. 557; Currer *v.* Walkley, 2 Dick. 649; 3 Sugd. V. & P. 168 (10th ed.); Gardner *v.* Gardner, 3 Mason, 178; Potter *v.* Gardner, 12 Wheat. 198; Laurens *v.* Lucas, 6 Rich. Eq. 217; Williams *v.* Otey, 8 Humph. 568; Hauser *v.* Shore, 1 Ired. Eq. 357; Goodrich *v.* Proctor, 1 Gray, 570.

[3] Ibid.; Co. Lit. 29 b.; Butl. n.; Williamson *v.* Curtis, 3 Bro. Ch. 96; Johnson *v.* Kennett, 3 My. & K. 630; 6 Ves. 654, note a; Page *v.* Adam, 4 Beav. 629; Grant *v.* Hook, 13 S. & R. 259; Cadbury *v.* Duval, 10 Barr, 265; Andrews *v.* Sparhawk, 13 Pick. 393; Sims *v.* Lively, 14 B. Mon. 435.

[4] Robinson *v.* Lowater, 17 Beav. 592; 5 De G., M. & G. 272.

[5] Grant *v.* Hook, 13 S. & R. 259; Hannum *v.* Spear, 1 Yeates, 553; 2 Dall. 291; Cryder's App., 1 Jones, 72.

purchaser can be under no obligation to examine into the debts, so he cannot be required to take any action in regard to the legacies; and if one debt is named, but is coupled with others not named, the same considerations apply. In such trusts, the testator must be presumed to have intended that his trustees should have the full power to give receipts for the purchase-money, in order to apply it to the purposes pointed out.

§ 796. But where the trust is to pay from the proceeds of a sale a particular debt, or scheduled debts only, or to pay certain legacies named, the purchaser must see that the money finds its way into the hands of those to whom it belongs. In such case, there is no trust that requires time or discretion. The purchase-money is simply to be distributed to certain known persons in sums easily ascertained, and there is no reason to presume that the settlor intended that the general rule should not apply.[1]

§ 797. In Stroughill *v.* Anstey, Lord St. Leonards said that, "if a trust is created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule on which everybody would be able to act, authorized, too, by the words of the testator, and drawing none of those fine distinctions which embarrass courts and counsel, and lead to litigation; and it is one to which I shall adhere as long as I sit in this court."[2] This rule, thus stated, proceeds upon the ground that, in all cases where a

[1] Doran *v.* Wiltshire, 3 Swans. 701; Smith *v.* Guyon, 1 Bro. Ch. 186; Rogers *v.* Skillicorne, Amb. 189; Humble *v.* Bill, 1 Eq. Ca. Ab. 359; Anon., Moseley, 96; Spalding *v.* Shalmer; 1 Vern. 303; Abbot *v.* Gibbs, 1 Eq. Ca. Ab. 358; Elliott *v.* Merryman, Barn. 81; Binks *v.* Rokeby, 2 Mad. 238; Ithell *v.* Beane, 1 Ves. 215; Lloyd *v.* Baldwin, 1 Ves. 173; Mather *v.* Norton, 21 L. J. Ch. 15; Dunch *v.* Kent, 1 Vern. 260; Culpepper *v.* Aston, 2 Ch. Ca. 223; Johnson *v.* Kennett, 3 My. & K. 930; Horn *v.* Horn, 2 S. & S. 448; Dowman *v.* Rust, 6 Rand. 587; Bugbee *v.* Sargent, 23 Me. 269; Leavitt *v.* Wooster, 14 N. H. 550; Swasey *v.* Little, 7 Pick. 296; Kemp *v.* McPherson, 7 H. & J. 320; Long *v.* Long, 1 Watts, 267; Hoover *v.* Hoover, 5 Barr, 351; Dalzell *v.* Crawford, 1 Pars. Eq. 57; Duffy *v.* Calvert, 6 Gill, 487.

[2] Stroughill *v.* Anstey, 1 De G., M. & G. 653. See this case for an admirable discussion of principles and of the prior cases. But see 17 Jurist, pt. ii. 251, where the case is criticised, and the assertion is made that prior to that case and Forbes *v.* Peacock, 1 Phil. 717, the purchaser was relieved from seeing to the application of the purchase-money in the case of a trust for the payment of debts generally, not from an intention in the settlor, but from the impossibility of the case.

testator has given his trustees a power to sell to pay debts generally, or to pay particular debts, or to pay legacies only, he has reposed a special confidence in the trustees for those purposes, and has declared that they shall execute the trusts; and that purchasers have nothing to do with its execution, and therefore need not look to the application of the purchase-money, whether it is to pay debts generally, or debts and legacies, or particular debts named, or legacies only. Mr. Redfield asserts that this is the true principle, and that the old rule that a purchaser need not look to the application of the purchase-money where the trust is to pay debts generally, or debts and legacies, but must see to its application, where the trust is to pay particular debts or legacies only, rests upon no sound distinction.[1] He admits, however, that the distinction is established and acted upon in the American cases.[2] But a purchaser under a decree of the court need not look to the application of the purchase-money, whatever may be the purpose for which it is to be employed.[3]

§ 798. In the United States, where lands are holden for the payment of the testator's debts, a devise of lands for the payment of particular debts or legacies only, can impose upon the purchaser no obligation to see to the application of the purchase-money; for the reason that the lands being holden to pay all the debts, the purchaser would be compelled to investigate all the testator's business to ascertain whether the purchase-money should be paid to a particular debt or not, or whether it could be applied to the payment of legacies. In all cases where land is sold, by a decree or license of the probate or other court, to pay debts or legacies, the purchaser is exonerated from all responsibility.[4] It may be stated that the strict English rule is not favored by the American courts, although they apply the doctrine in cases where it cannot be avoided.[5]

[1] 3 Redf. on Wills, 235. Mr. Lewin, p. 352, thinks this would be the better rule. See also Sugd. V. & P. 844, 848 (11th ed.)

[2] 3 Redf. on Wills, 236; Andrews *v.* Sparhawk, 13 Pick. 393; Hanson *v.* Shore, 5 Ired. Eq. 357; Cadbury *v.* Duval, 10 Penn. St. 265; Gardner *v.* Gardner, 3 Mason, 178; St. Mary's Church *v.* Stockton, 4 Halst. Ch. 520; Duffy *v.* Calvert, 6 Gill, 487.

[3] Coombs *v.* Jordan, 3 Bland, 284, 329; Wilson *v.* Davisson, 2 Rob. (Va.) 385, 412.

[4] Grant *v.* Hook, 13 S. & R. 259; Cryder's App., 1 Jones, 72; Coombs *v.* Jordan, 3 Bland, 284, 329; Wilson *v.* Davisson, 2 Rob. Va. 385, 412.

[5] Dalzell *v.* Crawford, 1 Pars. Eq. 57; Rutledge *v.* Smith, 1 Busb. Eq. 283;

§ 799. Where trustees have authority to invest and vary the securities, power to sign receipts is implied from the nature of the trust.[1] If they are authorized to invest on security, the borrower has a right to pay, and the trustee must receive the money and give a receipt, though there is no express power given to sign receipts.[2] Where the trustee was directed to invest on security, but real security was not mentioned, and he loaned on mortgage, the court thought it doubtful whether he had power to sign the receipt, and declined to compel a vendee to perform a contract specifically, and take the title.[3] It is said that the authority to sign the receipt in such cases depends upon the *intention*, and that there could be no intention where there was no authority to lend on mortgage. This is a refinement that probably would not be recognized in our courts, mortgages being among recognized investments in this country. But a power of sale and exchange would not imply a power to sign receipts.[4]

§ 800. But whatever power and authority the trustee may have to receive the purchase-money and give valid receipts and discharges, the purchaser will not be protected by the receipt if there was any collusion between them;[5] or if he had notice, from the intrinsic nature and character of the transaction, that the trustee intended to misapply the purchase-money;[6] or if a suit was pending for the administration of the trust, or to take it out of the hands of the trustees.[7] If the purchaser deals with the trustee long after the trust should have been executed, he is bound to satisfy himself that the trustee is acting in the proper discharge of his duty.[8]

Redheimer *v.* Pyron, 1 Spears, Eq. 141; Elliott *v.* Merryman, 1 Lead. Ca. Eq. 40, Amer. notes.

[1] Lock *v.* Lomas, 5 De G. & Sm. 326.

[2] Wood *v.* Harman, 5 Mad. 368.

[3] Hanson *v.* Beverley, Sugd. V. & P. 848 (11th ed.).

[4] Cox *v.* Cox, 1 K. & J. 251.

[5] Rogers *v.* Skillicorne, Amb. 189; Eland *v.* Eland, 4 M. & Cr. 427; Potter *v.* Gardner, 12 Wheat. 498; Garnett *v.* Macon, 2 Brock. 185; 6 Call, 308.

[6] Watkin *v.* Cheek, 2 S. & S. 199; Colyer *v.* Finch, 5 H. L. Ca. 923; Stroughill *v.* Anstey, 1 De G., M. & G. 648; Burt *v.* Trueman, 6 Jur. (N. S.) 721; Eland *v.* Eland, 4 M. & Cr. 427; Williams *v.* Morton, 2 Md. Ch. 94; Clyde *v.* Simpson, 4 Ohio St. 445; Garnett *v.* Macon, 2 Brock. 185; 6 Call, 308.

[7] Lloyd *v.* Baldwin, 1 Ves. 173.

[8] Stroughill *v.* Anstey, 1 De G., M. & G. 654; Forbes *v.* Peacock, 11 Sim. 502; 12 Sim. 528; 11 M. & W. 637; Devaynes *v.* Robinson, 24 Beav. 93;

§ 801. The exemption of the purchaser from seeing to the application of the purchase-money depends upon the intention of the settlor at the date of the instrument: such exemption is not affected by circumstances that transpire subsequently; therefore the intention must be obtained from the construction of the instrument under the circumstances existing when it was made, and such construction cannot be changed by a change of circumstances. Thus if a trust is created to pay debts generally, and then to pay legacies and apply the surplus to certain purposes, and the purchaser knows that all debts have been paid, he will not be compelled to see to the application of the purchase-money to the payment of the legacies, or to the other determined purposes, for the reason that, when the instrument was made, the testator could not have intended that the purchaser should see to the application of the purchase-money to the payment of the debts generally, and the other purposes named, and no change of circumstances can change this intention.[1]

§ 802. The question has been raised, Who has the power to sell and give a discharge for the purchase-money, in case a testator *charges* his real estate with certain payments, and then *devises* it to *trustees upon trusts*, which do not require a sale? Can the executor sell? A few cases seem to intimate that he can.[2] But it is said that a mere charge cannot give executors a legal power.[3] On the other hand, it is said that there is no difference between a charge and a trust for the payments to be made, and therefore trustees take the legal estate subject to all the trusts, and, among others, the trust of making the payments charged.[4] This seems

McNeille *v.* Acton, 2 Eq. R. 21. See Sabin *v.* Heape, 27 Beav. 553; Redheimer *v.* Pyron, 1 Spears, Eq. 134.

[1] Johnson *v.* Kennett, 3 My. & K. 624, reversing s. c. 6 Sim. 384; Eland *v.* Eland, 4 My. & Cr. 420; Page *v.* Adam, 4 Beav. 269; Forbes *v.* Peacock, 1 Phil. 717, reversing same case 11 Sim. 152; 12 Sim. 528; Sabin *v.* Heape, 27 Beav. 553; Stroughill *v.* Anstey, 1 De G., M. & G. 653; Mather *v.* Norton, 16 Jur. 309; Garnett *v.* Macon, 2 Brock. 238; 6 Call, 308; Gosling *v.* Carter, 1 Coll. Ch. 648.

[2] Shaw *v.* Borrer, 1 Keen, 559; Ball *v.* Harris, 8 Sim. 485; 4 My. & Cr. 264; Gosling *v.* Carter, 1 Coll. 649; Robinson *v.* Lowater, 17 Beav. 592; 5 De G., M. & G. 272; Eidsforth *v.* Armstead, 2 K. & J. 333; Wrigley *v.* Sykes, 21 Beav. 337; Storry *v.* Walsh, 18 Beav. 568; Colyer *v.* Finch, 5 H. L. Ca. 905; Hodkinson *v.* Quinn, 1 J. & H. 310; Greetham *v.* Cotton, 34 Beav. 615.

[3] Doe *v.* Hughes, 6 Exch. 231.

[4] Elliott *v.* Merryman, Barn. 81; 1 Lead. Ca. Eq. 40; *Ex parte* Turner, 9

to have been the opinion of Lord Hardwicke.[1] Mr. Justice Wilde said that there was no difference between a devise of an estate to be sold, and a devise of an estate charged in the trustees' hands with certain payments; that there was no ground for the distinction, either in principle or upon authority.[2] In such case, the money to make the payments charged could not be allowed to go into the hands of the executor, as he has nothing to do with the real estate.[3] There seems to be no doubt that the trustee, with the concurrence of the executor, can make a good title;[4] but it may happen that such concurrence cannot be had. If a testator charges certain payments upon real estate, and then devises the real estate to a devisee to hold absolutely, the devisee can sell the estate, and give valid receipts and discharges for the purchase-money.[5]

§ 803. If a testator charges payments to be made upon his real estate, but does not devise it, and it descends to his heirs, can they sell it and give valid receipts and discharges for the purchase-money? It is clear that they cannot, for they take nothing under the will; and the testator has not expressly, nor by implication, appointed them trustees to make the payments.[6] They may sell the estate and pass the legal title, and if they make the payments no questions can be raised; but if they misapply the money, the land

Mod. 418; Jenkyns *v.* Hiles, 6 Ves. 654 n.; Bailey *v.* Elkins, 7 Ves. 323; Wood *v.* White, 4 M. & C. 482; Commissioners, &c., *v.* Wybrants, 2 Jon. & La. 197; Forbes *v.* Peacock, 12 Sim. 527.

[1] *Ex parte* Turner, 9 Mod. 418; and see Colyer *v.* Finch, 5 H. L. Ca. 922. Mr. Lewin is of the same opinion. Lewin on Trusts, 342, 343.

[2] Andrews *v.* Sparhawk, 13 Pick. 401.

[3] Gosling *v.* Carter, 1 Coll. 650.

[4] Hodkinson *v.* Quinn, 1 John. & H. 303; Cook *v.* Dawson, 29 Beav. 126; 3 De G., F. & J. 127; Shaw *v.* Borrer, 1 Keen, 559; Ball *v.* Harris, 8 Sim. 485; 4 My. & C. 264; Page *v.* Adam, 4 Beav. 269; Forbes *v.* Peacock, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; 1 Phil. 717; Sabin *v.* Heape, 27 Beav. 553.

[5] Bailey *v.* Elkins, 7 Ves. 323; Commissioners, &c. *v.* Wybrants, 2 Jon. & L. 198; Elton *v.* Harrison, 2 Swans. 276 n.; Elliott *v.* Merryman, Barn. 78; Doe *v.* Hughes, 6 Exch. 231; Eland *v.* Eland, 1 Beav. 234; Dalton *v.* Young, 6 Mad. 9; Johnson *v.* Kennett, 6 Sim. 384; 3 My. & K. 624; Page *v.* Adam, 4 Beav. 269; Colyer *v.* Finch, 5 H. L. Ca. 905; Jenkyns *v.* Hiles, 6 Ves. 654; Ball *v.* Harris, 4 My. & C. 267; Wood *v.* White, 4 My. & C. 482; *Ex parte* Turner, 9 Mod. 418; Andrews *v.* Sparhawk, 13 Pick. 393.

[6] Gosling *v.* Carter, 1 Coll. 650; Robson *v.* Flight, 34 Beav. 110; 5 N. R. 344; Forbes *v.* Peacock, 11 M. & W. 638; Doe *v.* Hughes, 6 Exch. 231.

would still be holden for the payments; that is, the purchaser in such cases would be bound to see to the application of the purchase-money. If the heirs are under disabilities, as infants or married women, can the executors sell the estate for the payment of the charges upon it? In Doe *v.* Hughes, the court held that a *charge* had no operation in law, but must be enforced in equity, from which it follows that the executors could not sell without a license or decree of the court.[1] This case has been much criticised on the ground that where a direction to sell and make payments is given, but no person is named, the executors have the power to sell by implication; and so it is thought that where there are charges upon real estate, there is an implied power of sale in the executors.[2] Mr. Lewin thinks that Doe *v.* Hughes was a sound decision upon the *legal* question, but that the executors have an equitable power of sale, and the holders of the legal title are trustees for them.[3] Even upon this statement of the rights and powers of the parties, it is clear that there must be a decree or license for sale from some court having jurisdiction, if the holders of the legal title are under disabilities.

§ 804. If a testator charges payments to be made upon his real estate, and then devises it subject to the charges, and the devisee dies in the testator's lifetime, can the heirs sell and give valid discharges for the purchase-money? The case stands as if no devisee had been named, but the estate had been allowed to descend to the heir.[4] There is no doubt that the executor cannot sell, as the testator has expressly appointed a devisee who might have sold as trustee for the payment of the charges: the heir may sell and pass the legal title; but, if he misapplies the purchase-money, the land would still be holden for the charges.[4]

§ 805. If a testator charges payments to be made upon his real

[1] Doe *v.* Hughes, 6 Exch. 231.

[2] Robinson *v.* Lowater, 17 Beav. 601; Wrigley *v.* Sykes, 21 Beav. 337; Storry *v.* Walsh, 18 Beav. 568; Sabin *v.* Heape, 27 Beav. 553; Hodkinson *v.* Quinn, 1 John. & H. 309; Cook *v.* Dawson, 29 Beav. 123; 3 De G., F. & J. 127; Greetham *v.* Colton, 34 Beav. 615; Forbes *v.* Peacock, 11 M. & W. 630; Tylden *v.* Hyde, 2 S. & S. 238; Bentham *v.* Wiltshire, 4 Mad. 44; *Re* Wise, 5 De G. & Sm. 415; Eidsforth *v.* Armstead, 2 K. & J. 333; Sugd. Pow. 129 (8th ed.); Colyer *v.* Finch, 5 H. L. Ca. 922.

[3] Lewin, 346.

[4] See *ante*, § 803. But see Hardwick *v.* Mynd, 1 Anst. 109; Austin *v.* Martin, 29 Beav. 523.

estate, and devises the same to A. for life with *contingent remainders*, or *other limitations* which render it impossible that the *devisees* can sell under an implied power,[1] the court will, if possible, imply a power of sale in the executors, on the ground that where there are charges that require a sale, and it is impossible for the devisees to sell, and no person is named to sell, there must be an implied power to sell in the executors. Courts in England give this construction to such bequests to avoid a suit in chancery for a sale;[2] but in the United States the proper course would be for the executors to apply to the Court of Probate for a license to sell and make the payments ordered. Mr. Lewin says that the true principle which ought to govern in these cases is this, that where a testator devises an estate to trustees or to a beneficiary, and charges payments to be made, then the trustees or the beneficiary should have a power of sale and of signing receipts; but where a testator charges payments, and does not devise the estate, or devises it in such manner that there is no one who can execute the trust, then the executors should have an equitable power of sale and of signing receipts, and that the depositaries of the legal title should be trustees for them, and bound to convey as they direct; but where the testator has devised the estate, and therefore provided a hand to execute the trust, but the trustee or devisee dies in the testator's lifetime, then, as the hand to execute the trust has only failed by the act of God, no person has a power of sale or signing receipts, but the trust can only be executed by the court.[3] By Lord St. Leonard's act, as it is called, executors in all the cases before named, when the wills shall come into operation after August 13, 1859, may make sales and give valid receipts for the purchase-money.[4] In the United States, it is conceived that executors would have the power of selling by applying to the Court of Probate for a license or decree to sell so much of the estate as is necessary to discharge the payments to be made; and, as before stated, whenever executors or trustees sell under a license or decree of court, the purchaser need not look to the application of the purchase-money.[5] Where there is a devise of an estate, sub-

[1] Gosling *v.* Carter, 1 Coll. 644; Eidsforth *v.* Armstead, 2 K. & J. 333; Wrigley *v.* Sykes, 21 Beav. 337; Bolton *v.* Stannard, 4 Jur. (N. S.) 576; Robinson *v.* Lowater, 17 Beav. 592; 5 De G., M. & G. 272; Sabin *v.* Heape, 27 Beav. 553. But see Doe *v.* Hughes, 6 Exch. 223.

[2] Lewin, 348.

[3] Lewin, 348, 349.

[4] 22 & 23 Vict. c. 35.

[5] *Ante*, § 798.

ject to the payment of charges, the devisee, with the concurrence of the executors, declaring that all *charges have been paid*, may sell for his own private purposes, and give a good and valid title to the purchaser, without any obligation on the purchaser to make further investigations as to the application of the purchase-money.[1]

§ 806. A trust for sale is a joint office, and the receipt must be signed by all the trustees who act; but it need not be signed by one who disclaims.[2] Where a power is given to trustees to sign receipts and exonerate the purchaser from seeing to the application of the purchase-money, the receipt must be signed by all the trustees, even if one of them has conveyed his interest in the trust estate to his cotrustees; for the power to sign the receipt was a personal confidence that did not pass with the estate.[3] So the trustees cannot delegate their power of signing receipts to exonerate the purchaser; as, if they convey the estate to another upon the same trusts upon which they held, a purchaser could not safely pay the purchase-money to such grantee without seeing to its application. The case of Hardwick *v.* Mynd seems to uphold a different rule; but it would not be safe to act upon it.[4] But if the trustees sign the receipt, the purchaser need not pay the money to them personally: he may pay to any person properly authorized by them to receive it; or he may pay it as the trustees direct it to be paid into a bank, or to any other person;[5] yet it is safer to pay to the trustees personally.[6] If, in such case, the person authorized to receive the money upon the receipts of the trustees, misapplies it, the trustees will be responsible to the *cestui que trust* for the loss.[7]

§ 807. If trustees for sale, with a power to sign receipts for the purchase-money die, and new trustees are appointed by the court to execute the power of sale, such new trustees may also give valid receipts. But this is an exception to the ordinary rule, that

[1] Storry *v.* Walsh, 18 Beav. 559; Howard *v.* Chaffers, 2 Dr. & Sm. 236.

[2] Adams *v.* Taunton, 5 Mad. 435; Hawkins *v.* Kemp, 3 East, 410; Smith *v.* Wheeler, 1 Vent. 128.

[3] Crewe *v.* Dicken, 4 Ves. 97.

[4] Hardwick *v.* Mynd, 1 Anst. 109; Braybroke *v.* Inskip, 8 Ves. 432.

[5] Hope *v.* Liddell, 21 Beav. 202; Miller *v.* Priddon, 1 De G., M. & G. 335; Lock *v.* Lomas, 5 De G. & Sm. 326; McCarogher *v.* Whieldon, 34 Beav. 107.

[6] Pell *v.* De Winton, 2 De G. & J. 13; *In re* Fishbourne, 9 Ir. Eq. 340.

[7] Ghost *v.* Walker, 9 Beav. 497.

trustees appointed by courts do not take the special powers conferred upon the trustees appointed by the settlor. The exception is made in cases of sales, for the reason that the power of giving receipts is so connected with the power of sale that it may be presumed to be the intention of the settlor.[1]

§ 808. A perplexing question has arisen whether trustees, who have a clear authority given them to sign receipts, have the same power remaining after a breach of the trust. Thus, if trustees suffer the property to pass to A. by a breach of trust, and A. afterwards passes the property back to the trustees, would the receipt of the trustees be a valid discharge of A., so that he could not be called upon to account for the property if the trustees again misapplied it? If the property comes back to the trustees *in specie*, so that it is exactly as if it had never passed out of their hands, it would seem that their grantee should not be further responsible. But if the property has been converted, and comes back in the form of payment, it would seem that the receipt of the trustees would not indemnify the person who has knowingly dealt with the property by aiding in committing a breach of trust.[2] Mere irregularity of appointment, however, will not vitiate a receipt; as, where one of two trustees was irregularly appointed, the receipt of both was held a good discharge.[3] If the trust property is mortgaged, the trustees may give receipts for the difference between the amount of the mortgage and the purchase-money. If there is no surplus, the trustees can convey without giving a receipt. In the United States, the forms of conveyance contain a receipt of the purchase-money or consideration; and, as deeds must be signed by all the trustees to whom the power is intrusted, the receipt is signed in the same instrument. But if the deed or conveyance does not contain a receipt, or if the full amount of the purchase-money is not named in the deed as the consideration of the purchase, a separate receipt should be given, signed by all the trustees; otherwise the purchaser would have no sufficient discharge, and he might be called upon to account.

[1] Drayson *v.* Pocock, 4 Sim. 283; Byam *v.* Byam, 19 Beav. 58; Bartley *v.* Bartley, 5 Drew. 385; Lord *v.* Bunn, 2 Y. & Col. Ch. 98.

[2] Lander *v.* Weston, 3 Drew. 389; Hanson *v.* Beverley, Sugd. V. & P. 848 (11th ed.); Carver *v.* Richards, Lewin, 350.

[3] Miller *v.* Priddon, 1 De G., M. & G. 335. But see Gosling *v.* Carter, 1 Coll. 650.

§ 809. On the death of a testator, the personal estate vests wholly in the executor, and in order that he may execute his office, the law permits him, with or without the concurrence of any co-executor,[1] to sell or mortgage,[2] by actual assignment or equitable deposit,[3] with or without a power of sale,[4] all or any part of the personal assets, legal or equitable.[5] He must render an account to the court; but no creditor, legatee, or heir can make any claim to any of the personal assets. The creditor can only pursue his legal claim against the executor personally.[6] The pecuniary or specific legatee is not entitled to the legacy, until it is assented to by the executor;[7] and the residuary legatee has no claim or lien until the estate has been liquidated, and all liabilities under the will have been settled.[8] Therefore, upon the sale of a chattel, the purchaser has no concern as to the purchase-money, and the conveyance need not state that the sale is necessary to pay debts or other liabilities.[9] The purchaser may rely upon the person appointed by the testator to liquidate his estate.[10] If the executor misapplies the purchase-money, those defrauded must seek their remedy against him, and not against the purchaser.[11] The purchaser need not inquire into the necessity of a sale.[12] Even express notice of the entire contents of a will cannot affect the purchaser of a chattel; for a purchaser of real estate under a power of sale to pay debts is not bound to investigate whether there are debts, nor to see to the application of the purchase-money. And as all personal property is bound for the payment of debts, a purchaser is not bound to know whether there

[1] Scott *v.* Tyler, 2 Dick. 725; Smith *v.* Everett, 27 Beav. 446; Sneesby *v.* Thorn, 7 De G., M. & G. 399; Fellows *v.* Mitchell, 2 Vern. 515; Doe *v.* Stace, 15 M. & W. 623; Murrell *v.* Cox, 2 Vern. 570; Shep. Touch. 484; Dyer, 23 a.

[2] Ibid.; Bonney *v.* Ridgard, 1 Cox, 145, 148; Miles *v.* Durnford, 13 Eng. L. & Eq. 123; 2 De G., M. & G. 641; Mead *v.* Orrery, 3 Atk. 340; Andrew *v.* Wrigley, 4 Bro. Ch. 138; Keane *v.* Roberts, 4 Mad. 357; Humble *v.* Bill, 2 Vern. 446; Sandars *v.* Richards, 2 Coll. 568; McLeod *v.* Drummond, 17 Ves. 154; Haynes *v.* Forshaw, 11 Hare, 93; Field *v.* Schieffelin, 7 John. Ch. 150; Petrie *v.* Clark, 11 S. & R. 377; Tyrrell *v.* Morris, 1 Dev. & Bat. Eq. 559.

[3] Ibid.; Ball *v.* Harris, 8 Sim. 485.

[4] Russell *v.* Plaice, 18 Beav. 21.

[5] McLeod *v.* Drummond, 14 Ves. 360; Nugent *v.* Gifford, 1 Atk. 463.

[6] Ibid.; Mead *v.* Orrery, 3 Atk. 238.

[7] Ibid.

[8] Ibid.

[9] Bonney *v.* Ridgard, 1 Cox, 148.

[10] Ibid.

[11] Humble *v.* Bill, 2 Vern. 445; Ewer *v.* Corbet, 2 P. Wms. 149; Watts *v.* Kancie, Toth. 77; Nurton *v.* Nurton, Toth. 77; Ward *v.* Ward, 4 Ir. Ch. 215.

[12] Nugent *v.* Gifford, 1 Atk. 464; Mead *v.* Orrery, 3 Atk. 242.

are debts or not, nor to see to the application of the purchase-money.[1] Thus an executor can sell the personal assets of his testator, and even chattels specifically devised; and the purchaser has no concern with the purchase-money.[2]

§ 810. While this is the general rule, executors and purchasers cannot collude and commit frauds, for fraud and collusion vitiate every transaction; therefore, if there is fraud, a purchaser cannot protect himself under the absolute power of the executor to sell.[3] Thus the sale of a chattel cannot stand, if it is sold for a nominal price only, or at a fraudulent undervalue;[4] or if the purchaser receives the chattel in payment of the executor's own debt to him;[5] or if the purchaser knows that the executor intends to misapply the money, and the sale is made for that purpose.[6] Nor can a purchaser buy from an executor a chattel specifically bequeathed, if he has notice or knowledge that all debts have been paid, and that such chattel is not required for the payment of debts.[7] Nor can the executor apply the chattels with knowledge of the pur-

[1] Keane *v.* Robarts, 4 Mad. 356; Burting *v.* Stonard, 2 P. Wms. 150.

[2] Watts *v.* Kancie, Toth. 77, 161; Ewer *v.* Corbet, 2 P. Wms. 148; Humble *v.* Bill, 2 Vern. 444; 1 Bro. P. C. 71; Andrew *v.* Wrigley, 4 Bro. Ch. 137; McLeod *v.* Drummond, 17 Ves. 160; Bonney *v.* Ridgard, 1 Cox, 147.

[3] Scott *v.* Tyler, 2 Dick. 725; Watkins *v.* Cheek, 2 S. & S. 205; McLeod *v.* Drummond, 17 Ves. 154; Hill *v.* Simpson, 7 Ves. 166; Taner *v.* Ivie, 2 Ves. 469; Keane *v.* Robarts, 4 Mad. 357; Crane *v.* Drake, 2 Vern. 616; Nugent *v.* Gifford, 1 Atk. 463; Mead *v.* Orrery, 3 Atk. 240; Bonney *v.* Ridgard, 1 Cox, 147; Whale *v.* Booth, 4 T. R. 625; Elliot *v.* Merryman, Barn. 81; 1 Lead. Ca. Eq. 77, notes; Williams *v.* Branch Bank, 7 Ala. 906; Dodson *v.* Simpson, 2 Rand. 294; Williamson *v.* Morton, 2 Md. Ch. 94; Wilson *v.* Doster, 7 Ired. Eq. 231; Miller *v.* Williamson, 5 Md. 219.

[4] Scott *v.* Tyler, 2 Dick. 725; Ewer *v.* Corbet, 2 P. Wms. 149; McMullen *v.* O'Reilly, 15 Ir. Ch. 251; Drohan *v.* Drohan, 1 B. & B. 185.

[5] Andrew *v.* Wrigley, 4 Bro. Ch. 187; Eland *v.* Eland, 4 M. & Cr. 127; Miles *v.* Durnford, 13 Eng. L. & Eq. 123; 2 De G., M. & G. 641; Anon., Pr. Ch. 434; Williams *v.* Branch Bank, 7 Ala. 906; Dodson *v.* Simpson, 2 Rand. 294; Williamson *v.* Morton, 2 Md. Ch. 94; Wilson *v.* Doster, 7 Ired. Eq. 231; Miller *v.* Williamson, 5 Md. 219; Scott *v.* Tyler, 2 Dick. 712; Hill *v.* Simpson, 7 Ves. 152; Watkins *v.* Cheek, 2 S. & S. 205; Keane *v.* Robarts, 4 Mad. 357; Crane *v.* Drake, 2 Vern. 616.

[6] Watkins *v.* Cheek, 2 S. & S. 199; Eland *v.* Eland, 4 M. & Cr. 427; Strough-hill *v.* Anstey, 1 De G., M. & G. 648; Sacia *v.* Berthoud, 17 Barb. 15; Miller *v.* Williamson, 5 Md. 219; Williamson *v.* Morton, 2 Md. Ch. 94; Garrard *v.* Railroad Co., 5 Casey, 154; Railway Co. *v.* Barker, 5 Casey, 160.

[7] Ewer *v.* Corbet, 2 P. Wms. 149; McMullen *v.* O'Reilly, 15 Ir. Ch. 251.

chaser to the payment of a debt wrongfully contracted by him in behalf of the estate.[1] Nor can an executor sell or pledge the assets to raise money to carry on the testator's business, though such business is carried on in pursuance of directions contained in his will; for such debts are the executor's own debts and not the debts of the estate. The executor can only apply the special property devoted to the purposes of the business he is directed to carry on.[2]

§ 811. If the executor is the specific or residuary legatee, he may sell the testator's chattels to pay his own debt, for as soon as the testator's debts are paid, the chattels belong to the executor as legatee, and a purchaser is not bound to know whether the testator's debts are paid;[3] but if the creditor of the executor has actual knowledge that the testator's debts or any one of them are unpaid, he cannot receive such assets in payment of his own debts, although the executor is residuary legatee.[4] If the executor is joint residuary legatee, his creditor cannot take any of the assets in payment of debts; he cannot take them from the executor, *qua* executor, because the executor cannot pay his own debts from the assets of the estate, and the creditor cannot receive the assets from him, *qua* legatee, for the reason that others own the assets with him after the testator's debts are paid;[5] the purchaser in such case must not rely upon the representations of the executor, but he is bound to examine the will.[6] Where a creditor receives assets from an executor in payment, knowing that such assets belong to the executor only as executor, a suspicion of fraud at once arises; but if an executor applies for a loan, and the party applied to parts with his money on security of the assets, there is no presumption of fraud. Therefore, if an executor sells or mortgages personal assets for ready money, or money to be advanced, the dealing *prima facie* is in due course of administration, but *prima facie*

[1] Collinson *v.* Lister, 20 Beav. 356; 7 De G., M. & G. 634; Hill *v.* Simpson, 7 Ves. 169.

[2] McNeille *v.* Acton, 2 Eq. R. 21.

[3] Taylor *v.* Hawkins, 8 Ves. 209; Nugent *v.* Gifford, 1 Atk. 463; 4 Bro. Ch. 136; Storry *v.* Walsh, 18 Beav. 559; Mead *v.* Orrery, 3 Atk. 235; McLeod *v.* Drummond, 17 Ves. 163; Whale *v.* Booth, 4 T. R. 625, note (a); Bedford *v.* Woodman, 4 Ves. 40 n.

[4] Ibid.

[5] Bonney *v.* Ridgard, 1 Cox, 145; Hill *v.* Simpson, 7 Ves. 152, 170; Haynes *v.* Forshaw, 11 Hare, 93.

[6] Hill *v.* Simpson, 7 Ves. 152, 170.

only; for if there is affirmative evidence that the purchaser or mortgagee had notice that the money was to be used for some purpose other than in the settlement of the estate, the court will regard the transaction as fraudulent, and will not allow it to stand.[1]

§ 812. In the United States, bonds are required of both executors and administrators, for the protection of the estate and the parties interested; but neither such bonds, nor a judgment upon them vest the assets in the executor or administrator. But it is conceived, where there are no statutes to the contrary, that executors and administrators may sell the personal assets, acting in good faith, and receive the purchase-money, and length of time will not affect their right. As personal assets go to the personal representatives, if the executor or administrator cannot sell and receive the purchase-money, who can?[2] An executor has no power until he has proved the will and given bonds; until then he can neither sell the assets, nor make a valid contract, nor receive the purchase-money.[3]

§ 813. An agent of an executor or administrator is accountable only to his principal, therefore a broker or other agent employed by an executor cannot refuse to pay over money to his principal, because it may be misapplied; but if such agent receives any benefit from the breach of the trust he will be responsible.[4]

§ 814. Similar principles apply to all who stand in a fiduciary relation to others. Thus creditors of a partnership cannot receive the partnership assets in payment of the private debts of one of the partners.[5]

[1] McLeod *v.* Drummond, 14 Ves. 362; 17 Ves. 155; Miles *v.* Durnford, 2 De G., M. & G. 641; Scott *v.* Tyler, 2 Dick. 172; Keane *v.* Robarts, 4 Mad. 358.

[2] Stroughill *v.* Anstey, 1 De G., M. & G. 654; Ewer *v.* Corbet, 2 P. Wms. 148; Court *v.* Jeffery, 1 S. & S. 105; Orrock *v.* Binney, Jac. 523; Pierce *v.* Scott, 1 Y. & Col. 257; Forbes *v.* Peacock, 11 Sim. 152; Williams *v.* Massey, 15 Ir. Ch. 68; Lay *v.* Duckett, 1 Cr. & Ph. 305; Field *v.* Schieffelin, 7 John. Ch. 150; Petrie *v.* Clark, 1 S. & R. 377.

[3] Newton *v.* Metropolitan Rail. Co., 1 Dr. & Sm. 583; Luscomb *v.* Ballard, 5 Gray, 403.

[4] Pannel *v.* Hurley, 2 Coll. 241; Bodenham *v.* Hoskyns, 2 De G., M. & G. 241.

[5] Hoxie *v.* Carr, 1 Sumn. 193; Tillinghast *v.* Champlin, 4 R. I. 173, 213; Pipkin *v.* Casey, 13 Mo. 347; Dyer *v.* Clark, 5 Met. 580; Tapley *v.* Butterfield,

§ 815. Wherever in the preceding cases there is fraud or suspicion of fraud, the transaction may be investigated and impeached by creditors,[1] or by specific,[2] residuary,[3] and pecuniary legatees, if they are injured in their rights. But the court will not reopen transactions that have been allowed to sleep for twenty years or more.[4]

1 Met. 515; Hertell *v.* Bogert, 9 Paige, 59; Polk *v.* Robinson, 7 Ir. Eq. 231; Bond *v.* Ziegler, 1 Kelly, 324.

[1] Crane *v.* Drake, 2 Vern. 616; Mead *v.* Orrery, 3 Atk. 238; Nugent *v.* Gifford, 1 Atk. 463; Anon., cited Pr. Ch. 434.

[2] Scott *v.* Tyler, 2 Dick. 712; Humble *v.* Bill, 2 Vern. 444.

[3] McLeod *v.* Drummond, 17 Ves. 161; Mead *v.* Orrery, 3 Atk. 235; Burting *v.* Stonard, 2 P. Wms. 150.

[4] Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 17 Ves. 169.

CHAPTER XXVII.

RIGHTS AND REMEDIES OF THE CESTUIS QUE TRUST IN RELATION TO THE TRUST PROPERTY.

§ 816. THE *cestui que trust* may compel the trustee to the observance and performance of his duty; and if there is reason to suppose, or the court is satisfied, that the trustee is about to proceed in an unauthorized manner, an injunction will be granted to

restrain the improper exercise of the legal power in the trustee.[1] It is well established, that the *cestui que trust* is entitled to an injunction, where the intended act, if done by the trustee, will be irremediable;[2] and so any person interested in the estate in common with others may, in behalf of himself and the others, procure proper orders for the security of the property.[3] So a mortgagor in a power-of-sale mortgage, or other person interested in the equity of redemption may procure an injunction restraining a sale by the mortgagee after a tender to him of the principal and interest due; and a purchaser with notice is not protected, although there is a clause exempting him from seeing to the validity of the sale.[4] A purchaser with notice of the trust from a trustee would be subject to the same liabilities as the trustee. An injunction may be had against the disposition of the fund by an insolvent trustee,[5] or against a bankrupt trustee;[6] but if the trustee or executor is merely poor, the court will not interfere.[7] An injunction has been granted against the administration of a trust by an executor of bad character, drunken habits, and great poverty.[8] Stockholders in banks or other corporations may have injunctions against the directors of the corporation to prevent breaches of the trust.[9] But the inhabitants of a town or city cannot have an injunction against the town or its officers, in the absence of an enabling statute.

§ 817. Courts may also remove the trustees from office, and appoint others in their place, to prevent a threatened breach of trust, or any danger to the trust fund;[10] but if the conduct of the

[1] Balls *v.* Strutt, 1 Hare, 146; Corporation of Ludlow *v.* Greenhouse, 1 Bl. N. R. 57; In Chertsey Market, 6 Price, 279, 281; Att'y-Gen. *v.* Foundling Hosp., 2 Ves. Jr. 42.

[2] Anon., 6 Mad. 10; Webb *v.* Shaftesbury, 7 Ves. 487; Reeve *v.* Parkins, J. & W. 390; Milligan *v.* Mitchel, 1 M. & K. 446; Att'y-Gen. *v.* Liverpool, 1 M. & C. 210; Vann *v.* Barnett, 2 Bro. Ch. 157. The contrary opinion expressed in Pechel *v.* Fowler, 2 Anst. 549, has not been followed.

[3] Scott *v.* Becher, 4 Price, 346.

[4] Jenkins *v.* Jones, 2 Gif. 99.

[5] Mansfield *v.* Shaw, 3 Mad. 100; Taylor *v.* Allen, 2 Atk. 213; Scott *v.* Becher, 4 Price, 346.

[6] Gladdon *v.* Stoneman, 1 Mad. 143 n.

[7] Howard *v.* Papera, 1 Mad. 143; Hathornthwaite *v.* Russell, 2 Atk. 126; Barn. 334.

[8] Everett *v.* Prythergch, 12 Sim. 365.

[9] *Ante*, § 207; Dodge *v.* Woolsey, 18 How. 331; Mechanics' Bank *v.* De Bolt, 18 How. 330.

[10] *Ante*, § 275, and cases cited; Parsons *v.* Winslow, 6 Mass. 169; Dixon *v.* Smith, 2 Rich. Eq. 131; Johnson's App., 9 Barr, 416.

trustee proceeds from a misunderstanding of his duty, or from mistake, or a long-continued practice by himself and other trustees, and not from any dishonest, selfish, or improper motives, and the safety of the property is not imperilled, the court generally will not remove him.[1]

§ 818. Proceedings for the removal of trustees and the appointment of others require some little time, as trustees have the right to file answers to the charges against them, and to a regular and full hearing; and, as the *cestuis que trust* are entitled to have the fund properly protected and managed in the mean time, the court may appoint receivers.[2] Thus, if it can be shown that the trustees have been guilty of misconduct, waste, or an improper disposition of the estate;[3] or that they have an undue leaning towards one of two conflicting interests;[4] or that the fund is in danger from their insolvency or bankruptcy;[5] or that one of the trustees has been guilty of misconduct, and the other trustees desire a receiver;[6] or that they are incapacitated from acting;[7] or that they are of bad character, drunken habits, and great poverty;[8] or that the trustees are out of the jurisdiction;[9] or that they so disagree among themselves that the estate cannot be properly administered,[10] receivers will be appointed; and so where the trustee was a married woman, and her husband was out of the jurisdiction.[11] In all cases, the court will appoint a receiver if the trustees and *cestuis que trust* agree or concur in the appointment.[12] But the court will require security.[13]

[1] *Ante*, § 276, and cases cited; 2 Story, Eq. Jur. § 1289.

[2] Beverley *v.* Brooke, 4 Grat. 208; Calhoun *v.* King, 5 Ala. 523; Jones *v.* Dougherty, 10 Ga. 273.

[3] Anon., 12 Ves. 5; Middleton *v.* Dodswell, 13 Ves. 266; Howard *v.* Papera, 1 Mad. 142; Richards *v.* Perkins, 3 Y. & Col. 299; Evans *v.* Coventry, 5 De G., M. & G. 911; Att'y-Gen. *v.* Boyer, 3 Ves. 714.

[4] Talbot *v.* Scott, 4 K. & J. 139.

[5] Scott *v.* Becher, 4 Price, 346; Gladdon *v.* Stoneman, 1 Mad. 143 n.; Langley *v.* Hawk, 5 Mad. 46; Mansfield *v.* Shaw, 3 Mad. 100; Havers *v.* Havers, Barn. 23; Middleton *v.* Dodswell, 13 Ves. 266; Anon., 12 Ves. 4.

[6] Middleton *v.* Dodswell, 13 Ves. 266; Tidd *v.* Lister, 5 Mad. 429.

[7] Bainbrigge *v.* Blair, 3 Beav. 481.

[8] Everett *v.* Prythergch, 12 Sim. 367.

[9] Noad *v.* Backhouse, 2 Y. & Col. Ch. 529; Smith *v.* Smith, 10 Hare, App., 71; Tidd *v.* Lister, 5 Mad. 429.

[10] Day *v.* Croft, Lewin on Trusts, 731; Swale *v.* Swale, 22 Beav. 584.

[11] Taylor *v.* Allen, 2 Atk. 213.

[12] Brodie *v.* Barry, 3 Mer. 695, and case cited; Browell *v.* Reid, 1 Hare, 435.

[13] Manners *v.* Furze, 11 Beav. 30; Tylee *v.* Tylee, 17 Beav. 583.

§ 819. The court will not appoint a receiver, and take the administration of the trust out of the hands of the trustees upon slight grounds.[1] It is not a sufficient ground of itself for a receiver, that one trustee has disclaimed, another is inactive, and another has gone abroad, if there is still a trustee capable and willing to execute the trust;[2] nor that the trustees are poor, if they are not insolvent;[3] nor that trustees for sale have let the purchaser into possession before the purchase-money is paid.[4] There must be good reason to fear that the property will not be forthcoming at the end of the litigation, or the court will not appoint a receiver.[5]

§ 820. A receiver is appointed for the benefit of all parties interested, and therefore he will not be discharged upon the application of one party, although he is the party that applied for the appointment.[6] But the expenses of the receivership, together with the commissions of the receivers, must be paid out of the income of the tenant for life.[7] For this reason, the court will appoint new trustees and discharge the receiver as soon as it can be done in the regular progress of the suit, to relieve the tenant for life from all extraordinary or unnecessary burdens.[8]

§ 821. A trustee or executor is bound to keep clear, distinct, and accurate accounts; and if he enters these accounts in his private books, he is bound to produce the books, although such books contain his private accounts;[9] and even if he enters the accounts of the trust in the books of the firm of which he is a partner, the books must be produced.[10] The *cestuis que trust* may enforce these rights against all persons acting for, or claiming by, through, or under the trustee with notice, or taking without value.[11] But where an agent was employed to manage an estate, and he entered the accounts in the same books in which he kept the accounts of other estates which he managed for other persons, the court declined

[1] Barkley *v.* Reay, 2 Hare, 306; Middleton *v.* Dodswell, 13 Ves. 268; Ogden *v.* Kip, 6 John. Ch. 160.

[2] Browell *v.* Reid, 1 Hare, 434; Tait *v.* Jenkins, 1 Y. & Col. Ch. 492.

[3] Anon., 12 Ves. 4; Howard *v.* Papera, 6 Mad. 142; Hathornthwaite *v.* Russell, 2 Atk. 126; Havers *v.* Havers, Barn. 23.

[4] Browell *v.* Reid, 1 Hare, 434.

[5] Poythress *v.* Poythress, 16 Ga. 406; Ogden *v.* Kip, 6 John. Ch. 160.

[6] Bainbrigge *v.* Blair, 3 Beav. 423.

[7] Shore *v.* Shore, 4 Drew. 510.

[8] Bainbrigge *v.* Blair, 3 Beav. 421; Poole *v.* Franks, 1 Moll. 80.

[9] Freeman *v.* Fairlee, 3 Mer. 43.

[10] Ibid.

[11] Smith *v.* Barnes, L. R. 1 Eq. 65.

to order the production of the books in the absence of such persons.[1]

§ 822. Where the relation of trustees and *cestuis que trust* is admitted or clearly established,[2] the *cestuis que trust*, as the true owners of the fund, have the right to the production and inspection of all the documents and papers relating to it. Where the trustee has taken the opinion of counsel for his guidance as trustee, the *cestuis que trust* have the right to see it, as it must be paid for out of their income.[3] As all the *cestuis que trust* have an interest in the documents, they must all be represented, directly or indirectly, in court, before a final disposition can be made of the papers;[4] but parties to bills, notes, bonds, or mortgages due to the trust estate, need not be before the court, if they are not *cestuis que trust*.[5]

§ 823. But so long as the relation of trustee and *cestuis que trust* is not admitted, or is not established, the *cestuis que trust* are strangers, and are not entitled to inspect the documents;[6] and where litigation is pending or contemplated between the trustee and *cestuis que trust*, and the trustee takes the opinion of counsel in relation to his rights against them, they have no right to see the opinion.[7]

§ 824. An order to pay the fund into court may be made at the final hearing, although it was not made upon an interlocutory application;[8] and such order may be made at the final hearing without notice or motion,[9] and it may be made, although a *distringas* or injunction has been previously obtained.[10]

§ 825. If the fund in the hands of the trustee consists of money, he will be ordered to pay it into court forthwith; if it consists of stocks, an immediate transfer will be ordered; if of mortgages or other property, a reasonable time, according to the circumstances, will be allowed in the order for the payment into court.[11]

[1] Airy *v.* Hall, 12 Jur. 1043. [2] Wynne *v.* Humberstone, 27 Beav. 421.

[3] Ibid.; Devaynes *v.* Robinson, 21 Beav. 42; Talbot *v.* Marshfield, 2 Dr. & Sm. 285.

[4] Bugden *v.* Tylee, 21 Beav. 545. [5] Gough *v.* Offley, 5 De G. & Sm. 653.

[6] Wynne *v.* Humberstone, 27 Beav. 421.

[7] Talbot *v.* Marshfield, 2 Dr. & Sm. 285; Brown *v.* Oakshott, 12 Beav. 252; Devaynes *v.* Robinson, 20 Beav. 42.

[8] Governesses' Institution *v.* Rusbridger, 18 Beav. 467.

[9] Isaacs *v.* Weatherstone, 10 Hare, App., 30. [10] Lewin on Trusts, 730.

[11] Vigrass *v.* Binfield, 3 Mad. 62; Hinde *v.* Blake, 4 Beav. 597; Roy *v.* Gib-

§ 826. If a plaintiff is clearly entitled to a fund;[1] or if he has a certain partial interest in a fund, and all the other parties are before the court;[2] or if the other parties interested are not necessary parties to the suit;[3] or if he has a contingent interest, and there is no doubt that the defendant is trustee for some one,[4] an order will be entered that the money be paid into court, if any misconduct is shown on the part of the trustee.[5] And, so where the plaintiff is entitled to a share of a fund which is clearly divisible into proportions.[6] Such orders were at one time entered as a matter of course upon the facts appearing in the answer, and Vice-Chancellor Kindersley said that he adhered to that practice.[7] But Lord Langdale said that the order would not be made, unless the misconduct of the trustee endangered the safety of the trust fund.[8] So trustees who have a discretionary power over the fund will not be ordered to pay it into court, if it appear that they intend to exercise their discretion in good faith.[9]

§ 827. An order for payment into court will not be made, except upon an equity clearly stated in the plaintiff's bill, although some other equity may appear from defendant's answer;[10] and the merits,

bon, 4 Hare, 65; Wyatt *v.* Sharratt, 3 Beav. 498; Score *v.* Ford, 7 Beav. 333.

[1] Freeman *v.* Fairlee, 3 Mer. 29; Dubless *v.* Flint, 4 M. & C. 502; McHardy *v.* Hitchcock, 11 Beav. 77.

[2] Ross *v.* Ross, 12 Beav. 89; Whitmarsh *v.* Robertson, 4 Beav. 26; Bartlett *v.* Bartlett, 4 Hare, 631.

[3] Wilton *v.* Hill, 2 De G., M. & G. 807; Hammond *v.* Walker, 3 Jur. (N. S.) 686; Marryatt *v.* Marryatt, 23 L. J. (N. S.) Ch. 876; Lewellin *v.* Cobbold, 1 Sm. & Gif. 572.

[4] Dolder *v.* Bank of England, 10 Ves. 355; Whitmore *v.* Turquand, 1 John. & H. 296; Dublin *v.* Flint, 4 M. & C. 502; McHardy *v.* Hitchcock, 11 Beav. 73.

[5] Ross *v.* Ross, 12 Beav. 89; Rothwell *v.* Rothwell, 2 S. & S. 217; Richardson *v.* Bank of England, 4 M. & C. 184; Meyer *v.* Montriou, 4 Beav. 343; Hinde *v.* Blake, 4 Beav. 597; Johnson *v.* Aston, 1 S. & S. 73; Freeman *v.* Fairlee, 3 Mer. 39; Vigrass *v.* Binfield, 3 Mad. 62; Collis *v.* Collis, 2 Sim. 366; Wyatt *v.* Sherratt, 3 Beav. 499; Widdowson *v.* Duck, 3 Mer. 494; Contee *v.* Dawson, 2 Bland. 264; Hosack *v.* Rogers, 9 Paige, 468; Bartlett *v.* Bartlett, 4 Hare, 631; Nokes *v.* Seppings, 2 Phil. 19; Boschetti *v.* Power, 8 Beav. 98; Marryatt *v.* Marryatt, 23 L. J. Ch. 876; Clogett *v.* Hill, 9 G. & J. 81; Bourne *v.* Mole, 8 Beav. 177; Futter *v.* Jackson, 6 Beav. 424.

[6] Rogers *v.* Rogers, 1 Anst. 174; Hammond *v.* Walker, 3 Jur. (N. S.) 686; Score *v.* Ford, 7 Beav. 336.

[7] Robertson *v.* Scott, 1 W. N. 114.

[8] Ross *v.* Ross, 12 Beav. 89.

[9] Talbot *v.* Marshfield, 2 Dr. & Sm. 285.

[10] Proudfoot *v.* Hume, 4 Beav. 476.

upon which the prayer or motion is made, must substantially appear in defendant's answer, as no evidence *aliunde* can be introduced upon the merits;[1] and so the plaintiff's interest or title should appear in the answer.[2] So it should appear in defendant's answer that he has received the trust fund;[3] but it need not appear that the trustees actually have the money in their hands; for if they state that they have received the fund, and have applied it, or invested it in a manner not authorized, they will be ordered to bring it into court.[4] Where an executor admits funds to have come to his hands, he may be allowed to show by affidavit what debts he has paid, and he will be ordered to pay in the balance only.[5] Payment into court is ordered where the trustees admit the receipts of funds, and do not show any legal discharge;[6] but it is not ordered where the trustees admit facts only from which a liability may be inferred;[7] thus if they admit funds in their hands, in such manner that it may be inferred that they ought to pay interest, they will not be ordered to pay the interest into court until the final hearing;[8] but if they admit that they have received interest, they may be ordered to pay it into court with the fund.[9] And so if the trustees admit that they owe a debt to the trust estate, they may be ordered to pay it into court at once, as the persons to receive and pay the debt are the same.[10]

[1] Beaumont *v.* Meredith, 3 V. & B. 181; Richardson *v.* England, 4 M. & C. 171; Dubless *v.* Flint, 4 M. & C. 502; Black *v.* Creighton, 2 Moll. 554; Green *v.* Pledger, 3 Hare, 171; Boschetti *v.* Power, 8 Beav. 98.

[2] Dubless *v.* Flint, 4 M. & C. 502; McHardy *v.* Hitchcock, 11 Beav. 73; Bank of Turkey *v.* Ottoman Co., L. R. 2 Eq. 366.

[3] Ibid.

[4] Ingle *v.* Partridge, 32 Beav. 661; Phillipo *v.* Munnings, 2 M. & C. 309; Meyer *v.* Montriou, 4 Beav. 346; Futter *v.* Jackson, 6 Beav. 424; Scott *v.* Becher, 4 Price, 350; Nokes *v.* Seppings, 2 Phil. 19; Vigrass *v.* Binfield, 3 Mad. 62; Collis *v.* Collis, 2 Sim. 365; Roy *v.* Gibbon, 4 Hare, 65; Wyatt *v.* Sharratt, 3 Beav. 498; Costeker *v.* Horrox, 3 Y. & Col. 530; Hinde *v.* Blake, 4 Beav. 597; Bourne *v.* Mole, 8 Beav. 177; Rothwell *v.* Rothwell, 2 S. & S. 217.

[5] Anon., 4 Sim. 359; Proudfoot *v.* Hume, 4 Beav. 476; Roy *v.* Gibbon, 4 Hare, 65.

[6] Peacham *v.* Daw, 6 Mad. 98; Richardson *v.* England, 4 M. & C. 174; Rothwell *v.* Rothwell, 2 S. & S. 217.

[7] Ibid.

[8] Wood *v.* Downes, 1 V. & B. 50.

[9] Ibid.; Freeman *v.* Fairlee, 3 Mer. 43; Rothwell *v.* Rothwell, 2 S. & S. 217.

[10] Richardson *v.* Bank of England, 4 M. & C. 174; White *v.* Barton, 19 Beav. 192.

§ 828. If the trustees convey the estate by a breach of the trust, the *cestui que trust* may follow the estate into the hands of a volunteer, whether he had notice of the trust or not;[1] and into the hands of a purchaser for value, if he has notice of the trust.[2] Even the statute of limitations does not apply to a purchaser, taking the property with full notice of the trus and therefore by fraud.[3] The purchaser under such circumstances becomes a trustee, and liable in the same manner as the person from whom he purchased; for, knowing another's rights to the property, he throws away his money.[4] And the rule applies not only to direct or express trusts, but also to all constructive trusts,[5] equitable incumbrances,[6] and liens for the purchase-money.[7] But a *bona fide* purchaser for a valuable consideration without notice, expressed or implied, is entitled to full protection.[8]

§ 829. If a purchaser has no notice of the trust at the time, but afterwards discovers the trust, and obtains a conveyance from the trustee, he cannot protect himself by getting in the legal estate; for this is not like getting in a first mortgage, which the mortgagees have a right to transfer to anybody. But notice of the trust, before the conveyance, converts the purchaser into a trustee,

[1] See *ante*, §§ 217, 223; Mansell *v.* Mansell, 2 P. Wms. 679; Saunders *v.* Dehew, 2 Vern. 271; 2 Freem. 123; Langton *v.* Astrey, 2 Ch. R. 30; Nels. 126; Bell *v.* Bell, Ll. & G. t. Plunk. 50; Pye *v.* George, 2 Salk. 680; 1 Rep. 122 b; Burgess *v.* Wheate, 1 Ed. 219; Spurgeon *v.* Collier, 1 Ed. 55; Cole *v.* Moore, Mose. 806; Bourset *v.* Savage, L. R. 2 Eq. 134.

[2] Ibid.

[3] Rolfe *v.* Gregory, 11 Jur. (N. S.) 98.

[4] *Ante*, § 217, and cases cited; Bovey *v.* Smith, 1 Vern. 149; Phayre *v.* Perce, 3 Dow. 129; Willoughby *v.* Willoughby, 1 T. R. 771; Verney *v.* Carding, cited Joy *v.* Campbell, 1 Sch. & Lef. 345; Flemming *v.* Page, Finch, 320; Backhouse *v.* Middleton, 1 Ch. Ca. 173, 208; Powell *v.* Price, 2 P. Wms. 539; Walley *v.* Whalley, 1 Vern. 484; Pearce *v.* Newlyn, 3 Mad. 186.

[5] *Ante*, § 217, p. 190.

[6] Daniels *v.* Davison, 16 Ves. 249; Brooke *v.* Bulkely, 2 Ves. 498; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Winged *v.* Lefebury, 2 Eq. Ca. Ab. 32; Ferrars *v.* Cherry, 2 Vern. 384; Jackson's Case, Lane, 60; Crofton *v.* Ormsby, 2 Sch. & Lef. 583; Kennedy *v.* Daly, 1 Sch. & Lef. 355.

[7] *Ante*, § 239, and cases cited; Kator *v.* Pembroke, 1 Bro. Ch. 202; Grant *v.* Mills, 2 V. & B. 306; Dunbar *v.* Tredennick, 2 B. & B. 320.

[8] *Ante*, § 218, and cases cited; Burgess *v.* Wheate, 1 Ed. 195; Millard's Case, 2 Freem. 43; Mansell *v.* Mansell, 2 P. Wms. 681; Trevor *v.* Trevor, 1 P. Wms. 633; Harding *v.* Hardrett, Finch, 9; Cole *v.* Moore, Mose. 806; Payne *v.* Compton, 2 Y. & Col. 457; Thorndike *v.* Hunt, 3 De G. & J. 563.

and he cannot protect himself by another breach of the trust.[1] But a conveyance may be recorded after notice of the trust.[2]

§ 830. A purchaser without notice from a purchaser with notice is protected; for his own *good faith* is a defence, and the *bad faith* of the vendor, like the *bad faith* of the original trustee in making the sale, cannot injure an innocent party.[3] So a purchaser with notice from a purchaser without notice is protected, not on his own merit, but on the merit of the innocent purchaser; for, if such purchaser could not sell the estate, he would be deprived of one of the valuable attributes of his property;[4] but if the property comes back to the defaulting trustee, the trust will reattach to it,[5] and a similar principle prevails at law.[6] But in case a trustee sells an estate vested in him for a charitable use, the purchaser will be bound by the trust, though he has no notice; and so of an innocent purchaser from the first purchaser;[7] in other respects purchasers of estates devoted to charitable uses are subject to the same rules that govern the purchase of other trust estates.[8]

§ 831. It is a rule of law, that the purchaser of *choses in action*, or personal property not transferable at law, cannot take any other, or different title than that held by the vendor; therefore, if a trustee sells *choses in action* and other personal property not transferable, the *cestuis que trust* may follow such *choses* and property into the hands of the purchaser, and charge him with the same equities and trusts that the property was subject to in the hands of the trustee.[9]

[1] *Ante*, § 218, p. 191, and cases cited; Bates *v.* Johnson, 1 John. (Eng.) 304; Langton *v.* Astrey, 2 Ch. R. 30; Nels. 126; Carter *v.* Carter, 3 K. & J. 617; Sharpless *v.* Adams, 32 Beav. 213; Collier *v.* McBean, 34 Beav. 426; Justin *v.* Wynne, 10 Ir. Eq. 489; 12 Ir. Eq. 289.

[2] Dodds *v.* Hills, 2 Hem. & Mil. 426.

[3] Martin *v.* Joliffe, Amb. 313; Ferrars *v.* Cherry, 2 Vern. 384; Pitts *v.* Edelph, Toth. 164; Salsbury *v.* Bagott, 2 Swans. 608.

[4] *Ante*, § 222, and cases cited; Bradwell *v.* Catchpole, cited Walker *v.* Symonds, 3 Swans. 78; Martin *v.* Joliffe, Amb. 313; McQueen *v.* Farquar, 11 Ves. 478; Andrew *v.* Wrigley, 4 Bro. Ch. 136; Salsbury *v.* Bagott, 2 Swans. 608.

[5] *Ante*, § 222, and cases cited; Bovey *v.* Smith, 2 Ch. Ca. 124; 1 Vern. 60, 81, 144; Kennedy *v.* Daly, 1 Sch. & Lef. 379.

[6] Bovey *v.* Smith, 2 Ch. Ca. 126.

[7] East Greenstead's Case, Duke, 65; Sutton Colefield's Case, Duke, 68, 94, 173; Comm'rs of Char. Dona. *v.* Wybrants, 2 Jon. & Lat. 194.

[8] See Sugd. V. & P. 722 (14th ed.).

[9] Ord *v.* White, 3 Beav. 357; Cockell *v.* Taylor, 15 Beav. 105; Clack *v.*

§ 832. So if a trustee loans the trust fund in breach of the trust, and the borrower has notice of the trust and the breach, he becomes a *quasi* trustee; and he cannot separate the loan from the trust, nor insist that the statute of limitations, which bars a loan as a loan, also bars the remedy for the trust fund in his hands.[1]

§ 833. Notice of *doubtful* equities has been the subject of much discussion. In Cordwell *v.* Mackrill, Lord Northington said: "A man must take notice of a deed on which an equity supported by precedents, the justice of which every one acknowledges, arises, but not the mere construction of words which are uncertain in themselves, and the meaning of which often depends upon their locality."[2] Sir. W. Grant said: "There may be such a doubtful equity that a purchaser is not to be taken to know what will be the decision, and that is all Lord Camden means, but in this case the equity is clear."[3] Lord St. Leonards observed, that Cordwell *v.* Mackrill was of no great authority, though decided by a great judge; and conceived the true rule to be, that where, upon the whole articles, it is plain what construction the court will put upon them had it been called upon to execute them at the time they were made, they should be enforced, however difficult the construction might be, even as against a purchaser with notice; but not after a lapse of time, when there was any thing so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated.[4]

§ 834. Thus the rule, that "heirs of the body" in articles shall be construed "first and other sons," was not established till about 1720. Lord Hardwicke, therefore, said that notice of *ancient* articles, or articles before the doctrine was established should not bind a *bona fide purchaser*.[5] But notice of modern articles will affect the purchaser;[6] but even then the articles must be produced, that

Holland, 19 Beav. 262; Barnard *v.* Hunter, 2 Jur. (N. S.) 1213; Mangles *v.* Dixon, 1 McN. & G. 437; 3 H. L. Ca. 702; Athenæum, &c., Soc. *v.* Pooley, 3 De G. & J. 294.

[1] Earnest *v.* Croysdill, 2 De G., F. & J. 198.

[2] Cordwell *v.* Mackrill, 2 Ed. 347; Amb. 516.

[3] Parker *v.* Brooks, 9 Ves. 588.

[4] Thompson *v.* Simpson, 1 Dr. & War. 491.

[5] Trevor *v.* Trevor, 1 P. Wms. 622; Senhouse *v.* Earle, Amb. 288; West *v.* Errissey, 2 P. Wms. 349; Warwick *v.* Warwick, 3 Atk. 291; Davies *v.* Davies, 4 Beav. 54; Parker *v.* Brooke, 9 Ves. 587.

[6] Ibid.

the court may judge of their character from the whole instrument, and the clearness or doubtfulness of the notice.[1] Where a residuary legatee had enjoyed an estate for nineteen years, which had been mortgaged to the testator in fee, and the heir of the testator recovered the land by ejectment, and mortgaged it, and the residuary legatee neglected to assert his title to the possession for nine years, and then filed a bill and established his claim, it was determined that the mortgagee of the heir after the ejectment was not called upon to notice the right of the residuary legatee, for it was not that "clear and broad equity" which affects a purchaser.[2] But where lands were given to the sole and separate use of a married woman, and the husband in possession made conveyances in mortgage, it was held that the grantees or mortgagees were bound to notice the equitable construction of the will, as a doctrine well understood;[3] and the same rule applies to leases.[4]

§ 835. Not only can the *cestuis que trust* follow the trust property into the hands of third persons, as herein stated, but they can follow the proceeds of it, if it is wrongfully sold, so long as the proceeds can be traced and identified. It has been urged, that, where the conversion is in *pursuance* of the trust, the newly acquired property is bound by the original equity; but where the conversion is wrongful, the acquired property not being in a form consistent with the trust, the *cestuis que trust* are under no obligations to accept it in place of the original property, and therefore they must come in as creditors of the trustee, and cannot assert a specific lien upon the substituted property.[5] But this reasoning has been rejected.[6] Lord Ellenborough said, that "an abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him."[7] And it may be added, that an abuse of trust can deprive the *cestuis que trust* of no rights, so long as the property or its proceeds can be traced and identified, in the hands of those who have full knowledge of all the equities.[8]

[1] Cordwell *v.* Mackrill, Amb. 515, 2 Ed. 344.

[2] Hardy *v.* Reeves, 4 Ves. 466; 5 Ves. 426.

[3] Parker *v.* Brooke, 9 Ves. 583. [4] Coppin *v.* Fernyhough, 2 Bro. Ch. 291.

[5] Argument in Taylor *v.* Plumer, 3 M. & S. 562.

[6] Burdett *v.* Willett, 2 Vern. 638; Ryall *v.* Rolle, 1 Atk. 17; *Ex parte* Chion, 3 P. Wms. 187; Waite *v.* Whorwood, 2 Atk. 159; *Ex parte* Sayers, 5 Ves. 169; Anon. Case, Sel. Ca. Ch. 57.

[7] Taylor *v.* Plumer, 3 M. & S. 574.

[8] Whitcomb *v.* Jacob, 1 Salk. 160; Lane *v.* Dighton, Amb. 409; Ryall *v.*

§ 836. Thus if the trustee invests the trust fund or its proceeds in other property, the *cestui que trust* may follow the fund into the new investment, so long as he can identify the purchase, as made with the trust property or its proceeds, although the trustee may have taken the title in his own name, or in the name of any other person with notice of the facts.[1]

§ 837. Lord King remarked, that "*money* had no ear-mark, insomuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realize all his testator's estate and afterwards die insolvent, a court of equity could not charge or follow the land;"[2] and bank-notes and negotiable bills have been represented, as possessing the same quality.[3] In reply to this, Lord Mansfield observes: "It has been quaintly said, that the reason why money cannot be followed is because it has no ear-mark, but this is not true. The true reason is upon account of the currency of it: it cannot be recovered after it has passed in currency. Thus, in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before the money has passed in currency an action may be brought for the money itself. Apply this to the case of a bank-note: an action may lie against the finder, it is true, but not after it has been paid away in currency."[4] And Lord Ellenborough observed, "the *dictum* that money has no ear-

Ryall, Amb. 413; Balguey *v.* Hamilton, Amb. 414; Lench *v.* Lench, 10 Ves. 519; Chedworth *v.* Edwards, 8 Ves. 46; Greatly *v.* Noble, 3 Mad. 79; Buckeridge *v.* Glasse, Cr. & Phil. 126; Murray *v.* Pinkett, 12 Cl. & Fin. 784; Sheridan *v.* Joyce, 1 Jon. & Lat. 401; French *v.* Harrison, 17 Sim. 111; Harford *v.* Lloyd, 20 Beav. 310; Frith *v.* Cartland, 2 Hem. & Mil. 417.

[1] Oliver *v.* Piatt, 3 How. 333; *Ex parte* Montefiore, De G. Bank. R. 171; Pierce *v.* McKeehan, 3 W. & S. 280; Bonsall's App., 1 Rawle, 274; Kaufman *v.* Crawford, 9 W. & S. 234; Blaisdell *v.* Stevens, 16 Vt. 179; Turner *v.* Pettigrew, 9 Humph. 438; Moffatt *v.* McDonald, 11 Humph. 457; Sollee *v.* Croft, 7 Rich. Eq. 84; Bomar *v.* Mullins, 4 Rich. Eq. 80; Martin *v.* Greer, 1 Ga. Dec. 109; Garrett *v.* Garrett, 1 Strob. Eq. 96; Cheshire *v.* Cheshire, 3 Ired. Eq. 569; Brothers *v.* Porter, 6 B. Mon. 106; Murray *v.* Lylburn, 2 John. Ch. 441; Yerger *v.* Jones, 16 How. 36; Georges *v.* Pye, 7 Bro. P. C. 221; 1 P. Wms. 128; Bush *v.* Bush, 1 Strob. Eq. 377; Bailey *v.* Inglee, 2 Paige, 278; Heth *v.* Richmond R. R. Co., 4 Grat. 482; Barksdale *v.* Finney, 4 Grat. 338.

[2] Deg *v.* Deg, 2 P. Wms. 414.

[3] Cox *v.* Bateman, 2 Ves. 19; Whitecomb *v.* Jacob, 1 Salk. 160; Waite *v.* Whorwood, 2 Atk. 159.

[4] Miller *v.* Race, 1 Burr. 457.

mark must be understood as predicated only of an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, — guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, — are so far ear-marked as to fall within the rule which applies to every other description of personal property whilst it remains in the hands of the factor or his general legal representatives."[1] The only distinction between money, notes, bills, and other chattels appears to be this, that the former, for the protection of commerce, cannot be pursued into the hands of a *bona fide* holder, to whom they have passed in circulation, while other chattels can be recovered even from a purchaser for valuable consideration, provided he did not buy them in market overt. Money,[2] notes,[3] and bills[4] may be followed by the rightful owner when they have not been circulated or negotiated, or the person to whom they so passed had express notice of the trust.[5] The only difference between *money* and *notes* or *bills* is, that money is not ear-marked and therefore cannot be traced except under particular circumstances; but notes and bills, from carrying a number or date, can in general be identified by the owner without difficulty.[6] Thus if trust money is mixed in the same parcel with the trustee's own money, it may be said that the trust money has run into the general mass and has become absorbed, and that the *cestui que trust* has no lien; but such cannot be the case. If a trustee purchases an estate partly with his own money and partly with trust money, it cannot be predicated that any particular part of the estate was purchased with money of the *cestui que trust*, but he will have a lien on the whole estate for the amount of the trust fund that was misemployed.[7] It follows from this, that, although every identical piece

[1] Taylor *v.* Plumer, 3 M. & S. 575.

[2] Taylor *v.* Plumer, 3 M. & S. 575; Miller *v.* Race, 1 Burr. 457; Howard *v.* Jemmet, 3 Burr. 1369; King *v.* Eggington, 1 T. R. 370; Ryall *v.* Rolle, 1 Atk. 172.

[3] Ibid.; Anon., 1 Salk. 126; 1 Raym. 738.

[4] Bennet *v.* Mayhew, cited 1 Bro. Ch. 232; Caton *v.* Pembroke, 2 Bro. Ch. 287; Frith *v.* Cartland, 2 Hem. & Mil. 417; *Ex parte* Sayers, 5 Ves. 169; Chedworth *v.* Edwards, 8 Ves. 46; Ryall *v.* Rolle, 1 Atk. 172; Raphael *v.* Bank of England, 17 C. B. 161.

[5] Verney *v.* Carding, cited Joy *v.* Campbell, 1 Sch. & L. 345.

[6] Ford *v.* Hopkins, 1 Salk. 283.

[7] Lane *v.* Dighton, Amb. 409; Lewis *v.* Madocks, 17 Ves. 57; Price *v.* Blakemore, 6 Beav. 507; Hopper *v.* Conyers, 12 Jur. (N. S.) 328.

of coin cannot be ascertained in a given mass, yet there being so much trust money in the parcel, the *cestui que trust* is entitled to so much of it.[1]

§ 838. Upon the same principle, if the executor of a deceased partner is also the surviving partner, and he continues the deceased partner's capital without authority in the business, and changes the property many times over, yet the court follows the trust fund through all these changes, and gives the beneficiaries of the deceased partner's estate the capital and all its proceeds or gains in the business in which it has been employed.[2] So if a trustee deposits trust moneys in bank to his own credit, mixed with other deposits of his own money, the court will disentangle the accounts, and give the *cestuis que trust* what belongs to them.[3]

§ 839. Parol evidence is admissible to identify and follow trust money, laid out and invested in land, notwithstanding the statute of frauds; for in such case the trust created is a resulting, or constructive trust, which is not within the letter or spirit of the statute.[4]

§ 840. So where the trust money is followed into the hands of a person who receives it by collusion, or with express notice of the trust, he cannot plead the statute of limitations, for the reason that he becomes himself a trustee.[5]

§ 841. There may be some difficulty, as a *matter of fact*, in tracing the trust property into purchases made by trustees. Thus if a trustee having money in his hands misappropriates the funds, and afterwards purchase lands in his own name, it may be difficult to show that the land was purchased with the trust money; and if the trust money, or its proceeds cannot be traced into the lands, the *cestui que trust* cannot have a lien upon them.[6] But if the money can be traced through all its transformations, the law is plain; and the *cestui que trust* can claim the land. Parol evidence is admis-

[1] Pennell *v.* Deffell, 4 De G., M. & G. 382; *Ex parte* Sayers, 5 Ves. 169; Ernest *v.* Croysdill, 2 De G., F. & J. 175; Frith *v.* Cartland, 2 Hem. & Mil. 417.

[2] *Ante*, § 430, and cases cited. [3] *Ante*, § 448, and § 463, and cases cited.

[4] See *ante;* Ryall *v.* Ryall, Amb. 413; Anon., Sel. Ch. Ca. 57; Lane *v.* Dighton, Amb. 409; Lench *v.* Lench, 10 Ves. 517; Hopper *v.* Conyers, L. R. 2 Eq. 549.

[5] Ernest *v.* Croysdill, 6 Jur. (N. S.) 740; Rolfe *v.* Gregory, 11 Jur. (N. S.) 97.

[6] Kirk *v.* Webb, Pr. Ch. 84; Perry *v.* Phillips, 4 Ves. 108; Roberts *v.* Broom, 1 Harring. 57; Pharis *v.* Leachman, 20 Ala. 663.

sible to show all the transactions made with the trust money.[1] Thus the fact that the purchase-money nearly corresponds with the trust fund to be invested is important.[2] So if by a check or other means it can be shown that the trust money was drawn to pay the purchase-money, there can be no doubt.[3] If a trustee make a sale of one estate and purchases another at the same time, or shortly afterwards, it will be presumed to be one transaction, although the purchase-money of the estate purchased was larger than of the estate sold, and the *cestui que trust* will have a lien on the estate for the amount of the trust fund paid towards the purchase.[4] So if a trustee is under obligation to lay out a sum of money in land, and he purchase an estate at a price corresponding with the sum to be invested, the court will presume that the purchase was made with trust money.[5] So where a settlor covenanted in marriage articles to settle all his personal estate, a subsequent purchase of real estate was presumed, without evidence, to be made upon the same trusts.[6] But no such presumption can arise when it appears that the trustee was mistaken in the nature of the trust, or acted under any different impression.[7] So where a tenant for life, with power to sell and purchase other estates, purchased other estates with borrowed money, and many years afterwards sold the settled estates, and applied part of the proceeds of them to the payment of the borrowed money, it was held that the purchased estates were not subject to the trusts of the settled estates.[8]

§ 842. Where the trust fund constitutes a part only of the purchase-money of an estate, the court usually gives a lien on the land only for the amount of the trust fund invested and interest;[9] but where the entire land is the fruit of the trust fund, the *cestui que trust* has an election to take the land, or the trust fund and

[1] Lowden *v.* Lowden, 2 Bro. Ch. 583.

[2] Ibid.; Small *v.* Attwood, Younge, 507.

[3] Price *v.* Blackmore, 6 Beav. 507.

[4] Price *v.* Blackmore, 6 Beav. 507; Yerger *v.* Jones, 16 How. 36.

[5] Ibid.; Mathias *v.* Mathias, 3 Sm. & Gif. 252; Anon., Sel. Ch. Ca. 57.

[6] Lewis *v.* Madocks, 8 Ves. 150; 17 Ves. 48.

[7] Perry *v.* Phelips, 4 Ves. 108, 116.

[8] Denton *v.* Davies, 18 Ves. 499.

[9] Lane *v.* Dighton, Amb. 409; Lewis *v.* Madocks, 8 Ves. 150; 17 Ves. 48; Price *v.* Blackmore, 6 Beav. 107; Scales *v.* Baker, 28 Beav. 91; Hopper *v.* Conyers, L. R. 2 Eq. 545.

interest.[1] In such case, if a part of the purchase-money remain unpaid, the *cestui que trust* would be required to pay it.[2] But if the trust fund has been used by the trustee to pay his debts, the *cestui que trust* cannot be subrogated to the claims and securities of the creditors whose debts have been paid.[3]

§ 843. If the *cestui que trust* is unable to trace the trust fund into the hands of other persons, or into other property in the hands of the trustee, or if he elects not to do so, he may proceed against the trustee personally.[4] Unless some *legal* debt has been created between the parties, or some engagement the non-performance of which may be the subject of damages at law, a court of equity is the only tribunal to which he can have recourse for redress. An action at law for money had and received will not lie against a trustee while the trust is still open; but if a final account is settled, and a balance struck, an action may be maintained.[5] So if a sum is set apart as income due to the *cestui que trust*, and the trustee makes an express promise to pay it, an action at law may be maintained.[6] In Pennsylvania, however, equitable relief can be given in an action for money had and received,[7] and the same practice prevailed in Massachusetts before full equity jurisdiction was given to the court.[8] But where the trust is fully executed, and the amounts settled, and there remains nothing to be done but for the trustee to pay over the amount to the *cestui que trust*, an action at law may be maintained in all the States for the

[1] Trench *v.* Harrison, 17 Sim. 111; Taylor *v.* Plumer, 3 M. & S. 575; Savage *v.* Carroll, 1 B. & B. 265, 284, has not been followed in this respect. Murray *v.* Lylburn, 2 John. Ch. 441; Sollee *v.* Croft, 7 Rich. Eq. 34; Bonsall's App., 1 Rawle, 274; Kaufman *v.* Crawford, 9 W. & S. 134; Oliver *v.* Piatt, 3 How. 333; Thornton *v.* Stokill, 19 Jur. 751.

[2] Yerger *v.* Jones, 16 How. 36.

[3] Winder *v.* Diffenderffer, 1 Bland, 198.

[4] Oliver *v.* Piatt, 3 How. 333; Flagg *v.* Mann, 3 Sumn. 486; Hawkins *v.* Hawkins, 1 Dr. & Sm. 75; Freeman *v.* Cook, 6 Ired. Eq. 379; Norman *v.* Cunningham, 5 Grat. 72; Roberts *v.* Mansfield, 38 Ga. 452.

[5] Chase *v.* Roberts, Holt, N. P. C. 501; Edwards *v.* Bates, 13 L. J. (N. S.) 156; 7 M. & G. 590; Dias *v.* Brunell, 24 Wend. 9; McCrea *v.* Purmont, 16 Wend. 460; New York Ins. Co. *v.* Roulet, 24 Wend. 505; Beaches *v.* Dorwin, 12 Vt. 139; Brown *v.* Wright, 4 Yerg. 57; Hall *v.* Harris, 12 Ired. Eq. 289; Blue *v.* Patterson, 1 Dev. & Bat. Eq. 457. A mere breach of confidence between parties, there being no subsisting trust or fiduciary relation, will not entitle a party to relief in equity. Ashley *v.* Denton, 1 Lit. 86.

[6] Weston *v.* Barker, 12 John. 276; Dias *v.* Brunell, 24 Wend. 9.

[7] Martzell *v.* Stauffer, Penn. R. 398; Aycinena *v.* Peries, 6 W. & S. 243.

[8] Newhall *v.* Wheeler, 7 Mass. 198.

payment of the amount found due.[1] This is in analogy to the rule in relation to suits between partners. If the partnership is wound up and the accounts stated, and a balance is found due from one partner to another, it may be sued for in an action of assumpsit; but while the partnership is still in existence no action at law can be maintained for any balances supposed to be due growing out of partnership matters not fully settled up. The remedies in courts of equity are so much more satisfactory that it would be much more convenient to sue in them, even though courts of common law had full jurisdiction.

§ 844. If a trustee disposes of the trust estate to a purchaser for a valuable consideration without notice, the *cestui que trust* may compel the trustee to purchase other lands of equal value;[2] or the *cestui que trust* may elect to take the proceeds of the sale with interest;[3] and where trustees are directed to invest in a particular stock or fund and to accumulate the income, they will be directed to purchase so much of the same stock as the fund if regularly invested and accumulated would have produced.[4]

§ 845. If a trustee neglects to transfer stock,[5] or if he neglects to sell, whereby there is a loss,[6] the *cestui que trust* can recover compensation. So if he neglects to pay the premium upon a policy of insurance, whereby it is forfeited,[7] if he had the means of paying the premium;[8] if he has no means to keep it up, the court will order it to be sold;[9] if he pay the money himself, he will have a lien on the policy.[10] If trustees neglect to give notice of the assignment to them of a *chose in action*, whereby a loss happens to the estate, they will be responsible.[11] So if a trustee is charged

[1] Baker *v.* Biddle, Baldw. 66, 142; Jordan *v.* Jordan, 2 Car. L. R. 409.

[2] Powlett *v.* Herbert, 1 Ves. Jr. 297; Pocock *v.* Reddington, 3 Ves. 794; Flagg *v.* Mann, 2 Sumn. 486; Oliver *v.* Piatt, 3 How. 333; Mansell *v.* Mansell, 2 P. Wms. 681; Vernon *v.* Vaudry, Barn. 303; Byrchall *v.* Bradford, 6 Mad. 235; Freeman *v.* Cook, 6 Ired. Eq. 375; Norman *v.* Cunningham, 5 Grat. 72.

[3] Att'y-Gen. *v.* East Retford, 2 M. & K. 35; Denton *v.* Davies, 18 Ves. 504.

[4] Pride *v.* Fooks, 2 Beav. 430; Byrchall *v.* Bradford, 6 Mad. 13, 235; *ante*, §§ 469, 472.

[5] Fenwick *v.* Greenwell, 10 Beav. 412.

[6] Devaynes *v.* Robinson, 24 Beav. 86.

[7] Marriott *v.* Kinnersley, Tam. 470.

[8] Hobday *v.* Peters, 28 Beav. 603.

[9] Hill *v.* Tienery, 23 Beav. 16; Beresford *v.* Beresford, 23 Beav. 16.

[10] Clack *v.* Holland, 19 Beav. 273; Johnson *v.* Swire, 3 Gif. 194.

[11] Lewin, 652.

with an imperative power, he will be responsible for any loss arising from a neglect to exercise it.[1]

§ 846. If a person assumes to act as trustee, and becomes possessed of the trust fund and misapplies it, he cannot protect himself by showing that he was not legally a trustee.[2] So if the trustee is a member of a firm, and the trust fund is invested in the business of the partnership, the firm must account;[3] and corporations are liable if the trust fund finds its way into their hands.[4] A solicitor who is a trustee will be liable to make good all losses that occur from a breach of the trust; and he may be struck from the rolls of the court for a wilful breach.[5] A solicitor who wilfully advises a breach of the trust may be struck from the rolls.[6] Executors and administrators of a trustee will be answerable for a breach of trust, though they may have distributed the assets without notice of the claim; but if the distribution is made by order of the court, they will not be liable;[7] nor if the time limited for suits against them has expired; though they cannot plead the general statute of limitations to a breach of trust by the testator.

§ 847. In awarding compensation to the *cestui que trust* for a breach of trust by the trustee, the court does not regard it as material that the trustee has made no profit or advantage out of the estate.[8] If there is a breach of the trust, and an inevitable calamity destroys the property, the trustee must account for it.[9]

[1] Luther *v.* Bianconi, 10 Ir. Eq. 194.

[2] Rackham *v.* Siddall, 16 Sim. 297; 1 McN. & G. 607; Pearce *v.* Pearce, 22 Beav. 248; Derbishire *v.* Home, 3 De G., M. & G. 80; Hope *v.* Liddell, 21 Beav. 183; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 58; Hennessey *v.* Bray, 33 Beav. 96.

[3] Eager *v.* Barnes, 21 Beav. 579.

[4] Att'y-Gen. *v.* Leicester, 9 Beav. 546.

[5] *In re* Chandler, 22 Beav. 253; *In re* Hall, 2 Jur. (N. S.) 633.

[6] Goodwin *v.* Gosnell, 2 Coll. 457.

[7] Knatchbull *v.* Fearnhead, 3 M. & C. 122; March *v.* Russell, 3 M. & C. 31; Low *v.* Carter, 1 Beav. 423; Hill *v.* Gomme, 1 Beav. 540; Underwood *v.* Hatton, 5 Beav. 39; Waller *v.* Barrett, 24 Beav. 413.

[8] Dornford *v.* Dornford, 12 Ves. 129; Raphael *v.* Boehm, 13 Ves. 411, 490; Moons *v.* De Bernales, 1 Russ. 305; Adair *v.* Shaw, 1 Sch. & Lef. 272; Montford *v.* Cadogan, 17 Ves. 489; Scurfield *v.* Howes, 3 Bro. Ch. 90; Att'y-Gen. *v.* Greenhouse, 1 Bligh, N. R. 57.

[9] Caffrey *v.* Darby, 6 Ves. 496; Cocker *v.* Quayle, 1 R. & M. 535; Fyler *v.* Fyler, 3 Beav. 568; Kellaway *v.* Johnson, 5 Beav. 324; Munch *v.* Cockerell, 5 M. & C. 212; Gibbons *v.* Taylor, 22 Beav. 344.

If he acts strictly within the line of his duty, he will be responsible for no loss; but if he varies from his duty, he must account for the property in all events.[1] So if a loss happens through a breach of the trust as to one part of the estate, the trustee cannot set off against the loss a gain that he has made to another part of the estate, through another distinct and wholly disconnected breach of trust.[2] But a trustee will not be charged with imaginary or speculative values,[3] except in very gross cases of wilful default.[4] Where lands were sold in breach of trust, it was held in one case that their value at the time of filing the bill should be accounted for;[5] in other cases, their value at the time of the sale has been fixed upon as the sum to be accounted for.[6]

§ 848. If cotrustees are jointly implicated in a breach of trust, the *cestui que trust* may have a *decree* against them jointly, but he may take an execution against any one of them separately,[7] or he may levy an execution on the property of one, as each one is liable for the whole amount;[8] but where a trustee accepted the trust on the condition that he should not be liable for more than he received, he was not held liable for a loss by his cotrustee.[9] Although each one may be compelled to pay the whole, yet if he pays the whole he may have contribution from the others who are implicated in the breach of the trust;[10] and if the one paying the whole has a legacy in his

[1] Clough *v.* Bond, 3 M. & C. 496.

[2] Wiles *v.* Gresham, 2 Dr. 258; Dimes *v.* Scott, 4 Russ. 195; Fletcher *v.* Green, 33 Beav. 426; Palmer *v.* Jones, 1 Vern. 144.

[3] Harnard *v.* Webster, Sel. Ca. Ch. 53.

[4] Pybus *v.* Smith, 1 Ves. Jr. 193; Palmer *v.* Jones, 1 Vern. 144.

[5] Hart *v.* Ten Eyck, 2 John. Ch. 62.

[6] Norman *v.* Cunningham, 5 Grat. 64; Ames *v.* Downing, 1 Bradf. 325; Heth *v.* Richmond R.R. Co., 4 Grat. 482; Johnson *v.* Lewis, 2 Strob. Eq. 157; and see Johnson *v.* Richey, 4 How. (Miss.) 233; Rainsford *v.* Rainsford, Rice, Eq. 369.

[7] *Ex parte* Shakeshaft, 3 Bro. Ch. 197; Walker *v.* Symonds, 3 Swans. 74; Att'y-Gen. *v.* Wilson, 1 Cr. & Phil. 28; Taylor *v.* Tabrum, 6 Sim. 281; Fletcher *v.* Green, 33 Beav. 426; *Ex parte* Angle, Barn. 425; *In re* Chertsey Market, 6 Price, 278.

[8] Wilson *v.* Moore, 1 M. & K. 146; Lyse *v.* Kingdom, 1 Coll. 188; Richardson *v.* Jenkins, 1 Dr. 477; Alleyne *v.* Darcy, 4 Ir. Eq. 206; Jenkins *v.* Robertson, 1 Eq. R. 123; Rehden *v.* Wesley, 29 Beav. 215.

[9] Birls *v.* Betty, 6 Mad. 90.

[10] Lockhart *v.* Reilly, 1 De G. & J. 464; Priestman *v.* Tindall, 24 Beav. 244; Lingard *v.* Bromley, 1 V. & B. 114; Tarleton *v.* Hornby, 1 Y. & Col. 336;

hands belonging to his cotrustee, he may hold the legacy by force of a lien upon it.[1] So if third persons have obtained all the benefit of a breach of the trust, the trustees may recover from them the loss which has occurred to the trust property.[2] But if a *cestui que trust* has reaped all the profit of a breach of the trust, the trustees cannot compel *him* to refund,[3] although he might not himself be able to maintain a suit against the trustees for a breach of the trust. The decree for costs against cotrustees for breach of the trust is always joint,[4] and if one pay the entire cost, he may have an order in the same cause for contribution.[5]

§ 849. If the *cestui que trust* concur in the breach of the trust, he is estopped from proceeding against the trustee;[6] but he must know that the acts in which he concurs are a breach of the trust,[7] and he must be capable of acting for himself; as neither a *feme covert*[8] nor an infant[9] can concur in a breach of trust, they having no authority to contract. If, however, a married woman or an infant, by a fraud, procure the breach of the trust, they will be estopped to pro-

Att'y-Gen. *v.* Wilson, 1 Cr. & Phil. 28; Fletcher *v.* Green, 33 Beav. 513; Wilson *v.* Goodman, 4 Hare, 54; *Ex parte* Shakeshaft, 3 Bro. Ch. 198; Perry *v.* Knott, 4 Beav. 180; Att'y-Gen. *v.* Dallgars, 33 Beav. 624; Cofford *v.* Allen, 2 De G., J. & S. 177; Knatchbull *v.* Fearnhead, 3 M. & C. 122; Pitt *v.* Bonner, 1 Y. & Col. Ch. 670; *Ex parte* Burton, 3 Mont. D. & De G. 373; Baynard *v.* Wolley, 20 Beav. 583.

[1] Binks *v.* Micklethwait, 33 Beav. 409.

[2] Trafford *v.* Boehm, 3 Atk. 440; Montford *v.* Cadogan, 1 Beav. 125; Binks *v.* Micklethwait, 33 Beav. 409; Greenwood *v.* Wakeford, 1 Beav. 580; Booth *v.* Booth, 1 Beav. 125; Howe *v.* Dartmouth, 7 Ves. 150; Jacob *v.* Lucas, 1 Beav. 436; Lincoln *v.* Wright, 4 Beav. 432; Vaughn *v.* Vanderstegen, 2 Drew. 165, 363; Hobday *v.* Peters, 28 Beav. 354.

[3] Raby *v.* Ridelhalgh, 7 De G., M. & G. 108.

[4] Lawrence *v.* Bowle, 2 Phil. 140; 1 C. P. Coop. t. Cott. 241.

[5] Pitt *v.* Bonner, 1 Y. & Col. Ch. 670.

[6] Brice *v.* Stokes, 11 Ves. 319; Walker *v.* Symonds, 3 Swans. 64; Wilkinson *v.* Parry, 4 Russ. 272; Cocker *v.* Quayle, 1 R. & M. 534; Nail *v.* Punter, 5 Sim. 555; Newman *v.* Jones, Finch, 58; Fellows *v.* Mitchell, 1 P. Wms. 81; Booth *v.* Booth, 1 Beav. 125; Langford *v.* Gascoyne, 11 Ves. 336; White *v.* White, 5 Ves. 555; *In re* Chertsey Market, 6 Price, 280; Baker *v.* Carter, 1 Y. & Col. 255; Byrchall *v.* Bradford, 6 Mad. 13; Morley *v.* Hawke, cited Small *v.* Attwood, 2 Y. & J. 520; Fyler *v.* Fyler, 3 Beav. 550; Griffiths *v.* Porter, 25 Beav. 236; Life Asso. of Scotland *v.* Siddall, 3 De J., F. & J. 74.

[7] Buckeridge *v.* Glasse, 1 Cr. & Phil. 135.

[8] Walker *v.* Symonds, 3 Swans. 80, and cases cited; Underwood *v.* Stevens, 1 Mer. 717; Parkes *v.* White, 11 Ves. 221; Needler's Case, Hob. 225; Bateman *v.* Davis, 3 Mad. 98; Smith *v.* French, 2 Atk. 243; Montford *v.* Cadogan, 19 Ves. 639; Cresswell *v.* Dewell, 4 Gif. 460.

[9] *Ante*, §§ 52–54.

ceed for such breach; for they have no privilege to commit frauds.[1] But a married woman may concur in a breach of trust in respect to estates settled to her separate use.[2] Where, however, her power of anticipation is restrained, she cannot concur in a breach of the trust.[3] And her concurrence will not operate beyond the interest settled to her separate use, although she may have a power of appointment.[4] The same observations apply to more formal acts by married women, such as releases, confirmations, and waivers of breaches of trust.[5]

§ 850. So a *cestui que trust* may be debarred from relief by long acquiescence in a breach of the trust, though he did not originally concur in it.[6] If the *cestui que trust* neglects to sue for twenty years, it will be such *laches* that it will bar relief;[7] but a mere neglect to sue for a few years, without other acquiescence, is not a bar;[8] nor can a party sue until his interest falls into possession;[9] nor can any acquiescence be inferred until the *cestui que trust* has actual knowledge of the breach, for the reason that it is the duty of the trustee to execute the trust, and it is not the duty of the *cestui que trust* to make any inquiries.[10] So if the *cestui que trust* gets what he can from the wreck after a breach of the trust, and

[1] *Ante*, § 53; Davis *v.* Tingle, 8 B. Mon. 359; Hall *v.* Timmons, 2 Rich. Eq. 120; Stoolfoos *v.* Jenkins, 12 S. & R. 399; Wright *v.* Snowe, 2 De G. & Sm. 320; Wright *v.* Arnold, 14 B. Mon. 643.

[2] *Ante*, § 669.

[3] *Ante*, §§ 669, 671.

[4] Kellaway *v.* Johnston, 5 Beav. 319; Vaughn *v.* Vanderstegen, 2 Dr. 165; Blatchford *v.* Woolley, 2 Dr. & Sm. 204; Hobday *v.* Peters, 28 Beav. 354; Shattock *v.* Shattock, L. R. 2 Eq. 182; Brewer *v.* Swirley, 2 Sm. & Gif. 219; Fletcher *v.* Green, 33 Beav. 426.

[5] Jones *v.* Higgins, L. R. 2 Eq. 598; Smith *v.* French, 2 Atk. 245; Davis *v.* Hodgson, 25 Beav. 187; Derbishire *v.* Home, 3 De G., M. & G. 80; Wilton *v.* Hill, 25 L. J. (N. S.) Ch. 156; Clive *v.* Carew, 1 John. & Hem. 205; Rowley *v.* Unwin, 2 Kay & John. 138.

[6] Harden *v.* Parsons, 1 Ed. 145; Villines *v.* Norfleet, 2 Dev. Eq. 167. See *post*, Chap. XXVIII., *passim*.

[7] Bright *v.* Legerton, 29 Beav. 60; 2 De G., F. & J. 606; Hodgson *v.* Bibby, 32 Beav. 221; Browne *v.* Cross, 14 Beav. 105; *Re* McKenna, 13 Ir. Eq. 239; Clanricarde *v.* Henning, 30 Beav. 175; Scott *v.* Haddock, 11 Ga. 258; Obee *v.* Bishop, 1 De G., F. & J. 137.

[8] Hanchett *v.* Briscoe, 22 Beav. 496.

[9] Knight *v.* Bowyer, 2 De G. & J. 421, 443; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 72, 74, 77.

[10] Thompson *v.* Finch, 22 Beav. 325; 8 De G., M. & G. 560; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 73; Prevost *v.* Gratz, Pet. 66, 367; 6 Wheat. 487; Mellish's Est., 1 Pars. Eq. 486; Beeson *v.* Beeson, 9 Barr, 300.

receives a part of what he is entitled to, he does not thereby waive his right to the whole, when he can obtain it.[1]

§ 851. A *cestui que trust* may release a breach of trust by giving to the trustee a formal release, or a formal confirmation of the transaction.[2] A release of the principal in a breach of the trust is a release of all parties who would be liable secondarily, or as sureties.[3] So it is said that the *cestui que trust* may for a good consideration waive a breach of the trust.[4] But all agreements or contracts between trustee and *cestui que trust* are looked upon with suspicion by the court, and are closely scrutinized; therefore, in order that the release, confirmation, waiver, or acquiescence may have any effect, the *cestui que trust* must have full knowledge of all the facts and circumstances of the case;[5] he must also know the law, and what his rights are, and how they would be dealt with by the court.[6] He must not execute the release, or do the acts relied on as a waiver, confirmation, or acquiescence, under undue influence or fear of the trustee.[7] The *cestui que trust* must be *sui juris*, as an infant cannot be bound by a release or other act;[8] and if the

[1] Thompson *v.* Finch, 22 Beav. 316; 8 De G., M. & G. 560.

[2] Blackwood *v.* Borrowes, 2 Conn. & Laws. 459; French *v.* Hobson, 9 Ves. 103; Wilkinson *v.* Parry, 4 Russ. 272; Small *v.* Attwood, 2 Y. & J. 517, and cases cited; Cresswell *v.* Dewell, 4 Gif. 465.

[3] Thompson *v.* Harrison, 2 Bro. Ch. 164; Blackwood *v.* Borrowes, 2 Conn. & Laws. 478.

[4] Stackhouse *v.* Barnston, 10 Ves. 46.

[5] Adams *v.* Clifton, 1 Russ. 297; Walker *v.* Symonds, 3 Swans. 1; Randall *v.* Errington, 10 Ves. 423; Buckeridge *v.* Glasse, Cr. & Phil. 126; Bennett *v.* Colley, 2 M. & K. 232; Vyvyan *v.* Vyvyan, 30 Beav. 65; Eaves *v.* Hickson, 30 Beav. 142; Farrant *v.* Blanchford, 1 De G., J. & S. 119; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 74; Strange *v.* Fooks, 4 Gif. 408; Chesterfield *v.* Janssen, 2 Ves. 146, 149, 152, 158; Roche *v.* O'Brien, 1 B. & B. 339, and cases cited; Bowes *v.* East London Water Works Co., 3 Mad. 375; McCarthy *v.* Decaix, 2 R. & M. 615; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & C. 41; Munch *v.* Cockerell, 9 Sim. 339; 5 M. & C. 179; Broadhurst *v.* Balguy, 1 Y. & Col. Ch. 16; Downes *v.* Bullock, 25 Beav. 62; Lloyd *v.* Attwood, 3 De G. & J. 650; Berryhill's App., 35 Penn. St. 245; Ringgold *v.* Ringgold, 1 Har. & Gill, 11; Briers *v.* Hackney, 6 Ga. 419.

[6] Cockerell *v.* Cholmeley, 1 R. & M. 425; McCarthy *v.* Decaix, 2 R. & M. 615; Marker *v.* Marker, 9 Hare, 16; Burrows *v.* Walls, 5 De G., M. & G. 254; *Re* Saxon Life Ins. Co., 2 John. & Hem. 412; Strange *v.* Fooks, 4 Gif. 408; Stafford *v.* Stafford, 1 De G. & Jon. 202.

[7] Bowles *v.* Stewart, 1 Sch. & Lef. 209; Chesterfield *v.* Janssen, 2 Ves. 149, 158.

[8] Walker *v.* Symonds, 3 Swans. 69; Hicks *v.* Hicks, 3 Atk. 274; Osmond *v.*

cestui que trust has just come of age, he ought to have proper legal advice.[1]

§ 852. So a breach of trust may be discharged by the will of the *cestui que trust* entitled to the fund; and a legacy may be a satisfaction of the breach. So the acceptance of a part of the purchase-money by the *cestui que trust* may be a confirmation of a sale made in breach of the trust.[2]

§ 853. Of course, no one not interested as a beneficiary can release or waive a breach of the trust.[3] When creditors have a right to come in and claim an account, or to have conveyances set aside, it is on the ground that the law gives them a right and interest to secure the property to pay the debts due to them.[4]

Fitzroy, 3 P. Wms. 131; Hylton *v.* Hylton, 2 Ves. 547; Kilby *v.* Sneyd, 2 Moll. 233; March *v.* Russell, 3 M. & C. 42, 44; Bateman *v.* Davis, 3 Mad. 98; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & C. 41; Kay *v.* Smith, 21 Beav. 522; Aveline *v.* Melhuish, 2 De G., J. & Sm. 288; Chambers *v.* Crabbe, 34 Beav. 457.

[1] Lloyd *v.* Attwood, 3 De G. & J. 615; Elliott *v.* Elliott, 5 Benn. 8; Say *v.* Barnes, 4 S. & R. 14; Luken's App., 7 W. & S. 48; Stanley's App., 8 Barr, 431; Williams *v.* Powell, 1 Ired. Eq. 460; Johnson *v.* Johnson, 2 Hill, Eq. 277; Brewer *v.* Vanarsdale, 6 Dana, 204; Fish *v.* Miller, 1 Hoff. 267; Waller *v.* Armistead, 2 Leigh, 11; Kirby *v.* Taylor, 6 John. Ch. 242.

[2] Stump *v.* Gaby, 2 De G., M. & G. 623; Bensusan *v.* Nehemias, 20 L. J. Ch. 536; 4 De G. & Sm. 381; Rosenberger's App., 26 Penn. 67; *ante*, § 202.

[3] Wilson *v.* Troup, 2 Cow. 195; Beeson *v.* Beeson, 9 Barr, 279.

[4] Bruch *v.* Lantz, 2 Rawle, 392; Iddings *v.* Bruen, 4 Sand. Ch. 223.

CHAPTER XXVIII.

THE STATUTE OF LIMITATIONS, LAPSE OF TIME, AND PUBLIC POLICY AS AFFECTING TRUSTS.

§ 854. THERE are three bars to claims or suits in equity arising from lapse of time: I. The statute of limitations; II. The presumption of something done, which, if done, is an answer to the plaintiff's suit; III. Public policy, which forbids the litigation of old and stale demands. These matters may be examined: (1) As between the trustee and *cestui que trust* on the one side, and a stranger on the other; and (2) as between the trustee and *cestui que trust.*

§ 855. Where there is a statute bar at *law*, the same period, in analogy or obedience to the statute, is adopted in equity as a bar to equitable claims. Lord Camden said: "A court of equity has no legislative authority, and it cannot properly define the time of bar by a positive rule, to an hour, minute, or year: it is governed by circumstances. But as often as parliament has limited the time of actions and remedies to a certain period in legal proceedings, chancery has adopted that rule and applied it to similar cases in equity; for when the legislature has fixed a time at law, it would be preposterous for equity, which by its proper authority always maintained a limitation, to countenance *laches* beyond the

period allowed by law. Therefore, in all cases, where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar."[1] Lord Redesdale was of opinion, "that the statute virtually included courts of equity, and that it was a mistake to say that equity acts in *analogy* to the statute: it acts in *obedience* to it. Equity follows the law."[2] The same opinion has been held by other great judges in England[3] and America.[4]

§ 856. Upon these principles, an equitable claim to lands cannot be enforced after the lapse of twenty years; for, although writs of *right* may be brought after a longer period, yet this has always been looked upon as an exception to the general rule.[5] At *law*, the statute time does not begin to run against a remainder-man until the determination of the particular estate,[6] except in the case of a

[1] Smith *v.* Clay, cited in Delorane *v.* Browne, 3 Bro. Ch. 639.

[2] Hovenden *v.* Annesley, 2 Sch. & Lef. 630.

[3] Cholmondeley *v.* Clinton, 2 J. & W. 192; Bond *v.* Hopkins, 1 Sch. & Lef. 429; Midlicott *v.* O'Donel, 1 B. & B. 166; Foley *v.* Hill, 1 Phil. 405; *Ex parte* Dewdney, 15 Ves. 496; Clanricarde *v.* Henning, 30 Beav. 175; Att'y-Gen. *v.* Exeter, Jac. 448; Knowles *v.* Spence, 1 Eq. Ca. Ab. 315; Hamilton *v.* Grant, 3 Dow, 44; Townshend *v.* Townshend, 1 Bro. Ch. 554; Salter *v.* Cavanagh, 1 Dr. & W. 668; Bonney *v.* Ridgard, 1 Cox, 149; Pearson *v.* Pulley, 1 Ch. Ca. 102; Beckford *v.* Wade, 17 Ves. 97; White *v.* Ewer, 2 Vent. 340; Kingston *v.* Lorton, 2 Hog. 166; Johnson *v.* Smith, 2 Burr. 961; Aggas *v.* Pickerell, 3 Atk. 225; Belch *v.* Harvey, App. to Sugd. V. & P. (13th ed.).

[4] Bowman *v.* Wathen, 2 McLean, 376; 1 How. 189; Chapman *v.* Butler, 22 Mo. 19; Phillips *v.* Rogers, 12 Met. 405; Bank of U. S. *v.* Daniels, 12 Pet. 56; Dodge *v.* Essex Ins. Co., 12 Gray, 71; Farnham *v.* Brooks, 9 Pick. 212; Kane *v.* Bloodgood, 7 John. Ch. 90; Robinson *v.* Hook, 4 Mason, 139; Miller *v.* McIntire, 6 Pet. 61; Baker *v.* Biddle, Baldw. 419; Hawkins *v.* Barney, 5 Pet. 457; Coulson *v.* Walton, 9 Pet. 62; Boone *v.* Chiles, 10 Pet. 177; Elsmendorf *v.* Taylor, 10 Wheat. 152; Piatt *v.* Vattier, 1 McLean, 16; 9 Pet. 416; People *v.* Everest, 4 Hill, 71; Michoud *v.* Girod, 4 How. 591; Taylor *v.* Benham, 5 How. 233; Lawrence *v.* Trustees, &c., 2 Denio, 577; Bruen *v.* Hone, 2 Barb. 586; McCarter *v.* Cornel, 1 Barb. Ch. 233; Perkins *v.* Cartwell, 4 Har. (Del.) 270; Manchester *v.* Mathewson, 3 R. I. 237; Dean *v.* Dean, 1 Stockt. 425; McCrea *v.* Piermont, 16 Wend. 460; Humbert *v.* Trinity Church, 24 Wend. 587; 7 Paige, 195; Hayden *v.* Bucklin, 9 Paige, 512; Saunders *v.* Collin, 1 Dev. & Bat. 95; Ridley *v.* Hetman, 10 Ohio, 524; Long *v.* White, 5 J. J. Marsh. 231; Reeves *v.* Dougherty, 7 Yerg. 222; Tiernan *v.* Rescaniere, 10 Gill & J. 218; Paff *v.* Kinney, 1 Bradf. 1; Lorman *v.* Clarke, 2 McLean, 273; Demorest *v.* Wynkoop, 3 John. Ch. 129.

[5] Cholmondeley *v.* Clinton, 2 J. & W. 192.

[6] Gen. Stat. of Mass. c. 154, § 3; Wells *v.* Prince, 9 Mass. 508; Wallingford *v.* Heard, 15 Mass. 471; Bacon *v.* McIntire, 8 Met. 89.

mortgage. If a mortgagee enters to foreclose, the time will run against the remainder-man, although the tenant for life is in possession, on the ground that the remainder-man, though out of possession, may have a bill to redeem.[1] But if the mortgagee is also tenant for life, the time does not begin to run until his death;[2] and so if the mortgagee is tenant in common with others of the equity of redemption.[3]

§ 857. The statute bar is absolute where it applies, and no allegations of poverty, ignorance, hardship, or mistake can avoid it. If courts allowed the rules of law, or periods of time, to be controlled by such considerations, there would be no end to litigation, and no certain rules of property.[4]

§ 858. It was said in one case, that "forbearance of the trustees, in not doing what it was their office to have done, should in no sort prejudice the *cestui que trust;*"[5] that is, that if the trustee does not bring an action to recover the estate within the statutory period, the *cestui que trust* is not barred. But this is not the rule of law. Lord Hardwicke said: "The rule that the statute of limitations does not bar a trust estate holds only between *cestui que trust* and trustee, not as between *cestui que trust* and *trustee* on one side, and *strangers* on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where the *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both."[6] Lord Redesdale and Lord Manners made similar observations and decisions.[7] But it would seem, that,

[1] Gifford *v.* Hort, 1 Sch. & Lef. 407; Blake *v.* Foster, 4 Bligh (N. S.), 407; Corbett *v.* Barker, 1 Anstr. 138; 3 Anstr. 755; Harrison *v.* Hollins, 1 S. & S. 491; 2 Phil. 121.

[2] Raffety *v.* King, 1 Keen, 601; Burrell *v.* Egremont, 7 Beav. 205.

[3] Wynne *v.* Styan, 2 Phil. 205.

[4] Cholmondeley *v.* Clinton, 2 J. & W. 139; Brooksbank *v.* Smith, 2 Y. & Col. 58; Byrne *v.* Frere, 2 Moll. 171; Hovenden *v.* Annesley, 2 Sch. & Lef. 640.

[5] Lechmere *v.* Carlisle, 3 P. Wms. 215.

[6] Llewellin *v.* Mackworth, 2 Eq. Ca. Ab. 579; Barn. 446; Crowther *v.* Crowther, 23 Beav. 305; Herndon *v.* Pratt, 6 Jones, Eq. 327; Fleming *v.* Gilmer, 35 Ala. 62.

[7] Hovenden *v.* Annesley, 2 Sch. & Lef. 629; Pentland *v.* Stokes, 2 B. & B. 75; Allen *v.* Sayer, 2 Vern. 368; Lewin, 625; Wych *v.* East India Co., 3 P. Wms. 309; Earl *v.* Huntingdon, ib.; Thomas *v.* Thomas, 2 K. & J. 79; Goss *v.* Singleton, 2 Head, 67; Belote *v.* White, 2 Head, 703; Maddox *v.* Allen, 1 Met. (Ky.) 495.

if the *cestui que trust* is entitled to an interest in remainder only, the statutory bar ought not to begin to run against him until his interest falls into a right to the possession of the beneficial or equitable interest.[1]

§ 859. If the subject-matter of the trust is a debt due the trustee for his *cestui que trust*, the statute runs against it. In such case, there is no right to sue in equity. The *cestui que trust* has the right to use the name of the trustee in an action at law to recover the debt. But the legal limitation cannot be avoided by changing the tribunal.[2] It is said, however, that if the debtor borrowed the money, knowing it to be trust money, especially if he borrowed it in breach of the trust, he becomes so far affected by the equities of the trust that he holds it as a trustee, and he cannot set up the statute as a bar against the rights of the *cestui que trust*.[3]

§ 860. If a trustee, in breach of his trust, conveys the land to a third person, such third person, if he is an innocent purchaser for value without notice, will hold the estate discharged of the trust. But if he received the conveyance with notice, or without paying any consideration, he will be holden as a trustee; for the *cestui que trust* may enforce the trust against him by proceeding in equity. Whether the *cestui que trust* can bring such bill after the lapse of twenty years without claim, or after the trustee is barred from maintaining a real action, is a serious question. It may be said, that the relation between such holder of the legal title and the *cestui que trust* is that of trustee and *cestui que trust*, and that the same principles apply, respecting the application of the statute, as apply between the *trustee* and *cestui que trust* in an express trust. But, on the other hand, such holder of the legal title is not a trustee, except by construction of law, and until a decree of the court is had; and if he has denied the trust for more than twenty years and held adversely, there would seem to be no reason why equitable as well as legal rights should not be barred.[4] But, in

[1] Parker *v.* Hall, 2 Head, 641.

[2] Hammond *v.* Messenger, 9 Sim. 327; Bolton *v.* Powell, 14 Beav. 275; Wych *v.* East India Co., 3 P. Wms. 309.

[3] Spickernell *v.* Hotham, Kay, 669; Bridgman *v.* Gill, 24 Beav. 302; Ernest *v.* Croysdill, 6 Jur. (N. S.) 740; Upham *v.* Wyman, 7 Allen, 499.

[4] Merriam *v.* Hassam, 14 Allen, 520; Milling *v.* Leak, 32 Eng. L. & Eq. 442; Att'y-Gen. *v.* Federal St. Meeting-house, 3 Gray, 1; Williams *v.* First Presby. Soc., 1 Ohio St. 478.

these cases, the rights of the *cestui que trust* cannot be barred until his rights fall into possession. If, therefore, the *cestui que trust* holds in remainder or reversion, the statute will not begin to run until his right to the possession falls in by the determination of the particular estate. So if the *cestui que trust* is under disability, the statute will not begin to run until the disability is removed.[1]

§ 861. No time will protect a fraud so long as it is concealed; therefore until a fraud is discovered, or could have been discovered by ordinary diligence, the statute does not begin to run; for no cause of action exists within the knowledge of the party entitled to the action.[2] But as soon as the fraud is known, the statute begins to run, and the defendant has a right to say that the matter cannot be brought under discussion at so late a period; that it is the plaintiff's own fault if he delays for more than twenty years after the fraud is known.[3] In one case, it was said that the statute would run from the date of the fraud, provided the party had notice of it within a reasonable time during which to bring his action before the expiration of the twenty years.[4] But the general rule is, that the time does not begin to run until the fraud is known.[5]

§ 862. The statute is so clear a defence, that the defendant may demur[6] whenever the facts appear upon the face of the bill; if they

[1] Thompson *v.* Simpson, 1 Dr. & War. 489; Att'y-Gen. *v.* Magdalen College, 18 Beav. 239; 6 H. L. Ca. 215; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 58.

[2] Blair *v.* Bromley, 2 Phil. 354; Booth *v.* Warrington, 4 Bro. P. C. 163; Alden *v.* Gregory, 2 Ed. 280; Cotterell *v.* Purchase, Cas. t. Talb. 63; Arran *v.* Tyrawley, cited 1 B. & B. 106; Rolf *v.* Gregory, 11 Jur. (N. S.) 97; Medlicott *v.* O'Donel, 1 B. & B. 166; Morse *v.* Royal, 12 Ves. 374; Bicknell *v.* Gouch, 3 Atk. 558; South Sea Co. *v.* Wymondsell, 3 P. Wms. 143; Hovenden *v.* Annesley, 2 Sch. & Lef. 634; Pickering *v.* Stamford, 2 Ves. Jr. 280; Robertson *v.* Norris, 1 Gif. 421; Western *v.* Cartwright, 1 Sel. Ca. Ch. 34; Blennerhassett *v.* Day, 2 B. & B. 118; Roche *v.* O'Brien, 1 B. & B. 330; Watson *v.* Toone, 5 Mad. 54; Whalley *v.* Whalley, 1 Mer. 436.

[3] Hovenden *v.* Annesley, 2 Sch. & Lef. 634; Western *v.* Cartwright, Sel. Ca. Ch. 34; Mulcahy *v.* Kennedy, 1 Ridg. 337.

[4] Byrne *v.* Frere, 2 Moll. 137.

[5] Hieronymous *v.* Mayhall, 1 Bush, 508; Townsend *v.* Townsend, 4 Cold. 70; Relf *v.* Eberly, 23 Io. 467; Baldwin *v.* Tuttle, 23 Io. 66; McCarthy *v.* Kyle, 4 Cold. 348.

[6] Foster *v.* Hodgson, 19 Ves. 180; Bampton *v.* Birchall, 5 Beav. 67; Hoare *v.* Peck, 6 Sim. 51; Hovenden *v.* Annesley, 2 Sch. & Lef. 637; Aggas *v.* Pick-

do not, he may set them forth in a plea,[1] or in his answer, and pray the same benefit as if he had demurred, or pleaded the statute.[2] If the defendant does not do one of these things, he can have no benefit from the statute at the hearing;[3] though it is said that the court may in its discretion refuse relief after the limited period.[4] If the bill contains charges of fraud, the defendant may demur[5] or plead,[6] according as the facts and circumstances appear upon the face of the bill. But if the plaintiff alleges that he did not discover the fraud within the period limited by the statute, the defendant must in his plea or answer either deny the fraud or allege that the plaintiff had knowledge.[7]

§ 863. As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar.[8] Accounts have been decreed

erell, 3 Atk. 225; Hodle *v.* Healey, 1 V. & B. 539; Beckford *v.* Close, cited 6 Sim. 184; Hardy *v.* Reeves, 4 Ves. 479; Pearson *v.* Pulley, 1 Ch. Ca. 102; Frazer *v.* Moor, Bunb. 54; Prance *v.* Sympson, Kay, 680; Ferguson *v.* Livingston, 9 Ir. Eq. 202; Fyson *v.* Pole, 3 Y. & Col. 266; Cook *v.* Arnham, 3 P. Wms. 287, and cases cited; Deloraine *v.* Browne, 3 Bro. Ch. 635, is inconsistent. And see O'Kelly *v.* Glenny, 9 Ir. Eq. 25.

1 Aggas *v.* Pickerell, 3 Atk. 225; Blewitt *v.* Thomas, 2 Ves. Jr. 669; Wych *v.* East India Co., 3 P. Wms. 309; Walford *v.* Liddel, 2 Ves. 400; Lacon *v* Lacon, 2 Atk. 395.

2 Barber *v.* Barber, 18 Ves. 286.

3 Prince *v.* Heylin, 1 Atk. 494; Harrison *v.* Boswell, 10 Sim. 382; Roch *v.* Callen, 6 Hare, 535; Sleight *v.* Lawson, 3 K. & J. 296.

4 Prince *v.* Heylin, 1 Atk. 494.

5 Hovenden *v.* Annesley, 2 Sch. & Lef. 637, in which Deloraine *v.* Browne, 3 Bro. Ch. 633, is commented upon; Hoare *v.* Peck, 6 Sim. 51.

6 South Sea Co. *v.* Wymondsell, 3 P. Wms. 143.

7 Mitford on Plead. 269; Story, Eq. Plead. §§ 503–506.

8 Chalmer *v.* Bradley, 1 J. & W. 27; Llewellin *v.* Mackworth, Barn. 449; Townshend *v.* Townshend, 1 Bro. Ch. 554; Hollis's Case, 2 Ventr. 345; Hargreaves *v.* Michell, 6 Mad. 326; Massey *v.* O'Dell, 10 Ir. Eq. 22; Sheilds *v.* Atkins, 3 Atk. 563; Heath *v.* Henly, 1 Ch. Ca. 26; Wedderburn *v.* Wedderburn, 2 Keen, 749; 2 My. & C. 41; 22 Beav. 84; Pomfret *v.* Winsor, 2 Ves. 484; Bennett *v.* Colley, 2 My. & K. 232; Wilson *v.* Moore, 1 My. & K. 146; Hammond *v.* Hicks, 1 Vern. 432; Smith *v.* Acton, 26 Beav. 210; Bell *v.* Bell, Ll. & G. t. Plunk. 66; Phillipo *v.* Munnings, 2 My. & C. 309; Gough *v.* Bult, 16 Sim. 323; Norton *v.* Turville, 2 P. Wms. 144; Att'y-Gen. *v.* Exeter, Jac. 448; Nevarre *v.* Rutton, 1 Vin. Ab. 185; Ward *v.* Arch, 12 Sim. 472; Young *v.* Waterpark, 13 Sim. 204; Sheldon *v.* Wildman, 2 Ch. Ca. 26; Beckford *v.* Wade, 17 Ves. 97; Delouche *v.* Savetier, 3 John. Ch. 190; Baker *v.* Whiting, 3 Sumn. 486; Kane *v.* Bloodgood, 7 John. Ch. 90; Shibla *v.* Ely, 2 Halst. Ch.

against trustees, extending over periods of thirty, forty, and even fifty years.[1] The relations and privity between trustee and *cestui que trust* are such that the possession of the one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation.[2] Lord Justice Knight Bruce said, that where one entered into possession as trustee, he could not be permitted to set up a possession or title in himself adverse to the *cestui que trust.*[3] It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver over the possession which he received as trustee.[4] He will then be in a position to

181; Zacharias *v.* Zacharias, 23 Penn. St. 425; Prevost *v.* Gratz, 6 Wheat. 481; Lyon *v.* Marclay, 1 Watts, 275; White *v.* White, 1 Md. Ch. 53; Thomas *v.* Brinsfield, 7 Ga. 154; Tinnen *v.* McCane, 10 Tex. 248; Goodrich *v.* Pendleton, 3 John. Ch. 387; Coster *v.* Murray, 5 John. Ch. 522; Allen *v.* Wooley, 1 Green, Ch. 209; Manton *v.* Titsworth, 18 B. Mon. 582; Finney *v.* Cochran, 1 W. & S. 118; Walker *v.* Walker, 16 S. & R. 379; McDowell *v.* Goldsmith, 6 Md. 319; Alexander *v.* Williams, 1 Hill, S. C. 522; Mussey *v.* Mussey, 2 Hill, Ch. 496; Burham *v.* James, 1 Speer, Eq. 375; Tucker *v.* Tucker, 1 McCord, Ch. 176; Presley *v.* Davis, 7 Rich. Eq. 105; Prewett *v.* Buckingham, 28 Miss. 92; Soggens *v.* Heard, 31 Miss. 426; Payne *v.* Ballard, 23 Miss. 88; Gay *v.* Edwards, 30 Miss. 218; Carter *v.* Bennett, 6 Fla. 214; Paff *v.* Kenney, 1 Bradf. 1; Howard *v.* Aiken, 3 McCord, 467; Wickliffe *v.* Lexington, 11 B. Mon. 161; Smith *v.* Calloway, 7 Blackf. 86; McDonald *v.* Sims, 3 Kelley, 383; Murdock *v.* Hughes, 7 Sm. & Mar. 219; Farnum *v.* Brooks, 9 Pick. 212; Johnson *v.* Humphrey, 14 S. & R. 394; Fleming *v.* Culbert, 46 Penn. St. 496; Pinston *v.* Ivey, 1 Yerg. 296; Williams *v.* Cook, 1 Green, Ch. 209; Foscue *v.* Foscue, 2 Ired. Eq. 321; Young *v.* Mackall, 3 Md. Ch. 56; Armstrong *v.* Campbell, 3 Yerg. 201; Overstreet *v.* Bates, 1 J. J. Marsh. 370; Thompson *v.* Blair, 3 Murph. 583; Jones *v.* Parsons, 2 Hawkes, 269; Martin *v.* Jackson, 27 Penn. St. 506; North *v.* Barnum, 12 Vt. 206; Goodhue *v.* Barnwell, Rice, Eq. 198; Redwood *v.* Riddick, 4 Munf. 222; Wamburzee *v.* Kennedy, 4 Des. 479; Anstice *v.* Brown, 6 Paige, 488; Bohannon *v.* Strespley, 2 B. Mon. 438; Pinkston *v.* Brewster, 14 Ala. 315; Boone *v.* Chiles, 10 Pet. 177; Oliver *v.* Piatt, 3 How. 333; Zeller *v.* Eckert, 4 How. 289; Creigh *v.* Henson, 10 Grat. 231; Starke *v.* Starke, 3 Rich. 438; Perkins *v.* Cartwell, 4 Harring. 270; Varick *v.* Edwards, 11 Paige, 289; Blount *v.* Robeson, 3 Jones, Eq. 73; Fish *v.* Wilson, 15 Tex. 430; Cunningham *v.* McKindley, 22 Md. 149; Kutz's App., 40 Penn. St. 90.

[1] Beaumont *v.* Boultbee, 5 Ves. 485; Townshend *v.* Townshend, 1 Cox, 28; Chalmer *v.* Bradley, 1 J. & W. 51; Att'y-Gen. *v.* Brewers' Co., 1 Mer. 495; Burrowes *v.* Gore, 6 H. L. Ca. 907; Wood *v.* Arch, 12 Sim. 472; Man *v.* Ricketts, 13 L. J. (N. S.) Ch. 194; Snow *v.* Booth, 8 De G., M. & G. 69; Cox *v.* Dolman, 2 De G., M. & G. 592; West *v.* Sloan, 3 Jones, Eq. 102.

[2] Ibid.

[3] Stone *v.* Godfrey, 5 De G., M. & G. 86.

[4] Ibid.; Att'y-Gen. *v.* Munro, 2 De G. & Sm. 163; *Ex parte* Andrews, 2 Rose, 412; Kennedy *v.* Daly, 1 Sch. & Lef. 381; Shields *v.* Atkins, 3 Atk. 560;

maintain his claim, for no claim should be made through a breach of trust. And no trustee, while occupying a place of trust and confidence should be allowed to set up an adverse title.[1] This rule applies to all acting as trustees, whether regularly appointed or not.[2] It also applies to all who stand in a fiduciary relation to others, as executors, administrators, or guardians.[3] A *cestui que trust* cannot set up the statute against his *co-cestuis que trust*,[4] nor against his trustee.[5] These rules apply to all cases of express trusts.[6]

§ 864. It has been held, however, that if a trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*, and he will be completely barred at the end of twenty years, if he has been *sui juris*, or under no disability, and is capable

Pomfret *v.* Winsor, 2 Ves. 476; Conry *v.* Caulfield, 2 B. & B. 272; Langley *v.* Fisher, 9 Beav. 90; Reece *v.* Trye, 1 De G. & Sm. 279; Newsome *v.* Flowers, 30 Beav. 461; Frith *v.* Curtland, 2 Hem. & M. 417; Huntly *v.* Huntly, 8 Ired. Eq. 250.

[1] Ibid.; 250.

[2] Lyon *v.* Maclay, 1 Watts, 275; Life Asso. *v.* Siddall, 3 De G., F. & J. 58; 7 Jur. (N. S.) 785; Johnson *v.* Smith, 27 Mo. 591, is to the contrary; Hayden *v.* Stone, 1 Duvall, 396.

[3] Pelley *v.* Bascombe, 33 L. J. Ch. 100; 34 L. J. Ch. 233; Thomas *v.* Thomas, 2 K. & J. 79; Lindsay *v.* Lindsay, 1 Des. 150; Carr *v.* Bob, 7 Dana, 417; Blue *v.* Patterson, 1 Dev. & Bat. Eq. 457; Bird *v.* Graham, 1 Ired. Eq. 196 Nelson *v.* Cornwall, 1 Grat. 174; Lafferty *v.* Farley, 3 Sneed, 157; Jacobs *v.* Pou, 18 Ga. 346; Marsh *v.* Oliver, 1 McCart. 259. Some States have statutes that bar claims against executors and administrators after a certain time; and in nearly all the States a presumption of payment of debts, legacies, and other charges, will arise after a great length of time. Angel on Limitations, §§ 166, 178; Wilkinson's Est., 1 Pars. Eq. 170; Graham *v.* Torrance, 1 Ired. Eq. 210; Shearin *v.* Eaton, 2 Ired. Eq. 282; Hudson *v.* Hudson, 3 Rand. 117; Skinner *v.* Skinner, 1 J. J. Marsh. 594; Graham *v.* Davidson, 2 Dev. & B. 155; Hayes *v.* Goode, 7 Leigh, 452; Tate *v.* Connor, 2 Dev. Eq. 244.

[4] Foscue *v.* Foscue, 2 Ired. 321.

[5] Spickernell *v.* Hotham, 1 Kay, 669; Knight *v.* Bowyer, 4 De G. & J. 421.

[6] Manby *v.* Bewicke, 3 K. & J. 342; Dickenson *v.* Teasdale, 1 De G., J. & Sm. 52; Sturgis *v.* Morse, 3 De G. & J. 1; Watson *v.* Saul, 1 Gif. 188; Webster *v.* Newbold, 41 Penn. St. 482.

of bringing an action to maintain his right.[1] To enable a trustee, without giving up the possession, to turn it into an adverse holding against the *cestui que trust*, the evidence must be clear and unmistakable, and such adverse claim must be brought home to the *cestui que trust* beyond question or doubt. The attitude of the trustee must be hostile, and continuously so; and there must be no mistake or misapprehension as to the character of his holding, by either party.[2] Where the trustee makes a conveyance of the trust property in breach of the trust, and his grantee continues to hold adversely, the statute applies;[3] and so where the relation of trustee and *cestui que trust* is absolutely ended, whether by breach of the trust or otherwise.[4] But in such case the statute will not begin to run so long as the *cestui que trust* is under the control or influence of the trustee.[5] Where a trustee paid over the trust fund to a married woman, the statute began to run as soon as she became discovert.[6] So where the trustee paid over the trust fund to a minor *cestui que trust*, and denied all further liability, the statute began to run as soon as the minor became of age.[7]

§ 865. It has been urged that the statute cannot apply in favor of persons who become trustees by construction of law; as, where a person is construed into a trustee of property which he has fraudulently obtained, or where a trust estate is traced into his hands, or where a resulting trust arises; and that the *cestui que trust* is not precluded, in such cases, from his remedy by lapse of time. But the later authorities establish the doctrine that the statute applies in such cases.[8] Lord Redesdale, after stating the ground

[1] Merriam *v.* Hassam, 14 Allen, 522; Baker *v.* Whiting, 3 Sumn. 486; Kane *v.* Bloodgood, 7 John. Ch. 90; Att'y-Gen. *v.* Federal St. Meeting-house, 3 Gray, 1; Bright *v.* Egerton, 2 De G., F. & J. 606; Wedderburn *v.* Wedderburn, 2 Keen, 749; 4 M. & Cr. 52; Portlock *v.* Gardner, 1 Hare, 594; Wickliffe *v.* Lexington, 11 B. Mon. 161; Turner *v.* Smith, 11 Tex. 629; Grumbles *v.* Grumbles, 17 Tex. 472; Williams *v.* First Presby. Soc., 1 Ohio St. 478; Robertson *v.* Wood, 15 Tex. 1.

[2] Ibid.; Lister *v.* Pickford, 34 L. J. Ch. 582; Cunningham *v.* McKindley, 22 Md. 149; Andrews *v.* Smithwick, 20 Tex. 111; White *v.* Leavitt, 20 Tex. 703.

[3] Williams *v.* First Presby. Soc., 1 Ohio St. 478; White *v.* White, 1 Md. Ch. 56.

[4] Wickliffe *v.* Lexington, 11 B. Mon. 161.

[5] Welborn *v.* Rogers, 24 Ga. 558; Keaton *v.* McGwier, 24 Ga. 217.

[6] Harrison *v.* Brolaskey, 20 Penn. St. 299.

[7] Sollee *v.* Croft, 7 Rich. Eq. 34.

[8] Strimfler *v.* Roberts, 18 Penn. St. 300; Prevost *v.* Gratz, 6 Wheat. 480;

upon which a direct trust was not within the statute, said: "But the question of fraud is of a very different description; that is a case where a person, who is in possession by virtue of a fraud, is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a court of equity founded on the fraud; and his possession in the mean time is adverse to the title of the person who impeaches the transaction on the ground of fraud."[1] Sir William Grant made similar observations.[2]

§ 866. Courts, in many cases, presume acts to have been done after a great length of time, as, that payments have been made, releases and conveyances executed, or rights abandoned.[3] As a general rule, they adopt the statute bar at law as the period at the end of which they will give effect to such presumptions.[4] The presumptions are made, in the absence of evidence, for the purpose of quieting titles,[5] and because there is no better ground to go upon.[6] If positive evidence is produced, the fact may be found or presumed after a much shorter period. On the other hand, if there is positive evidence which negatives the fact, the presumption cannot be made after a much longer period; for the rule is, *stabit præsumptio donec probetur in contrarium.* Presumptions, after a long time, are favored in law; and courts will not allow them to be controlled or rebutted by slight evidence, or doubtful circumstances.[7] In

Sheppards *v.* Turpin, 3 Grat. 373; Murdoch *v.* Hughes, 7 Sm. & M. 219; Cuyler *v.* Bradt, 2 Caine's Cas. 326; Davis *v.* Cotton, 2 Jones, Eq. 430; Cunningham *v.* McKindley, 22 Md. 149; Marrion *v.* Titsworth, 18 B. Mon. 582; Howell *v.* Howell, 15 Wis. 55; Townshend *v.* Townshend, 1 Bro. Ch. 550; Bonney *v.* Ridgard, 1 Cox, 145; Andrew *v.* Wrigley, 4 Bro. Ch. 125; Collard *v.* Hare, 2 R. & M. 675; Cholmondeley *v.* Clinton, 2 J. & W. 190; 4 Bligh, 4; Bell *v.* Bell, t. Plunk. 661; Portlock *v.* Gardner, 1 Hare, 594; *Ex parte* Hasell, 3 Y. & Col. 622; Wedderburn *v.* Wedderburn, 4 My. & C. 53; Att'y-Gen. *v.* Christ Hospital, 3 My. & K. 344; Rolfe *v.* Gregory, 11 Jur. (N. S.) 98.

[1] Hovenden *v.* Annesley, 2 Sch. & Lef. 633.

[2] Beckford *v.* Wade, 17 Ves. 97. But see Sturgis *v.* Morse, 3 De G. & J. 1; Taylor *v.* Gooche, 4 Jones, L. 436. See *ante*, §§ 141, 228, 229, 230, and cases cited.

[3] Pattison *v.* Hawkesworth, 10 Beav. 375; Att'y-Gen. *v.* Moor, 10 Beav. 119; Clemenston *v.* Williams, 8 Cranch, 72; Jackson *v.* Sackett, 7 Wend. 94; Bass *v.* Williams, 8 Pick. 187.

[4] Eldridge *v.* Knott, Cowp. 214.

[5] Ibid.; Grenfell *v.* Girdlestone, 2 Y. & Col. 682; Magdalen College *v.* Att'y-Gen., 3 Jur. (N. S.) 675.

[6] Ibid.; Hillary *v.* Waller, 12 Ves. 266.

[7] Jones *v.* Turberville, 2 Ves. Jr. 13; Grenfell *v.* Girdlestone, 2 Y. & Col. 662.

cases where a possession may be lawful and rightful, it cannot be presumed to be adverse. Thus one tenant in common cannot be presumed to hold adversely to the other, unless something more is shown than mere lapse of time. A trustee cannot be presumed to hold adversely to his *cestui que trust:* on the contrary, he is presumed to hold for his *cestui que trust* until the contrary appears.[1]

§ 867. It is clear that a person, in ignorance of his right, cannot be presumed to have abandoned it.[2] One under disability cannot be presumed to have released a right.[3] If persons are in poverty or distress, the force of the presumption is weakened.[4] So a release from a large number of persons cannot be presumed with the same force; for where interests are divided, they are not prosecuted with the same diligence.[5]

§ 868. When a defendant relies upon lapse of time, or upon presumptions arising therefrom, but not upon the absolute bar of the statute, he must plead or answer the facts. He cannot protect himself by demurrer.[6]

§ 869. Courts of equity will sometimes refuse to grant relief, although the statute of limitations cannot be pleaded in bar, and although presumptions cannot arise from lapse of time, or may be conclusivelyrebutted. In such cases, courts proceed upon the ground that the public *convenience* will not allow old and stale claims to be

[1] Harmood *v.* Oglander, 6 Ves. 199; 8 Ves. 106; Doe *v.* Phillips, 10 Q. B. 130; Young *v.* Waterplank, 13 Sim. 204; Garrard *v.* Tuck, 8 C. B. 248; Melling *v.* Leak, 16 C. B. 652; Creigh *v.* Henson, 10 Grat. 231; Colvin *v.* Menefee, 11 Grat. 92; Whiting *v.* Whiting, 4 Gray, 237.

[2] Cholmondeley *v.* Clinton, 2 Mer. 362; Randall *v.* Errington, 10 Ves. 427; Roche *v.* O'Brien, 1 B. & B. 330; Pickering *v.* Stamford, 2 Ves. Jr. 280, 585; Chalmer *v.* Bradley, 1 J. & W. 65; Bennett *v.* Colley, 2 My. & K. 232; Stone *v.* Godfrey, 5 De G., M. & G. 76; Blennerhassett *v.* Day, 2 B. & B. 118; Stackpole *v.* Daveron, 1 Bro. P. C. 1.

[3] March *v.* Russell, 3 M. & Cr. 31; Bennett *v.* Colley, 5 Sim. 181; 2 My. & K. 225; Thompson *v.* Simpson, 1 Dr. & W. 489.

[4] Roche *v.* O'Brien, 1 B. & B. 342; Hillary *v.* Waller, 12 Ves. 266; Gowland *v.* De Faria, 17 Ves. 25; Byrne *v.* Frere, 2 Moll. 171.

[5] Whichcote *v.* Lawrence, 3 Ves. 740; 6 Ves. 632; York *v.* Mackenzie, 3 Bro. P. C. 42; Att'y-Gen. *v.* Duley, Coop. 146; Pinkston *v.* Brewster, 14 Ala. 320; Kidney *v.* Coussmaker, 12 Ves. 158; Hardwick *v.* Mynd, 1 Anst. 109; Elliott *v.* Merryman, 2 Atk. 42; Hercy *v.* Dinwoody, 2 Ves. Jr. 87. See chapter on Charitable Trusts.

[6] Deloraine *v.* Browne, 3 Bro. Ch. 633; Mitf. on Plead. 212. See Story's Eq. Plead. §§ 503, 751, 814.

investigated, when many of the parties and witnesses are dead, or their memories impaired, and vouchers are lost. *Expedit reipublicæ ut sit finis litium.*[1] Thus, where a bill was brought against an executor for an account, there being no statute protection, and the presumption of a final settlement being rebutted, the court refused to open the accounts after a great lapse of time, when it was probable that most of the parties were dead, and the vouchers and receipts were lost.[2] Mere *lapse* of time, or delay in suing is such *laches* in the plaintiff, in a certain class of cases, that he is not entitled to relief, unless he can explain the delay. Thus, if a *cestui que trust* attempts to impeach a purchase of the trust estate by the trustee, a delay for much less than twenty years will bar his relief.[3] In a bill to set aside a purchase made by a solicitor of the party,[4] or to set aside the sale of a reversion by an heir expectant,[5] or to impose a constructive trust upon a fraudulent purchaser,[6] or to call a tenant to an account for waste,[7] or to enforce the specific performance of a contract,[8] or where fraud is alleged to avoid the statute of limitations,[9] or where an account is sought by a surviving partner,[10] and in a large number of other cases,

[1] Att'y-Gen. *v.* Exeter, Jac. 448; Pickering *v.* Stamford, 2 Ves. Jr. 272, 582; Parkes *v.* White, 11 Ves. 226; Morse *v.* Royal, 12 Ves. 374; Price *v.* Byrn, cited in Campbell *v.* Walker, 5 Ves. 681; Barwell *v.* Barwell, 34 Beav. 371; McKnight *v.* Taylor, 1 How. 161; Piatt *v.* Vattier, 9 Pet. 466; Thompson *v.* McGaw, 2 Watts, 161.

[2] Hunton *v.* Davies, 2 Ch. R. 44; Huet *v.* Fletcher, 1 Atk. 457; Pearson *v.* Belchier, 4 Ves. 627; Hercy *v.* Dunwoody, 4 Bro. Ch. 257; 2 Ves. Jr. 87; St. John *v.* Turner, 2 Vern. 418; Campbell *v.* Graham, 1 R. & M. 453; Pomfret *v.* Winsor, 2 Ves. 483; Anderson *v.* Burwell, 6 Grat. 405; Smith *v.* Calloway, 7 Blackf. 86.

[3] Parkes *v.* White, 11 Ves. 226; Barwell *v* Barwell, 34 Beav. 371; Morse *v.* Royal, 12 Ves. 374; Price *v.* Byrn, cited in Campbell *v.* Walker, 5 Ves. 681.

[4] Gresley *v.* Mansley, 4 De G. & J. 78; Lyddon *v.* Moss, 4 De G. & J. 104.

[5] Roberts *v.* Tunstall, 4 Hare, 257.

[6] Glegg *v.* Edmondson, 3 Jur. (N. S.) 299; Norris *v.* Le Neve, 3 Atk. 38; Pennell *v.* Home, 3 Drew. 337; Jackson *v.* Welsh, Ll. & G. t. Plunk. 346. See Amb. 735, 737.

[7] Harcourt *v.* White, 28 Beav. 303.

[8] Southcomb *v.* Exeter, 6 Hare, 213; Alloway *v.* Braine, 26 Beav. 575; Sharp *v.* Wright, 28 Beav. 150; Hope *v.* Gloucester, 1 Jur. (N. S.) 320.

[9] Blair *v.* Ormond, 1 De G. & Sm. 428.

[10] Tatam *v.* Williams, 3 Hare, 347; Harcourt *v.* White, 28 Beav. 303.

courts refuse to interfere actively after a considerable lapse of time, if the delay is unexplained by the party seeking relief.[1] But in cases of mere dry equitable demands, falling within the purview of some of the provisions of the statute of limitations, general *laches* short of the statutory period, ought not to bar a plaintiff, for the reason that the legislature has prescribed a period which it deems sufficiently short for private and public convenience, and courts ought not to assume the power of abridging that period.[2]

§ 870. But acquiescence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief. He is estopped by his acquiescence, and cannot undo that which has been done.[3] So if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence, and it estops him.[4]

§ 871. Questions sometimes arise as to how far back courts of equity will order an account of the mesne rents and profits to be taken. Where the *cestui que trust* seeks an account of rents and profits from an *express* trustee, there is no limitation of time, as the statute of limitations does not apply.[5] If the claim to rents and profits rests upon a *legal* title, the remedy is at law, and the legal limitation must be applied.[6] If, however, in

[1] Gresley *v.* Mansley, 4 De G. & J. 95; Roberts *v.* Tunstall, 4 Hare, 266; Browne *v.* Crosse, 14 Beav. 105; Life Assoc. *v.* Siddall, 3 De G., F. & J. 73.

[2] Rochdale Canal Co. *v.* King, 2 Sim. (N. S.) 89; Penny *v.* Allen, 7 De G., M. & G. 426; Mehrtens *v.* Andrews, 3 Beav. 76; Leeds *v.* Amherst, 2 Phil. 117; Clarke *v.* Hart, 6 H. L. Ca. 633; Beaudry *v.* Montreal, 11 Moore, P. C. C. 399; Story *v.* Gape, 2 Jur. (N. S.) 706.

[3] Kent *v.* Jackson, 14 Beav. 384; Styles *v.* Guy, 1 H. & Tw. 523; *Ex parte* Morgan, 1 H. & Tw. 328; Graham *v.* Birkenhead Railw. Co., 2 Mc. & Gor. 146.

[4] Leeds *v.* Amherst, 2 Phil. 123; Phillipson *v.* Gatly, 7 Hare, 523; Stafford *v.* Stafford, 1 De G. & J. 202; Jorden *v.* Money, 5 H. L. Ca. 185; Rennie *v.* Young, 2 De G. & J. 142.

[5] Att'y-Gen. *v.* Brewers' Co., 1 Mer. 498; Matthew *v.* Brise, 14 Beav. 341.

[6] Jesus College *v.* Bloom, 3 Atk. 262; Dinwiddie *v.* Bailey, 6 Ves. 136; Taylor *v.* Crompton, Bunb. 95; Landsdowne *v.* Landsdowne, 1 Mad. 137.

such case, the accounts are complicated, a court of equity may entertain jurisdiction to take the accounts; but the legal limitation of time will be adhered to.[1] Accounts may be taken in equity upon a legal title respecting *mines* and timber when an injunction is prayed for, but the legal limitation will be applied.[2] An infant may have a bill for an account upon a legal title, as every person entering upon an infant's lands is regarded in the light of a receiver for him, and this jurisdiction remains, though the bill is not filed until after his majority.[3] If, however, the infant has never had the possession, but it has always been held adversely to him, the remedy is at law.[4] So, after the death of a receiver of the rents and profits, a party entitled, although he had a remedy at law, may have a bill for an account of the assets.[5] The legal limitation in these cases is six years, or such other period as the statutes in the several States have established.[6] But if a party has simply lost his plain remedy at law by some other event, he cannot invoke the aid of a court of equity.[7] If, however, a party loses his remedy at law by mistake, he may have an account in equity; for mistake is one of the heads of equity jurisdiction.[8] So

[1] O'Connor *v.* Spaight, 1 Sch. & Lef. 309; Corp. of Carlisle *v.* Wilson, 13 Ves. 276.

[2] Winchester *v.* Knight, 1 P. Wms. 406; Pulteney *v.* Warren, 6 Ves. 89; Landsdowne *v.* Landsdowne, 1 Mad. 116; Parrott *v.* Palmer, 3 My. & K. 632; Jesus College *v.* Bloom, 3 Atk. 262; Oxford *v.* Richardson, 6 Ves. 701; Grierson *v.* Eyre, 9 Ves. 346; Garth *v.* Cotton, 1 Dick. 211; Lee *v.* Alston, 1 Bro. Ch. 194.

[3] Gardner *v.* Fell, 1 J. & W. 22; Roberdean *v.* Rouse, 1 Atk. 543; Yallop *v.* Halworthy, 1 Eq. Ca. Ab. 7; Newburgh *v.* Bickerstaffe, 1 Vern. 295; Curtis *v.* Curtis, 2 Bro. Ch. 631; Dormer *v.* Fortescue, 3 Atk. 130; Pulteney *v.* Warren, 6 Ves. 89; Morgan *v.* Morgan, 1 Atk. 489; Falkland *v.* Bertie, 2 Vern. 342; Doe *v.* Keen, 7 T. R. 390; Hicks *v.* Sallitt, 3 De G., M. & G. 782; Pascal *v.* Swan, 27 Beav. 508; Blomfield *v.* Eyre, 8 Beav. 250. But he must bring his bill within six years after his majority. Lockey *v.* Lockey, Pr. Ch. 518.

[4] Crowther *v.* Crowther, 23 Beav. 305.

[5] Monypenny *v.* Bristow, 2 R. & M. 117; Gardner *v.* Fell, 1 J. & W. 22; Thomas *v.* Oakley, 18 Ves. 186; Landsdowne *v.* Landsdowne, 1 Mad. 116.

[6] Monypenny *v.* Bristow, 2 R. & M. 125.

[7] Barnwall *v.* Barnwall, 3 Ridg. P. C. 71; Hutton *v.* Simpson, 2 Vern. 722; Norton *v.* Frecker, 1 Atk. 525; Pulteney *v.* Warren, 6 Ves. 88.

[8] Bolton *v.* Deane, Pr. Ch. 516; Dormer *v.* Fortescue, Ridg. t. Hardw. 183; Barnwall *v.* Barnwall, 3 Ridg. P. C. 68.

if the remedy at law was lost by the fraud of the defendant,[1] or by other fault of his,[2] equity can give relief, and an account; but the legal limitations must be observed.[3]

§ 872. Where a party is rightfully seeking the possession of property, the court, if the plaintiff prevails, will order an account of the rents and profits, as incident to the relief. If the plaintiff is a *cestui que trust*, following the trust estate into the hands of a person claiming through the trustee, under such circumstances that the defendant himself is to be regarded as a trustee, the plaintiff will be entitled to an account of the rents and profits from the commencement of his title, or from the withholding of his rights by the defendant.[4] The case will be much stronger if the plaintiff is an infant, or there has been any fraud or concealment.[5] But if the plaintiff is not a *cestui que trust*, but is an *equitable owner* merely, seeking to recover the estate against a *bona fide* adverse holder of the possession, the account will not, unless there are special circumstances, be carried back of six years, where that is the statute limitation, or to the inception of the title within that time.[6] This was the rule in the earlier cases; but the later cases determine that where there is no trust, infancy, fraud, nor concealment, the accounts will not be carried back beyond the filing of the bill,[7] unless there was a previous demand for the possession, in

[1] Ibid.; Bennett *v.* Whitehead, 3 P. Wms. 644.

[2] Pulteney *v.* Warren, 6 Ves. 73. See Dormer *v.* Fortescue, 3 Atk. 124; Reade *v.* Reade, 5 Ves. 744; 3 Atk. 336; Edwards *v.* Morgan, McClel. 541; Reynolds *v.* Jones, 2 S. & S. 206; Thomas *v.* Thomas, 2 K. & J. 85; Agar *v.* Fairfax, 17 Ves. 552; Moor *v.* Black, t. Talb. 126; Mundy *v.* Mundy, 2 Ves. Jr. 122; D'Arcy *v.* Blake, 2 Sch. & Lef. 387; Wild *v.* Wells, 1 Dick. 3; Meggott *v.* Meggott, 1 Dick. 794; Goodenough *v.* Goodenough, 2 Dick. 798; Tilly *v.* Bridges, Pr. Ch. 252; Owen *v.* Aprice, 1 Ch. R. 32.

[3] Ibid.

[4] Barnwall *v.* Barnwall, 3 Ridg. P. C. 66; Sturgis *v.* Morse, 3 De G. & J. 1; 24 Beav. 54; Wright *v.* Chard, 4 Drew. 673; Kidney *v.* Coussmaker, 12 Ves. 158.

[5] Hicks *v.* Sallitt, 3 De G., M. & G. 782; Schroder *v.* Schroder, Kay, 591; Pascoe *v.* Swan, 27 Beav. 508; *ante*, § 871.

[6] Dormer *v.* Fortescue, Ridg. t. Hardw. 183; 3 Atk. 130; Hobson *v.* Trevor, 2 P. Wms. 191; Coventry *v.* Hall, 2 Ch. Ca. 134; Reade *v.* Reade, 5 Ves. 749; Harmood *v.* Oglander, 6 Ves. 215; Drummond *v.* St. Albans, 5 Ves. 439; Stackhouse *v.* Barnston, 10 Ves. 470.

[7] Pulteney *v.* Warren, 6 Ves. 93; Edwards *v.* Morgan, McClel. 541, 554; Hicks *v.* Sallitt, 3 De G., M. & G. 813; Thomas *v.* Thomas, 2 K. & J. 79.

which case they may be carried back to the time of the demand.[1] In one case, where the plaintiff was an infant, and the defendant a trustee in fact, but ignorant of his character, the court refused to carry the accounts further back than the filing of the bill.[2] If the plaintiff, as *cestui que trust* or equitable owner, is guilty of *laches*, courts will not carry the accounts further back than the filing of the bill;[3] and if the *laches* are very gross, the accounts will not be carried further back than the decree.[4] Nor will the decree for an account embrace the rents and profits "which the defendant might have received without neglect or default;" and all just allowances will be ordered in taking the account,[5] unless the defendant is guilty of gross fraud.[6] An assignee who receives the rents and profits will be accountable in the first instance, but he will not be chargeable with interest.[7] In case the assignee is insolvent, the trustee who assigned the estate in breach of the trust may be called upon, and he must pay interest.[8] Separate bills for the recovery of the estate, and for an account of the mesne profits may be filed.[9]

[1] Ibid.; Penny *v.* Allen, 7 De G., M. & G. 409.

[2] Drummond *v.* St. Albans, 5 Ves. 433. But the case is of doubtful authority. See Hicks *v.* Sallitt, 3 De G. & J. 811, 815.

[3] Dormer *v.* Fortescue, Ridg. t. Hardw. 183; 3 Atk. 130; Cook *v.* Arnham, 2 Eq. Ca. Ab. 245; Pettiward *v.* Prescott, 7 Ves. 541; Bowes *v.* East London Water Co., 3 Mad. 375; Pickett *v.* Loggon, 14 Ves. 215; Schroder *v.* Schroder, Kay, 591; Kidney *v.* Coussmaker, 12 Ves. 158.

[4] Acherley *v.* Roe, 5 Ves. 565.

[5] Howell *v.* Howell, 2 M. & C. 478.

[6] Stackpole *v.* Davoren, 1 Bro. P. C. 9.

[7] Macartney *v.* Blackwood, Ridg., Lapp & Sch. 602.

[8] Vandebende *v.* Livingstone, 3 Swans. 625.

[9] Hall *v.* Coventry, 2 Ch. Ca. 134; Wright *v.* Chard, 4 Drew. 673.

CHAPTER XXIX.

ACTIONS IN RESPECT TO TRUST PROPERTY — PARTIES — PLEADING — PRACTICE.

§§ 873, 874. Both the *cestuis que trust* and the trustees are required to be joined when the action is between strangers and the trust estate.
§ 875. Where the suit is between the *cestuis que trust* and the trustees.
§ 876. Where the *cestuis que trust* bring an action against the trustees, all the trustees ought to be joined as defendants.
§ 877. Where third persons ought to be joined with the trustees.
§ 878. Where courts will allow a suit to go on, though all the trustees are not joined.
§ 879. Where the trustees are guilty of a *tort.*
§ 880. Where a wife commits a breach of trust, her husband must be joined.
§ 881. *Cestuis que trust* ought all to be joined as plaintiffs when they bring an action against trustees.
§ 882. Where they need not all be joined.
§ 883. Where the court will allow the suit to go on, although the *cestuis que trust* are not all joined.
§ 884. Where suits are brought between cotrustees.
§ 885. Where the parties are numerous.
§§ 886, 887. All the parties in the same interest ought to be joined on the same side.
§ 888. Trustees ought to join in their answer.
§ 889. Married woman ought to join her husband in her answer, but may answer separately.
§ 890. What allegations *cestuis que trust* should make in their bill against trustees.

§ 873. Trustees and *cestuis que trust* are the owners of the whole interest in the trust estate; and therefore, in suits in equity in relation to the estate by or against strangers, both the trustees and *cestuis que trust* must be parties representing that interest.[1] Thus where a mortgage is made to A. in trust for B., the *cestui que trust* B. cannot file a bill for foreclosure without joining A., for the reason that A. is the only person who, on payment, can discharge the mortgage;[2] and where a contract was made to convey land to A. in trust for B., A. must join in a bill for a specific performance, as the legal estate must be conveyed to him.[3] So one of several *cestuis que trust* cannot bring

[1] Bifield *v.* Taylor, 1 Moll. 198; Adams *v.* St. Leger, 1 B. & B. 184; 1 Daniell, Chan. Prac. 220, 221, 256 (4th Am. ed.).
[2] Woods *v.* Williams, 4 Mad. 186; Scott *v.* Nicoll, 3 Russ. 476; Hichens *v.* Kelly, 2 Sm. & Gif. 264.
[3] Cope *v.* Parry, 2 J. & W. 588; Hobson *v.* Staneer, 9 Mod. 83.

a bill for foreclosure or for redemption without joining all the *cestuis que trust* interested in the mortgage or equity of redemption.[1] A mortgagee cannot foreclose without joining all his *cestuis que trust;* and a mortgagor in a bill to redeem must join all the *cestuis que trust* as defendants,[2] unless the mortgagee had created the trust for the purpose of perplexing the mortgagor.[3] So if A. grants an annuity to B., and conveys an estate to C. to secure it, he must join both B. and C. in a suit to set it aside.[4] So in suits by or against trustees for the payment of debts, or for the payment of legacies, all the *cestuis que trust* must be joined and made parties, plaintiffs or defendants,[5] although a contrary rule has been laid down by high authority.[6]

§ 874. If trustees enter into a contract without any reference to their *cestuis que trust*, as if they contract in their own names to purchase an estate, they may maintain or defend a suit in relation to it in their own names, although they in fact intended the contract for the benefit of the trust. If it does not appear on the face of the contract or otherwise that the trustees acted as agents or in a fiduciary character, it is unnecessary to go beyond the terms of the contract; and in many cases it would be improper to do so.[7] But where trustees enter into contracts in their character as trustees, and in behalf of the trust estate, and for the benefit of the *cestuis que trust*, the *cestuis que trust*, for whose benefit the contract was made, ought to be parties to the suit.[8] In marriage articles and

[1] Palmer *v.* Carlisle, 1 S. & S. 423; Lowe *v.* Morgan, 1 Bro. Ch. 368; Henley *v.* Stone, 3 Beav. 355. The decree in Montgomerie *v.* Bath, 3 Ves. 360, was made by consent.

[2] Caverly *v.* Philp, 6 Mad. 229; Osburn *v.* Tallows, 1 R. & M. 741; Wetherell *v.* Collins, 3 Mad. 255; Thomas *v.* Dunning, 5 De G. & Sm. 618; Whistler *v.* Webb, Bunb. 53; Anderson *v.* Stather, 2 Coll. 209; Coles *v.* Forest, 10 Beav. 557; Yates *v.* Hambly, 2 Atk. 237; Wilton *v.* Jones, 2 Y. & Col. Ch. 244; Drew *v.* Harman, 5 Price, 319.

[3] Yates *v.* Hambly, 2 Atk. 237; Osburn *v.* Fallows, 1 R. & M. 743.

[4] Bromley *v.* Holland, 7 Ves. 3; Butler *v.* Prendergast, 2 Bro. P. C. 170.

[5] Harrison *v.* Stewardson, 2 Hare, 530; Holland *v.* Baker, 3 Hare, 68; Thomas *v.* Dunning, 5 De G. & Sm. 618.

[6] Mitf. Eq. Plead. 174, 176 (4th ed.).

[7] White *v.* White, 4 M. & C. 460; Keon *v.* Magawley, 1 Dr. & W. 401; Tasker *v.* Small, 3 M. & C. 63; Humphreys *v.* Hollis, Jac. 73; Wakeman *v.* Rutland, 3 Ves. 233, 504; 1 Daniell, Chan. Prac. 230, 231 (4th Am. ed.).

[8] Douglass *v.* Horsefall, 2 S. & S. 184; Hook *v.* Kinnear, 2 Swans. 417; Small *v.* Atwood, Younge, 457.

settlements, the husband and wife and all the issue are purchasers for a valuable consideration, and are parties to the contract; therefore they must be joined with the trustees in all suits in relation to the property.[1] A person may be appointed the agent or representative of others in such manner that he may sue and be sued alone, and without joining such other persons; but the intention to constitute such an absolute representative must very clearly appear.[2] Trustees are not such agents or representatives: they do not own the property beneficially, though the legal title is in them; they are in some sense the agents and representatives of the *cestuis que trust;* but they are not agents for the purpose of defending the property against the adverse claims of third persons without the knowledge and behind the backs of the real owners.[3]

§ 875. Where the suits are between the trustees and the *cestuis que trust* in relation to the property, the general rule is that all the trustees and all the *cestuis que trust* must be before the court, either as plaintiffs or defendants.

§ 876. Thus if the *cestuis que trust* bring a suit against the trustees, praying for relief, all the trustees ought to be made parties,[4] in order that, as each cotrustee is liable to the *cestuis que trust*, the court may do complete justice, so far as possible, by taking the accounts once for all, and by adjusting the liabilities of the codefendants, and thus obviate the necessity of ulterior proceedings and a multiplicity of suits.[5] The cotrustees must be made parties

[1] Kirk *v.* Clark, Pr. Ch. 275.

[2] Vernon *v.* Blackerly, 2 Atk. 145; Bifield *v.* Taylor, 1 Moll. 193; Beat. 91.

[3] Holland *v.* Baker, 3 Hare, 72.

[4] Munch *v.* Cockerell, 8 Sim. 219; Att'y-Gen. *v.* Wilson, Cr. & Phil. 28; Att'y-Gen. *v.* Newbury Corp. C. P. Coop. 77 (1837, 1838); Walker *v.* Symonds, 3 Swans. 75; *In re* Chertsey Market, 6 Price, 278; Humberstone *v.* Chase, 2 Y. & Col. 213; Perry *v.* Knott, 4 Beav. 179; Tarleton *v.* Hornby, 1 Y. & Col. 336; Wilson *v.* Moore, 1 M. & K. 127; Fowler *v.* Reynal, 2 De G. & Sm. 749; Willie *v.* Ellice, 6 Hare, 505.

[5] Jones *v.* Jones, 3 Atk. 112; Shipton *v.* Rawlins, 4 Hare, 623; Latouche *v.* Dunsany, 1 Sch. & Lef. 137; 2 Sch. & Lef. 690; Walker *v.* Preswick, 2 Ves. 622; Conry *v.* Caulfield, 2 B. & B. 255; Farquharson *v.* Seton, 5 Russ. 45; *Ex parte* Shakeshaft, 3 Bro. Ch. 197; Taylor *v.* Tabrum, 6 Sim. 281; Fletcher *v.* Green, 33 Beav. 426; *Ex parte* Angle, Barn. 425; Wilson *v.* Moore, 1 M. & K. 146; Lyse *v.* Kingdom, 1 Coll. 188; Richardson *v.* Jenkins, 1 Drew. 477; Alleyne *v.* Darcy, 4 Ir. Eq. 206; Jenkins *v.* Robinson, 1 Eq. R. 123; Rehden *v.* Wesley, 29 Beav. 215; Birls *v.* Betty, 6 Mad. 90; Lawrence *v.* Bowle, 2 Phil. 140; 1 C. P. Coop. t. Cott. 241; Pitt *v.* Bonner, 1 Y. & Col. Ch. 670; Lockhart *v.* Reil-

(although the equities between themselves cannot be adjusted), for the reason that the decree of relief to the *cestuis que trust* is the foundation of the relief to the cotrustees *inter sese;* and if any of the trustees are not parties to the first suit by the *cestuis que trust*, they will not be bound by the decree, and the whole subject-matter will of course come under litigation for the second time.[1] But a person named as trustee need not be joined if he has disclaimed the office.[2]

§ 877. If the trustees commit a breach of trust, and third persons obtain the benefit of it, they must be joined as defendants in a suit by the *cestuis que trust*.[3] If the trustees convey the property to a third person with notice of the trust, or without consideration, such third person may be sued by the *cestuis que trust*, and must be joined with the trustees in a suit for relief by the *cestuis que trust*.[4] But if such third person has received a conveyance without notice, and has conveyed away the estate for a valuable consideration not paid to himself, he need not be joined in the suit; for, having no notice of the trust, he cannot be made personally liable, and having none of the trust property or its proceeds in his hands, it cannot be attached or reached through him.[5] So if a third person purchases the trust property for a valuable consideration, and without notice expressed or implied, he need not be made a party, for the reason that no relief can be had against him.[6] If a cotrustee has deceased, his representatives need not be joined

ly, 1 De G. & J. 464; Priestman *v.* Tindall, 24 Beav. 244; Lingard *v.* Bromley, 1 Ves. & B. 114.

[1] Perry *v.* Knott, 4 Beav. 180; Eccleston *v.* Skelmersdale, 1 Beav. 396; Cottingham *v.* Shrewsbury, 3 Hare, 627; Lennard *v.* Curzon, 1 De G. & Sm. 350.

[2] Wilkinson *v.* Parry, 4 Russ. 274; Creed *v.* Creed, 2 Hog. 215; Richardson *v.* Hulbert, 1 Anst. 65.

[3] Burt *v.* Dennett, 2 Bro. Ch. 225; Cousett *v.* Bell, 1 Y. & Col. Ch. 569; Perry *v.* Knott, 4 Beav. 179; 5 Beav. 297; Williams *v.* Allen, 29 Beav. 292. But see Pearse *v.* Hewitt, 7 Sim. 471; Vanderhende *v.* Livingston, 3 Swans. 625; Trafford *v.* Boehm, 3 Atk. 440; Fuller *v.* Knight, 6 Beav. 205.

[4] Ibid.; Montford *v.* Cadogan, 17 Ves. 485; Salomans *v.* Laing, 12 Beav. 377; Hanson *v.* Worthington, 12 Md. 418; Abbott *v.* Reeves, 49 Penn. St. 494; Hutchinson *v.* Reid, Hoff. Ch. 317; Bailey *v.* Inglee, 2 Paige, 278; Bush *v.* Bush, 3 Strob. Eq. 377; Lund *v.* Blanshard, 4 Hare, 28 and n.; Meyer *v.* Montriou, 9 Beav. 521.

[5] Knye *v.* Moore, 1 S. & S. 61; Harrison *v.* Pryse, Barn. 324.

[6] Ibid.

if they have had nothing to do with the trust;[1] and so if the plaintiff waives all relief that he might have by joining them.[2] If the suit does not seek to charge the trustees personally, and one of them dies during its progress, his representatives need not be brought before the court, as the trusteeship survives in the remaining trustees.[3] So the representatives of a deceased trustee, who was not a party to a breach of trust, need not be made parties to a suit to remedy the breach.[4] But the representatives of a deceased cotrustee are liable to the extent of assets received by them, for a breach of trust committed in his lifetime, and they may all be joined that their relative rights may be ascertained in the suit.[5]

§ 878. If a trustee is out of the jurisdiction, or if he cannot be served with process after diligent search, or if for any reason he cannot be compelled to appear, the court will allow the suit to proceed so far as it can in the absence of such trustee.[6] In a suit to adjudicate the rights of parties to an estate, the trustee of an outstanding term need not be a party,[7] and where a trustee has died insolvent his representatives need not be made parties.[8] But if an insolvent trustee is living, he must be brought before the court.[9] An intermediate trustee of a mere equity need not be made a party except there are some peculiar circumstances.[10] So

[1] Glass *v.* Oxenham, 2 Atk. 121; Slater *v.* Wheeler, 9 Sim. 156; Routh *v.* Kinder, 3 Swans. 144 n.; Beattie *v.* Johnstone, 8 Hare, 169; Simes *v.* Eyre, 6 Hare, 137.

[2] Selyard *v.* Harris, 1 Eq. Ca. Ab. 74; Moore *v.* Blake, 1 Moll. 284.

[3] London Gas Light Co. *v.* Spottiswood, 14 Beav. 271.

[4] Simes *v.* Eyre, 6 Hare, 137.

[5] Lyse *v.* Kingdom, 1 Coll. 184; Knatchbull *v.* Fearnhead, 3 M. & Cr. 122; Pharis *v.* Leachman, 20 Ala. 683; Kirkman *v.* Booth, 11 Beav. 273; White *v.* Commonwealth, 39 Penn. St. 167; Beattie *v.* Johnstone, 8 Hare, 177; Hall *v.* Austin, 10 Jur. 452; 2 Coll. 570; Penny *v.* Penny, 9 Hare, 39; Haldenby *v.* Spofforth, 9 Beav. 195; Richardson *v.* Jenkins, 1 Drew. 477.

[6] Morrill *v.* Lawson, 2 Eq. Ca. Ab. 167; Whalley *v.* Whalley, 1 Vern. 487; Cowstad *v.* Cely, Pr. Ch. 83; Butler *v.* Prendergast, 2 Bro. P. C. 170; Moore *v.* Vinten, 12 Sim. 161; Heath *v.* Percival, 2 Eq. Ca. Ab. 167; 1 P. Wms. 683.

[7] Brooks *v.* Burt, 1 Beav. 106.

[8] Seddon *v.* Connel, 10 Sim. 85; Madox *v.* Jackson, 3 Atk. 406; Devaynes *v.* Robinson, 24 Beav. 98. But see Hayward *v.* Ovey, 6 Mad. 113.

[9] Hayward *v.* Ovey, 6 Mad. 113; Thorpe *v.* Jackson, 2 Y. & Col. 560.

[10] Scully *v.* Scully, 3 Ir. Eq. 494; Head *v.* Teynham, 1 Cox, 57; Munch *v.* Cockerell, 8 Sim. 219; Malone *v.* Geraghty, 2 Conn. & Laws. 249; Whittle *v.* Halliday, 2 Conn. & Laws. 430; Horrocks *v.* Ledsam, 2 Coll. 208; Nelson *v.* Seaman, 6 Jur. (N. S.) 258.

where a trustee has properly conveyed all his interest to a third person upon the same trusts.[1] So where a mortgagor conveyed his equity of redemption to trustees by a voluntary and revocable instrument, it was held that the mortgagor so far represented the estate that the trustees need not be made parties to a foreclosure suit.[2] So suits have been allowed to be maintained, though the trustees were not joined, where they had no interest, and the *cestuis que trust* undertook for the trustee that the decree should be final and effectual. But these are anomalous cases.[3] If a *cestui que trust* makes a new settlement of the trust fund upon new trustees, and they commit a breach of trust, the *cestuis que trust* under the new settlement may have relief against the new trustees without joining the old ones, although they are implicated in the wrong.[4]

§ 879. If a person holding a fiduciary relation is guilty of something more than a mere breach of trust or of civil obligation, as if he commits a *tort* or *delictum*, or a fraudulent or criminal act, he may be pursued alone, and his cotrustees need not be joined, nor even his confederates in the wrong.[5]

§ 880. The husband of a *feme covert* trustee is responsible, in the absence of statute exemptions, for breaches of trust committed by his wife before marriage as well as after, and he should be joined in the suit.[6]

§ 881. As a general rule, all the *cestuis que trust* must be before the court, in order that the rights of all parties in interest may be ascertained, and future litigation avoided. The trustees ought not to be twice vexed where it is possible to determine all the rights of the parties in one suit.[7]

[1] Bromley *v.* Holland, 7 Ves. 11; Knye *v.* Moore, 1 S. & S. 65; Reed *v.* O'Brien, 7 Beav. 32.

[2] Slade *v.* Rigg, 3 Hare, 35.

[3] Kirk *v.* Clark, Pr. Ch. 275.

[4] McGachen *v.* Dew, 15 Beav. 84.

[5] Lingard *v.* Bromley, 1 V. & B. 117; Seddon *v.* Connel, 10 Sim. 86; Att'y-Gen. *v.* Wilson, 1 Cr. & Ph. 28; Walburn *v.* Ingilby, 1 M. & K. 77; Charity Corp. *v.* Sutton, 2 Atk. 406; Att'y-Gen. *v.* Brown, 1 Swans. 265; Cunningham *v.* Pell, 5 Paige, 612.

[6] Palmer *v.* Wakeford, 3 Beav. 227; Moone *v.* Henderson, 4 Des. 459; Carroll *v.* Connet, 2 J. J. Marsh. 195; Elliott *v.* Lewis, 3 Edw. Ch. 40; Redwood *v.* Riddick, 4 Munf. 222.

[7] Pyncent *v.* Pyncent, 3 Atk. 571; Morrill *v.* Lawson, 2 Eq. Ca. Ab. 167; Manning *v.* Thesiger, 1 S. & S. 107; Adams *v.* St. Leger, 1 B. & B. 181; Hanne *v.* Stevens, 1 Vern. 110; Court *v.* Jeffery, 1 S. & S. 105; Phillipson *v.* Gatty, 6 Hare, 26; Josling *v.* Karr, 3 Beav. 495; Piatt *v.* Oliver, 2 McLean,

§ 882. But if a *cestui que trust* has assigned all his interest to a third person, so that he has nothing, he need not be made a party;[1] or if a *cestui que trust* is entitled to a distinct and aliquot share of an ascertained fund, he may maintain a bill against the trustees for that share without joining the *cestuis que trust* of the remaining fund.[2] This practice, however, is not encouraged,[3] and if the fund is not certain, but is to be ascertained by an account, all the *cestuis que trust* interested in it must be made parties.[4]

§ 883. If a *cestui que trust* is absent, and all the means of compelling him to appear have been exhausted, the suit may proceed in his absence.[5] So if he is a merely passive party, and the disposition of the property is within the power of those before the court.[6] But if the primary object of the bill is to affect the right of the absent *cestui que trust*, or to charge it with debts or liens, the court will not make a decree in his absence, although the *legal* title is in the parties before the court.[7] In such cases decrees have been made, reserving the right of the absent *cestui que trust* to apply to have it amended,[8] or conveyances have been ordered without prejudice to the rights of *cestuis que trust* who could not be found.[9]

§ 884. Where some of the trustees have committed a breach of trust, a suit may be maintained against them by their *cotrustees* for restoration of the property, without joining the *cestuis que trust*, although they also may have a suit for the breach of trust. This rule has been established and acted upon by reason of its great convenience;[10] but where some of the *cestuis que trust* have

307; McKinley *v.* Irvine, 13 Ala. 682; Cassiday *v.* McDaniel, 8 B. Mon. 519; Munch *v.* Cockerell, 8 Sim. 219, 231.

[1] Goodson *v.* Ellison, 3 Russ. 583.

[2] Smith *v.* Snow, 3 Mad. 10; Perry *v.* Knott, 5 Beav. 293; Hughson *v.* Cookson, 3 Y. & Col. 378; Hutchinson *v.* Townsend, 2 Keen, 675; Hunt *v.* Peacock, 11 Jur. 555; Sandford *v.* Jodrell, 2 Sim. & Gif. 176; Montgomerie *v.* Bath, 3 Ves. 560; Piatt *v.* Oliver, 2 McLean, 307.

[3] Ibid.

[4] Lenaghan *v.* Smith, 2 Phil. 301; Alexander *v.* Mullins, 2 R. & M. 568.

[5] Downes *v.* Thomas, 7 Ves. 206; Phillips *v.* Buckingham, 1 Vern. 228.

[6] Rogers *v.* Linton, Bunb. 200; Willats *v.* Busby, 5 Beav. 193.

[7] Brown *v.* Blount, 2 R. & M. 83; Holmes *v.* Bell, 2 Beav. 298; Fell *v.* Brown, 2 Beav. 276; Willats *v.* Busby, 5 Beav. 193.

[8] Att'y-Gen. *v.* Baliol Coll., 9 Mod. 407.

[9] Willats *v.* Busby, 5 Beav. 193.

[10] Franco *v.* Franco, 3 Ves. 75; Bridgman *v.* Gill, 24 Beav. 302; Peake *v.* Ledger, 4 De G. & Sm. 137; Hughes *v.* Key, 20 Beav. 395; Groom *v.* Booth,

procured or concurred in a breach of the trust by some of the trustees, such *cestuis que trust* must be joined in a suit for the correction of the wrong.[1]

§ 885. Where the parties in interest are so numerous that it is not possible or convenient to join all as plaintiffs, the court will allow a few *cestuis que trust* to sue in behalf of themselves and the others;[2] so a small number may be made defendants as representatives of all the others for the purpose of determining their rights;[3] but in such cases all the trustees must be joined.[4] If all the *cestuis que trust* must join in a conveyance, they should all join in the suit, otherwise the litigation might be futile; but in the absence of any the court will proceed to bind the rights of all if possible.[5] In order that a few may sue, or be sued in behalf of a large number, it must appear that all have the same beneficial interest; for if they have different or conflicting interests, they must all be brought before the court, in order that their separate interests may be adjusted.[6] How large the number must be in order to dispense with calling them all before the court has never been determined. Where there were twenty-one *cestuis que trust*, the court required them all to be

1 Dr. 657; May *v.* Selby, 1 Y. & Col. Ch. 235; Baynard *v.* Woolley, 20 Beav. 583; Noble *v.* Meymott, 14 Beav. 471; Horsely *v.* Fawcett, 11 Beav. 565; Bridget *v.* Himes, 1 Coll. 72; Meyer *v.* Montriou, 9 Beav. 521.

[1] Jesse *v.* Bennett, 6 De G., M. & G. 609. But see Meyer *v.* Montriou, 9 Beav. 521; Greenwood *v.* Wakeford, 1 Beav. 576; Payne *v.* Collier, 1 Ves. Jr. 170; Fuller *v.* Knight, 6 Beav. 205; McGachen *v.* Dew, 15 Beav. 84; Shook *v.* Shook, 19 Barb. 653; Abbott *v.* Reeves, 49 Penn. St. 494; Jacob *v.* Lucas, 1 Beav. 436; Griffith *v.* Vanheythuysen, 9 Hare, 85; Hall *v.* Lock, 2 N. C. C. 631.

[2] Bromley *v.* Smith, 1 Sim. 8; Weld *v.* Bonham, 2 S. & S. 91; Lloyd *v.* Loaring, 6 Ves. 773; Taylor *v.* Salmon, 4 M. & C. 134; Walworth *v.* Holt, 4 M. & C. 619; Cockburn *v.* Thompson, 16 Ves. 321; Preston *v.* Grand, &c., Dock Co., 11 Sim. 327; Att'y-Gen. *v.* Heelis, 2 S. & S. 67; Chaney *v.* May, Pr. Ch. 529; Manning *v.* Thesiger, 1 S. & S. 106; Harvey *v.* Harvey, 4 Beav. 215; Hickens *v.* Congreve, 4 Russ. 562; William *v.* Salmond, 2 K. & J. 463; 1 Daniell, Ch. Prac. 256 (4th Am. ed.).

[3] Adair *v.* New River Co., 11 Ves. 429, 443–445; City of London *v.* Richmond, 2 Vern. 421; Meux *v.* Maltby, 2 Swans. 277; Milbank *v.* Collier, 1 Coll. 237; Harvey *v.* Harvey, 4 Beav. 215; 5 Beav. 134; Bunnett *v.* Foster, 7 Beav. 540.

[4] Holland *v.* Baker, 3 Hare, 68.

[5] Meux *v.* Maltby, 2 Swans. 285; Powell *v.* Wright, 7 Beav. 449.

[6] Att'y-Gen. *v.* Heelis, 2 S. & S. 76, and cases cited; T. & R. 297; Gray *v.* Chaplin, 2 S. & S. 267; Bainbrigge *v.* Burton, 2 Beav. 539; Long *v.* Yonge, 2 Sim. 385; Richardson *v.* Larpent, 2 Y. & Col. Ch. 507; Newton *v.* Egmont, 4

joined;[1] but in one case where the *cestuis que trust* were twenty-six in number, and in another twenty-seven, and bills were filed nearly twenty years after the institution of the trusts, a few were allowed to maintain bills in behalf of the whole for the execution of the trusts.[2]

§ 886. If a *cestui que trust* desires to bring a suit against a stranger, he should apply to the trustee to allow his name to be used as coplaintiff, and the trustee is bound to comply, on being indemnified against the costs. If the trustee refuses improperly, he may be made a defendant, and will be deprived of his costs, or he may be ordered to pay costs.[3] If the trustee is in no default, he may have his costs. If the trustees and *cestuis que trust* are sued by a stranger, they ought to join in their answer and defence. The court has no means of compelling them to join; but if they split in their defence, only one set of costs will be allowed against the plaintiff, and they may have to bear their own costs.[4]

§ 887. In suits between *cestuis que trust inter se*, or *cestuis que trust* and trustees, all the parties in the same interest, whether *cestuis que trust* or trustees, should join either as plaintiffs or defendants.[5]

§ 888. Trustees ought always to join in their answer; if they separate in their defence, only one set of costs will be given,[6] which will be divided equally, if both trustees are in fault,[7] but if only one trustee is in fault, the costs will be given to the trustee who is without fault.[8] But if there is good reason for severing in their defence, as where one trustee has a separate or personal

Sim. 574; 5 Sim. 130, 137; Evans *v.* Stokes, 1 Keen, 24; 1 Daniell, Ch. Prac. 242 (4th Am. ed.).

[1] Harrison *v.* Stewardson, 2 Hare, 533.

[2] Smart *v.* Bradstock, 7 Beav. 500; Bateman *v.* Margerison, 6 Hare, 496.

[3] Read *v.* Sparkes, 1 Moll. 8; Hughes *v.* Key, 20 Beav. 395; Browne *v.* Lockhart, 10 Sim. 426, seems to be contrary, but is doubted.

[4] Read *v.* Sparkes, 1 Moll. 10; Woods *v.* Woods, 5 Hare, 229; Farr *v.* Sherriffe, 4 Hare, 528; Van Sandau *v.* Moore, 1 Russ. 441, reversing 2 S. & S. 509; Cuddy *v.* Waldron, 1 Moll. 14; Homan *v.* Hague, 1 Moll. 14; Galway *v.* Butler, 1 Moll. 13.

[5] Hosking *v.* Nicholls, 1 Y. & Col. Ch. 478.

[6] Nicholson *v.* Falkiner, 1 Moll. 559; Gaunt *v.* Taylor, 2 Beav. 347; Shovelton *v.* Shovelton, 32 Beav. 143.

[7] Course *v.* Humphrey, 26 Beav. 402; Att'y-Gen. *v.* Wyville, 28 Beav. 464.

[8] Young *v.* Scott, 1 Jones, Ir. Exch. 71; Att'y-Gen. *v.* Cuming, 2 Y. & Col. Ch. 156; Webb *v.* Webb, 16 Sim. 55; Cummins *v.* Bromfield, 3 Jur. (N. S.) 657.

interest independent of the others, or where they reside at such a distance that it is impossible for them to act together, or where any proper reasonable ground exists, the trustees will be allowed to answer severally, and each one may be allowed his costs.[1] If some of the trustees are properly made plaintiffs and others defendants, in order to settle the rights of the parties, each may have costs; but if one is made defendant by reason of his misconduct, costs will not be allowed to him.[2]

§ 889. A *feme covert*, entitled to sue for her separate estate, cannot join with her husband, if he sets up any adverse claim or interest. In such case, she must sue by her next friend, and make her husband a defendant, and he will be entitled to his costs.[3] The same rule applies in relation to the execution of a power by a married woman.[4] But if the husband has no separate or adverse interest, he may be joined with the wife as coplaintiff.[5] If a married woman is sued in respect to her separate estate, she may obtain an order to answer separately;[6] but the mere fact that a woman is living apart from her husband does not entitle her to answer separately.[7]

§ 890. If a bill is filed for an account, and the plaintiff seeks relief against wilful default of the trustees, he must allege in his bill some specific act of wilful misconduct,[8] and pray consequential relief; and at the hearing he must prove the act alleged, or at least establish a case for inquiry.[9] If, at the hearing, the common accounts only are directed, it is too late to ask relief, on a hearing for further directions, against any wilful act that may appear accidentally from other inquiries;[10] and a trustee cannot be declared liable for wilful default upon a common order made at chambers for the

[1] Gaunt *v.* Taylor, 2 Beav. 346; Aldridge *v.* Westbrook, 4 Beav. 212; Cummins *v.* Bromfield, 3 Jur. (N. S.) 657; Dudgeon *v.* Cormley, 2 Conn. & Laws. 422; Nicholson *v.* Falkiner, 1 Moll. 560; Wiles *v.* Cooper, 9 Beav. 294; Farr *v.* Sherriffe, 4 Hare, 528; Barry *v.* Woodham, 1 Y. & Col. 538, and cases cited; Reade *v.* Sparkes, 1 Moll. 10; Kempf *v.* James, C. P. Coop. 13, 1837, 1838; Walsh *v.* Dillon, 1 Moll. 13.

[2] Hughes *v.* Key, 20 Beav. 395.

[3] Thorby *v.* Yates, 1 Y. & Col. Ch. 438; 1 Daniell, Chan. Prac. 89, 90, 178–189 (4th Am. ed.)

[4] Hope *v.* Fox, 1 John. & H. 456.

[5] Beadmore *v.* Gregory, 2 Hem. & Mil. 491.

[6] Norris *v.* Wright, 14 Beav. 303.

[7] Garey *v.* Whittingham, 5 Beav. 270; Barry *v.* Woodham, 1 Y. & Col. 538.

[8] Bond *v.* McWatty, 14 Ir. Eq. 74.

[9] Sleight *v.* Johnson, 3 K. & J. 292.

[10] Coop *v.* Carter, 2 De G., M. & G. 292.

administration of the trust estate.[1] But if a bill prays for an account with *interest*, and at the original hearing an account is directed, and in the course of taking the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing for further directions.[2] And if relief against a breach of trust is prayed for, and at the original hearing the usual accounts only are directed, but with an inquiry as to who are the parties interested, it is not too late to ask relief against the breach of trust on the hearing for further directions, as before that time the court cannot deal with the question.[3] In a redemption suit it is not necessary that the plaintiff should charge wilful default; nor is the case altered, if the deed, though in substance a security, is in form a deed of trust.[4] The general rule is, that a plaintiff, who seeks to charge a trustee with a breach of trust, is bound to state a clear case upon his bill. Therefore acts of a trustee which may, or may not, be breaches of trust must be so alleged that they necessarily appear to be breaches, or a demurrer will be sustained.[5] The presumption is in favor of the performance of his duty by the trustee, the plaintiff must therefore allege and prove affirmatively a breach of the trust.[6] The trustee will not be liable for breaches of trust not alleged in the bill.[7] But if the trustee commits breaches of trust of the same nature as those alleged in the bill, relief may be given against them without an amendment to the bill.[8]

[1] *Re* Fryer, 3 K. & J. 317; Partington *v.* Reynolds, 4 Drew. 253; *Re* Delavante, 6 Jur. (N. S.) 118; Brooker *v.* Brooker, 3 Sim. & Gif. 475.

[2] Shaw *v.* Turbett, 13 Ir. Eq. 476.

[3] Pattenden *v.* Hobson, 1 Eq. R. 28.

[4] O'Connell *v.* O'Callagan, 15 Ir. Eq. 31.

[5] Att'y-Gen. *v.* Norwich, 2 M. & Cr. 406, 422; Maccubbin *v.* Cromwell, 7 G. & J. 157; McGinn *v.* Shaeffer, 7 Watts, 412.

[6] Ibid.

[7] Smith *v.* Smith, 4 John. Ch. 45; Cooper *v.* Cooper, 1 Halst. Ch. 9.

[8] Harrison *v.* Mock, 10 Ala. 196; Coop *v.* Carter, 2 De G., M. & G. 292; Sleight *v.* Johnson, 3 K. & J. 292.

CHAPTER XXX.

COSTS.

§ 891. THE general rule is, that if trustees bring suits against strangers, or strangers bring suits against trustees respecting the trust fund, costs will be awarded against the losing party as in other suits.[1] The rule, however, is slightly varied in some cases. Thus in England, if an executor sues upon a cause of action accruing during his testator's lifetime, he is not liable for costs if he fails; but if he is sued, and judgment is awarded against him, he must pay costs like any other defendant.[2] And this rule has been followed in some of the United States.[3] But even where

[1] Westley *v.* Williamson, 2 Moll. 458; Burgess *v.* Wheate, 1 Ed. 251; Edwards *v.* Harvey, G. Coop. 40; Hill *v.* Magan, 2 Moll. 46; Elsey *v.* Lutyens, 8 Hare, 164; Dunlop *v.* Hubbard, 19 Ves. 205; Ellenborough *v.* Canterbury, 2 Russ. 94; Brodie *v.* St. Paul, 1 Ves. Jr. 326.

[2] 2 Wms. Ex'rs, 1718, 1792.

[3] Justices *v.* Haygood, 20 Ga. 847; Knox *v.* Bigelow, 15 Wis. 415; Jamison *v.* Lindsay, 1 Bail. 79; Buckels *v.* Carter, 6 Rich. 106; Wright *v.* Wright, 2 McCord, Ch. 185; Farrier *v.* Cairns, 5 Ohio, 45; Harrison *v.* Warner, 1 Blackf. 385; Caperton *v.* Callson, 1 J. J. Marsh. 396; Hanson *v.* Jacks, 22 Ala. 549; Callender *v.* Keystone M. Ins. Co., 23 Penn. St. 471, overruling Ewing *v.* Furness, 13 Penn. St. 532; Shaw *v.* Conway, 7 Penn. St. 136; Muntorff *v.* Muntorff,

a modified rule prevails, courts may impose costs for bringing any improper suits by executors or others suing in a fiduciary capacity.[1] If executors or trustees are compelled to pay costs, the amount paid may be allowed to them in their accounts, if the litigation was just and proper;[2] but if the litigation was improper and vexatious, courts may refuse to allow such charges.[3] It is the duty of an executor to present the will of his testator to the Court of Probate for allowance. If an issue of *devisavit vel non* is raised upon the will, it is the duty of the executor to take care that the issue is properly tried, and he will be allowed his costs out of the estate even though he may fail.[4] And so it is within the discretion of the court in some States to allow the opposite party costs out of the fund. Thus the executor must present the will for probate, and he should be allowed his reasonable costs for vindicating the action of the testator in making a will. So the heirs are not to be disinherited except upon clear proof of a will. If there is any doubt upon that question or issue, they are entitled to a fair trial; and the court may in its discretion allow them the costs of trial out of the estate. And costs as between solicitor and client may be allowed in such cases to both parties out of the fund;[4] but if there is any misconduct on the part of

2 Rawle, 180. In New York, trustees and executors must pay costs if they fail. Finley *v.* Jones, 6 Barb. 229; Rose *v.* Rose, 28 N. Y. 184; 2 R. S. 615, § 17. The law as stated in Ketchum *v.* Ketchum, 4 Cow. 87, is changed. In Virginia, executors pay costs like other parties. 2 Lomax Ex'rs, 38.

[1] Wms. Ex'rs, 1718, 1792; Hanson *v.* Jacks, 22 Ala. 549; Alexander *v.* Alexander, 5 Ala. 517; Savage *v.* Dickson, 16 Ala. 260; Roosevelt *v.* Ellithorp, 10 Paige, 415; Waterman *v.* Cochran, 2 Vt. 699.

[2] Hardy *v.* Call, 16 Mass. 530; Williams *v.* Mattocks, 3 Vt. 189; Connally *v.* Pardon, 1 Paige, 291; Long *v.* Israel, 9 Leigh, 596; Garner *v.* Strode, 5 Lit. 314; Moses *v.* Murgatroyd, 1 John. Ch. 473; Roosevelt *v.* Ellithorp, 10 Paige, 415; Dyer *v.* Potter, 2 John. Ch. 152; Arnoux *v.* Steinbrenner, 1 Paige, 82; *Ex parte* Croxton, 5 De G. & Sm. 432; Gage *v.* Rogers, 1 Strob. Eq. 370; Capehart *v.* Huey, 1 Hill, Eq. 405; Knox *v.* Picket, 4 Des. 92; Mumper's App., 3 W. & S. 413; Gouverneur *v.* Titus, 1 Edw. Ch. 477; Delafield *v.* Caldew, 1 Paige, 139; Collins *v.* Hoxie, 9 Paige, 81; Carow *v.* Mowatt, 2 Edw. Ch. 57; Day *v.* Day, 2 Green, Ch. 549; Morton *v.* Barrett, 22 Me. 257; Miles *v.* Bacon, 4 J. J. Marsh. 468; Peyton *v.* McDowell, 3 Dana, 314; Hill *v.* Morgan, 2 Moll. 460; Lowrie's App., 1 Grant, Ca. 373; Graver's App., 50 Penn. St. 189; Casey's Est., 47 Penn. St. 424; McElhenny's App., 46 Penn. St. 347.

[3] Armstrong's Est., 6 Watts, 236; Callighan *v.* Hall, 1 S. & R. 211; Getman *v.* Beardsley, 2 John. Ch. 274; Davis *v.* Davis, 2 Hill, Eq. 377.

[4] Drew *v.* Wakefield, 54 Me. 291; Abbott *v.* Bradstreet, 3 Allen, 587.

the executor, he may be compelled to pay costs; and, so if there is no reasonable ground to dispute the will, the heirs, as contestants, may be ordered to pay costs.[1] In all cases where trustees are compelled to pay costs in suits with strangers, the costs are taxed as between party and party, and not as between attorney and client.[2] If trustees are brought before the court as necessary parties by strangers, they are entitled to their costs if they disclaim all interest, or yield; [3] but if they contest the suit, they must upon failure pay costs like other parties.[4] Though if they make a claim, by way of submission to the court whether they have any, they may have their costs.[5]

§ 892. Courts of equity have a discretion in respect to the costs of proceedings before them. A stranger may fail in a suit against a trustee, and yet the court may not order costs; and the fact that the defendant was a trustee will not control the discretion of the court.[6] So a party may have a decree in his favor, and yet be ordered to pay the costs.[7] In England, a mortgagee is entitled to his costs whether the suit is to foreclose, or redeem the mortgage. So, where trustees are necessary parties, as mortgagees, to such suits, whether they were original parties to the mortgage, or some interest has been subsequently assigned to them, they are entitled to their costs.[8] If a creditor files a bill against an executor for an account and payment of a debt, the executor will not be decreed to pay costs personally, if the assets are insufficient to pay both debts and costs,[9] unless he had misconducted himself, and misapplied the

[1] Woodbury *v.* Obear, 7 Gray, 472; Nickirson *v.* Buck, 12 Cush. 343; Day *v.* Day, 2 Green, Ch. 549; Townshend *v.* Brooke, 9 Gill, 90; Scott's Est., 9 Watts & S. 98. But a different rule prevails in some States. See Mumper's App., 3 W. & S. 443; Royer's App., 13 Penn. St. 569; Verner's Est., 6 Watts, 250.

[2] Mohun *v.* Mohun, 1 Swans. 201; Saunders *v.* Saunders, 3 Jur. (N. S.) 727; McKern *v.* Handy, 4 Md. Ch. 234; Ralston *v.* Telfair, 2 Dev. & Bat. 414.

[3] Bartle *v.* Wilkin, 8 Sim. 238; Brown *v.* Lockhart, 10 Sim. 426.

[4] Rashleigh *v.* Masters, 1 Ves. Jr. 201.

[5] Ibid.; Wood *v.* Vanderburg, 6 Paige, 278; Morrell *v.* Dickey, 1 John. Ch. 153.

[6] Brodie *v.* St. Paul, 1 Ves. Jr. 326.

[7] Armstrong *v.* Zane, 12 Ohio, 287.

[8] Brown *v.* Lockhart, 10 Sim. 426; Wetherill *v.* Collins, 3 Mad. 255; Bartle *v.* Wilkin, 8 Sim. 238. But see Horrocks *v.* Ledsam, 2 Coll. 208.

[9] Twisleton *v.* Thelwell, Hard. 165; Uvedale *v.* Uvedale, 3 Atk. 119; Davy *v.* Seys, Mose. 204; Morony *v.* Vincent, 2 Moll. 461.

assets.[1] He may even retain his own costs out of the assets,[2] though formerly the practice was different.[3]

§ 893. It is difficult to state, as a general proposition, any rule as to costs in suits between *cestuis que trust* and trustees in relation to the trust fund. Courts of equity, having almost exclusive jurisdiction over such suits, have at the same time an unlimited discretion over the costs of them; and decrees as to the costs are made in a great variety of forms, to meet every degree of fidelity or neglect. The cases are ranged under four principal heads: (1.) Where trustees are allowed their costs; (2.) Where they are not allowed their costs; (3.) Where costs are imposed upon them; and (4.) Where they are allowed costs on one part of the case, and are refused their costs, or are ordered to pay the costs upon some other part of the case.

§ 894. The general rule is, that trustees shall have their costs either out of the trust fund, or from the *cestuis que trust* personally.[4] If there is a fund within the control of the court, they may have their costs as between solicitor and client.[5] Where there is no fund within control of the court, if the *cestuis que trust* bring the trustees before it to obtain a direction as to the

[1] Jefferies *v.* Harrison, 1 Atk. 468; Bennett *v.* Atkins, 1 Y. & Col. 247; Wilkins *v.* Hunt, 2 Atk. 151.

[2] Bennett *v.* Going, 1 Moll. 529; Tipping *v.* Power, 1 Hare, 405; Ottley *v.* Gilby, 8 Beav. 603; Tanner *v.* Dancey, 9 Beav. 339.

[3] Humph *v.* Morse, 2 Atk. 408; Sandys *v.* Watson, 2 Atk. 80; Adair *v.* Shaw, 1 Sch. & Lef. 280.

[4] Amand *v.* Bradbourne, 2 Ch. Ca. 138; Mohun *v.* Mohun, 1 Swans. 201; Pride *v.* Fooks, 2 Beav. 437; Whitmarsh *v.* Robertson, 1 Y. & Col. Ch. 717; Hall *v.* Hallett, 1 Cox, 141; Att'y-Gen. *v.* London, 3 Bro. Ch. 171; Coventry *v.* Coventry, 1 Keen, 758; Curties *v.* Candler, 6 Mad. 123; Taylor *v.* Glanville, 3 Mad. 176; Rashleigh *v.* Masters, 1 Ves. Jr. 201; Sammes *v.* Richman, 2 Ves. Jr. 38; Massett *v.* Pocock, t. Finch, 136; Roche *v.* Hart, 11 Ves. 58; Landen *v.* Green, Barn. 389; Norris *v.* Norris, 1 Cox, 183; 1 Eq. Ca. Ab. 125; Hosack *v.* Rogers, 9 Paige, 463; Irving *v.* De Kay, 9 Paige, 533; Minuse *v.* Cox, 5 John. Ch. 451; Graver's App., 50 Penn. St. 189; 2 Daniell, Chan. Prac. 1411 (4th Am. ed.). And the same general rules apply to executors or administrators brought into court. Jewett *v.* Woodward, 1 Edw. 200; Day *v.* Day, 2 Green, Ch. 549; Morton *v.* Barrett, 22 Me. 257; McKim *v.* Handy, 4 Md. Ch. 234; Townshend *v.* Brooke, 9 Gill, 90; Glass *v.* Ramsey, 9 Gill, 459; Capehart *v.* Huey, 1 Hill, Eq. 405; Hester *v.* Hester, 3 Ired. Eq. 9; Scott's Est., 9 W. & S. 98; Burr *v.* McEwen, 1 Baldw. C. C. 154; Bendall *v.* Bendall, 24 Ala. 295; Atcheson *v.* Robertson, 4 Rich. Eq. 39; Keeler *v.* Keeler, 3 Green (N. J.), 267.

[5] Mohun *v.* Mohun, 1 Swans. 201; Moore *v.* Frowd, 3 M. & C. 49.

rights of the parties, or the mode of administration, and the trustees are free from all blame or fault, they are entitled to costs against the *cestuis que trust* personally, to be taxed as between solicitor and client.[1] The reason involved in the rule is this: trustees have no beneficial interest in the trust property. They hold it for the accommodation and benefit of others. If they perform their duties faithfully, and are guilty of no unjust, improper, or oppressive conduct, they ought not in justice and good conscience to be put to any expense out of their own moneys. If, therefore, they are brought before the court without blame on their part, they should be reimbursed all the expenses that they incur, and allowed their costs as between solicitor and client for this purpose. So, if it appears to the court by the pleadings or otherwise that they have sustained charges and expenses beyond the costs of the suit, as between solicitor and client, the court will order such further expenses properly incurred to be paid to them; but such order will not embrace the costs and expenses of other suits, unless specially mentioned.[2]

§ 895. If the trustee, or one of the trustees is a solicitor, he can make no professional charge against the trust fund although he may have conducted the defence;[3] but the court will nevertheless order costs as between solicitor and client, and leave them to be taxed by the proper officer, according to the rules of law, upon the proper vouchers presented to him.[4]

§ 896. But where plaintiffs bring a bill against defendants for the purpose of *creating a trust fund*, as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands in trust for the plaintiffs,[5] the defendants can have costs only as

[1] Att'y-Gen. *v.* Cuming, 2 Y. & Col. Ch. 155; Edenborough *v.* Canterbury, 2 Russ. 112.

[2] Payne *v.* Little, 27 Beav. 83; Hall *v.* Laver, 1 Hare, 577; Amand *v.* Bradbourne, 2 Ch. Ca. 138; Warrall *v.* Hartford, 8 Ves. 8; 2 Daniell, Chan. Prac. 1411 (4th Am. ed.).

[3] *Ante,* § 432 and cases cited; Meyer *v.* Galluchat, 6 Rich. 1; Moore *v.* Frowd, 3 M. & Cr. 45; Lincoln *v.* Winsor, 9 Hare, 158; Broughton *v.* Broughton, 5 De G., M. & G. 160.

[4] York *v.* Brown, 1 Coll. 260. And see *Re* Taylor, 23 L. J. Ch. 857; Bainbrigge *v.* Blair, 8 Beav. 588; Cradock *v.* Piper, 1 Mac. & G. 688.

[5] See *ante,* Chap. VI.

between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers.[1]

§ 897. Where a trustee neglected to appear at the hearing, and a decree *nisi* was made against him, but a rehearing was obtained upon paying the costs of the day, the court ordered costs for the trustee, saying that the payment of the costs of the day makes the trustee *rectum in curia*, and as he would have been entitled to his costs on the first hearing, he now stands in the same situation.[2] But if a trustee neglects to ask for his costs, and a final decree is passed, he cannot have a rehearing upon the question of costs alone, nor can he obtain an order for costs upon a simple petition in the case.[3]

§ 898. Courts always scrutinize transactions between parent and children, and where a trustee refused to convey to a child or parent until the transaction could be examined, he was allowed his costs,[4] and so if the breach of trust is very trivial he may be allowed his costs.[5] If a person named as trustee is made defendant in a suit, and by his answer disclaims, he will be allowed his costs as a party, but not as between solicitor and client; for, not being a trustee, he must be an ordinary party:[6] but if his answer is unreasonably long, he will have only the costs of a disclaimer.[7] But the plaintiff may limit the extent of an answer required from a defendant; and if he does not limit it, but requires an answer to the whole bill, costs of the whole answer will be allowed.[8]

§ 899. The general rule, that trustees are to have their costs, applies whether they are plaintiffs or defendants;[9] and so all persons, whom it is necessary for the trustees to bring before the court as parties, in order to obtain a valid decree to protect them them in the discharge of their duties in disposing of the trust

[1] Mohun *v.* Mohun, 1 Swans. 201; Saunders *v.* Saunders, 3 Jur. (N. S.) 728; Gaylords *v.* Kelshaw, 1 Wallace, 81.

[2] Norris *v.* Norris, 1 Cox, 183.

[3] Colman *v.* Lord, 2 Cox, 206.

[4] King *v.* King, 1 De G. & J. 663, 671.

[5] Fitzgerald *v.* Pringle, 2 Moll. 534; Bailey *v.* Gould, 4 Y. & Col. 221; Knott *v.* Cottee, 16 Beav. 77; Cotton *v.* Clark, 16 Beav. 134.

[6] Hickson *v.* Fitzgerald, 1 Moll. 14; Norway *v.* Norway, 2 M. & K. 278, overruling Sherratt *v.* Bentley, 1 R. & M. 655.

[7] Martin *v.* Persse, 1 Moll. 146.

[8] Albridge *v.* Westbrooke, 4 Beav. 213.

[9] Curteis *v.* Candler, 6 Mad. 123; Coventry *v.* Coventry, 1 Keen, 758.

fund, will be entitled to their costs.[1] But this rule is under the control of the court, and the conduct of the parties will be carefully scrutinized; and if trustees appear in a suit when it is unnecessary, they will not be allowed their costs.[2] So if they institute a suit when one is already pending in which all their rights can be determined, they will not have costs.[3]

§ 900. If the misconduct or failure of the trustee to perform his duty[4] or his mere caprice or obstinacy[5] renders a suit necessary, he must pay the costs. So if he refuses to account,[6] or wilfully misstates the accounts,[7] or by any chicanery in his answer keeps the *cestui que trust* from a correct knowledge of the accounts,[8] or if he has kept the accounts in a careless and confused manner,[9]

[1] Hicks *v.* Wrench, 6 Mad. 93; Drew *v.* Wakefield, 54 Me. 291; Abbott *v.* Bradstreet, 3 Allen, 587; 2 Daniell, Chan. Prac. 1412 (4th Am. ed.).

[2] Bennett *v.* Biddles, 10 Jur. 534; Beer *v.* Tapp, 31 L. J. Ch. 513.

[3] Packwood *v.* Maddison, 2 S. & S. 232; 2 Daniell, Chan. Prac. 1412, 1413 (4th Am. ed.).

[4] Springett *v.* Dashwood, 2 Gif. 521; Caffrey *v.* Darby, 6 Ves. 488; Hide *v.* Haywood, 2 Atk. 126; Sheppard *v.* Smith, 2 Bro. P. C. 372; Stacpoole *v.* Stacpoole, 1 Dow, 209; Lyse *v.* Kingdom, 1 Coll. 184; Powlett *v.* Herbert, 1 Ves. Jr. 297; Byrne *v.* Norcott, 13 Beav. 346; Fell *v.* Lutwidge, Barn. 319; Brown *v.* How, Barn. 354; Littleholes *v.* Gascoyne, 3 Bro. Ch. 373; Att'y-Gen. *v.* Hobert, Ca. t. Finch, 259; Ashburnham *v.* Thompson, 13 Ves. 402; Mosley *v.* Ward, 11 Ves. 581; Haberdashers' Company *v.* Att'y-Gen., 2 Bro. P. C. 370; Crackett *v.* Bethune, 1 J. & W. 586; Att'y-Gen. *v.* Wilson, 1 Cr. & Phil. 1; Baker *v.* Carter, 1 Y. & Col. 252; Wilson *v.* Wilson, 2 Keen, 249; Franklin *v.* Frith, 3 Bro. Ch. 433; Piety *v.* Stace, 4 Ves. 620; Whistler *v.* Newman, 4 Ves. 129; Seers *v.* Hind, 1 Ves. Jr. 294; Adams *v.* Clifton, 1 Russ. 297; Egerton *v.* Egerton, 2 Green (N. J.), 419; Att'y-Gen. *v.* Drapers' Co., 4 Beav. 67; Att'y-Gen. *v.* Caius Coll., 2 Keen, 169; Att'y-Gen. *v.* East Retford, 2 M. & K. 35.

[5] Smith *v.* Bolden, 33 Beav. 266; Scarborough *v.* Parker, 1 Ves. Jr. 267; Burrows *v.* Greenwood, 4 Y. & Col. 251; Kirby *v.* Mash, 3 Y. & Col. 295; Penfold *v.* Bouch, 4 Hare, 271; Jones *v.* Lewis, 1 Cox, 199; Taylor *v.* Glanville, 3 Mad. 178; Thorby *v.* Yeates, 1 Y. & Col. Ch. 438; May *v.* Armstrong, 1 W. N. 233; Hampshire *v.* Bradley, 2 Col. 34; Jones *v.* Lewis, 1 Cox, 199; Moore *v.* Prance, 9 Hare, 299; Firmin *v.* Pulham, 2 De G. & Sm. 99; Brinton's Est., 10 Barr, 408; Goodson *v.* Ellisson, 3 Russ. 583; Lyse *v.* Kingdom, 1 Coll. 184.

[6] Boynton *v.* Richardson, 31 Beav. 340; Wroe *v.* Seed, 4 Gif. 425; Kemp *v.* Burn, 4 Gif. 348; Burnham *v.* Dalling, 7 Green (N. J.), 310; Sheppard *v.* Smith, 2 Bro. P. C. 372; Avery *v.* Osborne, Barn. 349.

[7] Flannagan *v.* Nolan, 1 Moll. 86; Sheppard *v.* Smith, 2 Bro. P. C. 372.

[8] Reech *v.* Kennegal, 1 Ves. 123; Avery *v.* Osborne, Barn. 349.

[9] Norbury *v.* Calbeck, 2 Moll. 461.

the court will charge him with the costs. If an executor denies that there are assets, contrary to the fact, he will be charged with the costs.[1] So if a trustee alleges in his answer, that the *cestui que trust* is largely indebted to him, and after a long investigation it turns out that the trustee is greatly in arrears, he will be decreed to pay costs.[2] Or even if the amount due the trustee is much less than he claimed, he will be ordered to pay the costs.[3] So if a trustee sets up a claim of his own to the trust property, and fails in his claim, he must pay all the costs.[4] So if a trustee refuses the use of his name in the prosecution of a suit for the interests of the trust estate and the *cestui que trust*, whereby the *cestui que trust* is obliged to institute the suit in his own name, and join the trustee as a defendant, the court will order the trustee to pay the costs.[5] So if a trustee has some private interest of his own, separate from and independent of the trust, and he compels the *cestui que trust* to come into a court of equity, merely for the purpose of procuring a decision, at the expense of the estate, upon some point relating to his own private interest, the court will decree him to pay the whole costs.[6] So where trustees in their answer pleaded ignorance of the trust, but the court inferred, from the papers annexed to the answer, an intention to defeat the ends of justice, costs were imposed upon the

[1] Sandys *v.* Watson, 2 Atk. 80; Vaughan *v.* Thurston, Colles, P. C. 175; Mallabar *v.* Mallabar, t. Talb. 71; Sheppard *v.* Smith, 2 Bro. P. C. 372.

[2] Parrott *v.* Treby, Pr. Ch. 254; Eglin *v.* Sanderson, 3 Gif. 434.

[3] Fozier *v.* Andrews, 2 Jo. & La. 199; Att'y-Gen. *v.* Brewers' Co., 1 P. Wms. 376.

[4] Lloyd *v.* Spillett, 3 P. Wms. 344; Bayly *v.* Powell, Pr. Ch. 92; Willis *v.* Hiscox, 4 M. & C. 179; Att'y-Gen. *v.* Drapers' Co., 4 Beav. 67; Att'y-Gen. *v.* Christ's Hospital, 4 Beav. 73; Irwin *v.* Rogers, 12 Ir. Eq. 159; Lawson *v.* Copeland, 2 Bro. Ch. 156; Baggot *v.* Baggot, 10 L. J. Ch. (N. S.) 116; Lemmond *v.* Peoples, 6 Ir. Eq. 137; Waterman *v.* Cochran, 2 Vt. 699.

[5] Guyton *v.* Shane, 7 Dana, 498; Read *v.* Sparks, 1 Moll. 8; Collyer *v.* Dudley, Y. & Col. 422; Blount *v.* Burrow, 2 Bro. Ch. 90. But see Brown *v.* Lockhart, 10 Sim. 426.

[6] Henley *v.* Phillips, 2 Atk. 48; Manning *v.* Manning, 1 John. Ch. 535; Ralston *v.* Telfair, 2 Dev. & Bat. 414; Ingram *v.* Kirkpatrick, 8 Ired. Eq. 62. But trustees have a right to the aid of the court in accounting, and to their costs; therefore trustees may have their costs for accounts, although they claim an interest in the trust fund or its proceeds as one of the *cestuis que trust*. Atcheson *v.* Robertson, 4 Rich. Eq. 44; Pell *v.* Ball, Speers, Eq. 48; Hartzell *v.* Brown, 5 Binn. 138; Royer's App., 13 Penn. St. 569; Raybold *v.* Raybold, 20 Penn. St. 308; Worrell's App., 23 Penn. St. 44; Halmon's App., 24 Penn. St. 172; Carpenter's App., 3 Grant's Cas. 381; Wham *v.* Love, Rice, Eq. 51.

trustees;[1] and where the court ordered the production of papers, and very material ones were suppressed, costs were imposed upon the trustees;[2] and where an executor puts the plaintiffs unnecessarily to proof of their relationship, costs are imposed.[3] It was said by Lord Thurlow, that, where the court is obliged to give interest as a remedy for a breach of trust, costs will follow of course;[4] that is to say, that, where a suit is occasioned by the misconduct of trustees, the charging them with interest is such an indication of misconduct that costs follow: and the same principle was acted upon in Frey *v.* Frey;[5] but Sir William Grant denied that there was any such rule, and said that there might be cases when a trustee could be charged with interest, but not with costs.[6]

§ 901. Where a trustee is guilty of some misconduct which does not amount to a wilful breach of the trust, or of some omission of duty which is of some inconvenience to the trust, he will not be allowed his costs.[7] Thus if he files an improper answer, he will not be allowed the costs of the answer.[8] So an innocent *mistake* by the trustee may deprive him of his costs,[9] or the court may decree him to pay part of the costs,[10] or even give him his whole costs.[11] So, where

[1] Att'y-Gen. *v.* East Retford, 2 M. & K. 35.

[2] Borough of Hertford *v.* Poor of Hertford, 2 Bro. P. C. 377.

[3] Lawson *v.* Copeland, 2 Bro. Ch. 156.

[4] Seers *v.* Hind, 1 Ves. Jr. 294. And see Franklin *v.* Frith, 3 Bro. Ch. 433; Moseley *v.* Ward, 11 Ves. 581; Piety *v.* Stace, 4 Ves. 620.

[5] Frey *v.* Frey, 2 C. E. Green, 71; Warbass *v.* Armstrong, 2 Stockt. 266; Dunscomb *v.* Dunscomb, 1 John. Ch. 508.

[6] Ashburnham *v.* Thompson, 13 Ves. 404; Tebbs *v.* Carpenter, 1 Mad. 308; Woodhead *v.* Marriott, C. P. Cooper, 62, 1837–1838; Holgate *v.* Hayworth, 17 Beav. 259; Fletcher *v.* Walker, 3 Mad. 73; Mousley *v.* Carr, 4 Beav. 49; MacKenzie *v.* Taylor, 7 Beav. 467; Fozier *v.* Andrews, 2 J. & Lat. 199; Cotton *v.* Clark, 16 Jur. 879.

[7] O'Callagan *v.* Cooper, 5 Ves. 129; Massey *v.* Banner, 4 Mad. 113; Newton *v.* Bennett, 1 Bro. Ch. 362; Mousley *v.* Carr, 4 Beav. 49; England *v.* Downs, 6 Beav. 279; Dawson *v.* Parrot, 3 Bro. Ch. 236; Spencer *v.* Spencer, 11 Paige, 159.

[8] Eddowes *v.* Eddowes, 30 Beav. 603.

[9] Fitzgerald *v.* Fitzgerald, 6 Ir. Eq. 145; O'Callagan *v.* Cooper, 5 Ves. 117; Mousley *v.* Carr, 4 Beav. 49; Devey *v.* Thornton, 9 Hare, 222; Att'y-Gen. *v.* Drapers' Co., 4 Beav. 71; Bennett *v.* Going, 1 Moll. 529; Robertson *v.* Wendell, 6 Paige, 322.

[10] East *v.* Ryall, 2 P. Wms. 284.

[11] Taylor *v.* Tabrum, 6 Sim. 281; Flanagan *v.* Nolan, 1 Moll. 84; Travers *v.* Townsend, 1 Moll. 496; Att'y-Gen. *v.* Caius College, 2 Keen, 150; Bennett *v.*

an executor was entitled to have his accounts taken under the direction of the court, he was not allowed his costs, because of his conduct in obstructing the settlement of the accounts;[1] but costs were not imposed upon him. So, if a trustee makes a claim in his account which is very much reduced by the court, costs will not be allowed him.[2] The court will give no costs to a defaulting trustee; as, if a balance is found due from a trustee, he can have no costs until he pays it.[3] So if a trustee renders it necessary to institute a suit for the appointment of a new trustee, where it might have been done by agreement of the parties, he will not be allowed his costs.[4] But if the trustee has a good reason for his discharge, as the misconduct of the *cestui que trust*, or his own age and infirmities, he may have the costs of a proceeding in equity for his discharge.[5] Where a trustee refuses to convey, or insists upon making an improper conveyance, and to improper persons, he may be refused his costs;[6] or he may even be made to pay costs,[7] although he acts under the advice of counsel.[8] But a trustee may properly refuse to convey, where there is any doubt as to the person to whom the conveyance should be made, or as to the

Atkins, 1 Y. & Col. 247; Fitzgerald *v.* O'Flaherty, 1 Moll. 347; Att'y-Gen. *v.* Drummond, 2 Conn. & Laws. 98; Royds *v.* Royds, 14 Beav. 54; Fitzgerald *v.* Pringle, 2 Moll. 534; Bennett *v.* Atkins, 1 Y. & Coll. 249; Taylor *v.* Tabrum, 6 Sim. 281; Att'y-Gen. *v.* Caius College, 2 Keen, 150, 170.

[1] *Re* King, 11 Jur. (N. S.) 899; Raphael *v.* Boehm, 13 Ves. 592.

[2] Att'y-Gen. *v.* Brewers' Co., 1 P. Wms. 376; Fozier *v.* Andrews, 2 Jo. & Lat. 199; Dawson *v.* Parrot, 3 Bro. Ch. 236; Ball *v.* Montgomery, 2 Ves. Jr. 191.

[3] Birks *v.* Micklethwait, 33 Beav. 409.

[4] Howard *v.* Rhodes, 1 Keen, 581; Greenwood *v.* Wakeford, 1 Beav. 580; Benbore *v.* Davies, 11 Beav. 369; *Re* Tryon, 7 Beav. 496; Gabril *v.* Sturgis, 5 Hare, 97; Jones *v.* Stockett, 2 Bland, 409; *Re* Molony, 2 J. & Lat. 391; Porter *v.* Watts, 21 L. J. Ch. 211; Cruger *v.* Halliday, 11 Paige, 314.

[5] Coventry *v.* Coventry, 1 Keen, 758; Greenwood *v.* Wakeford, 1 Beav. 576.

[6] Ellis *v.* Ellis, 1 Russ. 368; Knight *v.* Martin, 1 R. & M. 70; Campbell *v.* Horne, 1 N. C. C. 664; Angier *v.* Stannard, 3 M. & K. 566; Poole *v.* Pass, 1 Beav. 600.

[7] Jones *v.* Lewis, 1 Cox, 199; Willis *v.* Hiscox, 4 M. & Cr. 197; Thorby *v.* Yeates, 1 N. C. C. 438.

[8] Angier *v.* Stannard, 3 M. & K. 566; Devey *v.* Thornton, 9 Hare, 233. But Poole *v.* Pass, 1 Beav. 600, is contrary, and the better opinion is that Angier *v.* Stannard is not good law. Vez *v.* Emery, 5 Ves. 144; Hampson *v.* Bramwood, 1 Mad. 392; Bush's App., 33 Penn. St. 85; Harper *v.* Munday, 7 De G., M. & G. 369. But see Boulton *v.* Beard, 27 Eng. L. & Eq. 421.

property to be conveyed, or as to the form of the conveyance, and he may take the advice of the court and have the costs of the suit.[1]

§ 902. Where a trustee commits a breach of trust the general rule is, that he must pay the costs of the suit to rectify the wrong, but if there are other matters involved in the suit, in which the trustee is found to be without fault, he may have his costs in such other matters.[2] Thus where a bill charged a trustee with breach of trust in respect to both the real and personal property, and he was found to be wrongfully charged in relation to the real estate, he was ordered to pay costs for only one part of the bill.[3] So where there was a bill to set aside a purchase by the trustees of part of the trust property, and also for an account, the trustees were allowed the costs of the account, and ordered to pay the costs of the other part of the bill.[4] So where the suit did not originate in the misconduct of the trustee, but in the course of its progress a breach of trust appeared, the court ordered the trustee to pay so much of the costs as were caused by the breach of the trust, and allowed him the costs of the other part of the suit.[5] So where a trustee ought to have had his costs on one part of a suit, and to have paid costs on another, the court allowed no costs on either side.[6] If the breach of trust is very trifling, the court may overlook it, and give the trustee his whole costs.[7] So where grave charges of fraud were made against trustees, which failed, but they were removed on another ground, they were allowed their costs.[8]

§ 903. Where trustees are decreed to pay the costs of a suit occasioned by their misconduct, or where they are refused their costs

[1] Goodson *v.* Ellison, 3 Russ. 593; Poole *v.* Pass, 1 Beav. 600; Whitmarsh *v.* Robinson, 1 N. C. C. 715; Holford *v.* Phipps, 3 Beav. 434; 4 Beav. 475; Taylor *v.* Glanville, 1 Mad. 176; Thorby *v.* Yeates, 1 N. C. C. 438; Dustan *v.* Dustan, 1 Paige, 509; Armstrong *v.* Zane, 12 Ohio, 287.

[2] Pocock *v.* Reddington, 5 Ves. 800; Hewett *v.* Foster, 7 Beav. 348; Bate *v.* Hooper, 5 De G., M. & G. 345; *Re* King, 11 Jur. (N. S.) 899.

[3] Ibid.

[4] Sanderson *v.* Walker, 13 Ves. 601.

[5] Tebbs *v.* Carpenter, 1 Mad. 290; Heigington *v.* Grant, 1 Phil. 600; Pride *v.* Fooks, 2 Beav. 430; Newton *v.* Bennett, 1 Bro. Ch. 359.

[6] Newton *v.* Bennett, 1 Bro. Ch. 362.

[7] Fitzgerald *v.* Pringle, 2 Moll. 534; Bailey *v.* Gould, 4 Y. & Col. 221; Knott *v.* Cottee, 16 Beav. 77; Cotton *v.* Clark, 16 Beav. 134.

[8] Stanes *v.* Parker, 9 Beav. 385.

for the same reason, they cannot charge the expenses of the suit to the trust fund in their hands; as their misconduct and breach of duty were personal, so the costs are personal, and must be borne by them personally.[1]

[1] Att'y-Gen. v. Daugers, 33 Beav. 621.

CHAPTER XXXI.

ALLOWANCES AND COMPENSATION TO TRUSTEES.

§ 904. NOTHING is better established in England than that a trustee can have no allowance or compensation for his time and trouble in the execution of a trust.[1] The principle on which the rule is founded is, that a trustee can "make no profit out of his office;" and the reason of the principle is, that a trustee shall be placed in no position where his interest may be opposed to his duty.[2] The rule applies not only to trustees strictly so called, but also to all who hold a fiduciary relation, as executors and administrators, mortgagees, receivers, guardians, and officers, directors, and trustees of corporations.[3] If trustees render services to the

[1] Robinson *v.* Pett, 3 P. Wms. 251; 2 Lead. Ca. Eq. 206, Brocksopp *v.* Barnes, Cas. t. Finch, 361; Ayliffe *v.* Murray, 2 Atk. 58; *In re* Ormsby, 1 B. & B. 189; Charity Corpo. *v.* Sutton, 2 Atk. 406; Bonithon *v.* Hockmore, 1 Vern. 316.

[2] New *v.* Jones, cited in Moore *v.* Frowd, 3 M. & Cr. 50; Burton *v.* Wookey, 6 Mad. 368; Hamilton *v.* Wright, 9 Cl. & Fin. 111.

[3] Scattergood *v.* Harrison, Mose. 128; How *v.* Godfrey, Cas. t. Finch, 361; Sheriff *v.* Axe, 4 Russ. 33; Bonithon *v.* Hockmore, 1 Vern. 316; Langstaffe *v.* Fen-

trust estate in their professional characters, as solicitors, factors, brokers, bankers, or in any other capacity, they can receive no compensation or commissions for such services.[1]

§ 905. An exception to this rule has been established in the cases of trustees for absent owners of estates in the West Indies, of administrators of estates in the East Indies, and of mortgagees in possession of estates in Jamaica. Courts of chancery in England have allowed commissions as compensation for time and trouble in these instances.[2]

§ 906. Even where trustees are directed to carry on the testator's business, they can have no compensation for their time and trouble, unless there is a special provision in the will for their payment. The reason is that trustees can make no profit.[3] But a trustee under a constructive trust, who carries on business with another's property in such manner that he is compelled to account for the profits, may be allowed a compensation for his time and trouble, and for his skill in conducting the business.[4]

§ 907. The expenses of a trustee in the execution of the trust are a lien upon the estate, and he will not be compelled to part

wick, 10 Ves. 405; French *v.* Barron, 2 Atk. 120; Carew *v.* Johnston, 2 Sch. & Lef. 301; Arnold *v.* Garner, 2 Phil. 231; Matthison *v.* Clarke, 3 Drew. 3; Barrett *v.* Hartley, 12 Jur. 426; *In re* Ormsby, 1 B. & B. 189; Anon., 10 Ves. 103; *Re* Walker, 2 Phil. 630; *Re* Westbrooke, 2 Phil. 631; York, &c., Railw. *v.* Hudson, 16 Beav. 485; Burden *v* Burden, 1 V. & B. 170; Stocken *v.* Dawson, 6 Beav. 371; Kirkman *v.* Booth, 11 Beav. 273.

[1] Ibid.; New *v.* Jones, 1 Hall & Tw. 632; Broughton *v.* Broughton, 2 Sm. & G. 422; 5 De G., M. & G. 160; Gomley *v.* Wood, 3 J. & Lat. 702; Lincoln *v.* Winsor, 9 Hare, 158; Bainbrigge *v.* Blair, 8 Beav. 588; Todd *v.* Wilson, 9 Beav. 486; Lyon *v.* Baker, 5 De G. & Sm. 622; Collins *v.* Carey, 2 Beav. 129; Christophers *v.* White, 10 Beav. 523; Selatter *v.* Cottam, 3 Jur. (N. S.) 630; Matthison *v.* Clarke, 3 Drew. 3; *In re* Taylor, 18 Beav. 165.

[2] Chambers *v.* Goldwin, 5 Ves. 834; 9 Ves. 254, 257, 267, 273; Denton *v.* Davy, 1 Moore, P. C. C. 15; Forrest *v.* Elwes, 2 Mer. 68; Hinchel *v.* Daly, 1 Moore, P. C. C. 51; Grant *v.* Campbell, 1 Moore, P. C. C. 43; Leith *v.* Irwin, 1 M. & K. 277; Chetham *v.* Audly, 4 Ves. 72; Matthews *v.* Bagshaw, 14 Beav. 123; Campbell *v.* Campbell, 13 Sim. 168; 2 Y. & Col. Ch. 607; Freeman *v.* Fairlee, 3 Mer. 24, 28.

[3] Stocken *v.* Dawson, 6 Beav. 371; Burden *v.* Burden, 1 V. & B. 170; Brocksopp *v.* Barnes, 5 Mad. 90; Marshall *v.* Holloway, 2 Swans. 432; Forster *v.* Ridley, 4 N. R. 417.

[4] Brown *v.* De Tastet, Jac. 284; Crawshaw *v.* Collins, 15 Ves. 225; Wedderburn *v* Wedderburn, 22 Beav. 84; Brown *v.* Litton, 1 P. Wms. 140; 10 Mod. 20.

with the property until his disbursements are repaid.[1] The agent of the trustee is accountable to his principal only, and not to the *cestui que trust*;[2] therefore an agent has no lien upon the trust estate.[3] But an attorney who has collected trust funds for a trustee may set off his costs;[4] and where there is a particular direction to the trustees to employ a particular person in a particular capacity, such person will have a lien on the fund.[5] But a mere recommendation to the trustees to employ some person, will not give the person employed a lien on the estate.[6] The trustee of a *void* deed cannot claim a lien upon the estate for his expenses against those who establish the fraudulent or invalid character of the deed,[7] though he may be allowed for improvements;[8] nor can a trustee have a lien for expenses incurred beyond the scope of his authority.[9] The trustee's lien cannot be allowed to control the estate in such manner as to destroy the trust; but no conveyance will be ordered or allowed until he is repaid.[10] Although agents of trustees have no lien upon the trust estate, and are not responsible to the *cestui que trust* as before stated, yet if they mix themselves up with a breach of trust, and by an abuse of their powers as simple agents obtain possession of the trust property, the *cestui que trust* may proceed against them as trustees *de son tort* or constructive trustees.[11] If several estates are subject to the same trusts, the proceeds of any

[1] *Ex parte* James, 1 D. & C. 272; Hill *v.* Magan, 2 Moll. 460; Norwich Yarn Co., 22 Beav. 143; *Ex parte* Chippendale, 4 De G., M. & G. 19; Trott *v.* Dawson, 1 P. Wms. 780; Bro. P. C. 266; Morison *v.* Morison, 7 De G., M. & G. 226.

[2] Myler *v.* Fitzpatrick, 6 Mad. 360; Att'y-Gen. *v.* Chesterfield, 18 Beav. 596; Langford *v.* Mahoney, 2 Conn. & Laws. 317; Lockwood *v.* Abdy, 14 Sim. 441; Kean *v.* Robarts, 4 Mad. 350.

[3] Warrall *v.* Harford, 8 Ves. 4; Hall *v.* Laver, 1 Hare, 571; Heriot's Hospital *v.* Ross, 12 Cl. & Fin. 507; Francis *v.* Francis, 5 De G., M. & G. 108; *Re* Sadd, 34 Beav. 650.

[4] *Re* Sadd, 34 Beav. 650.

[5] Williams *v.* Corbett, 8 Sim. 349; Hibbert *v.* Hibbert, 3 Mer. 681; Cousett *v.* Bell, 1 Y. & Col. Ch. 569.

[6] Shaw *v.* Lawless, 1 Ll. & G. t. Sugd. 154; 1 Dr. & W. 512; 5 Cl. & Fin. 129; Ll. & G. t. Plunk. 559; Finden *v.* Stephens, 2 Phil. 142; Knott *v.* Cottee, 2 Phil. 192.

[7] Smith *v.* Dresser, L. R. 1 Eq. 651.

[8] Woods *v.* Axton, W. N. 207.

[9] Leedham *v.* Chawner, 1 K. & J. 458.

[10] Darke *v.* Williamson, 25 Beav. 622.

[11] Myler *v.* Fitzpatrick, 6 Mad. 360; Pollard *v.* Downes, 1 Eq. Ca. Ab. 6; Fyler *v.* Fyler, 3 Beav. 550; Hardy *v.* Caley, 33 Beav. 365; *Ex parte* Woodin,

one of the estates may be applied by the trustee to the payment of his expenses; but if several estates are subject to different trusts, in the hands of the same trustee, each estate must bear its own expenses.[1]

§ 908. Where a fund was created for the payment of *debts* and *funeral* and *testamentary expenses*, it was held that *administration* expenses were not embraced, and could *not be* paid from that fund.[2] There is, however, one case to the contrary.[3] But where the trusts were for the payment of "debts, testamentary, and *other* expenses and legacies;"[4] or to pay "funeral, testamentary, and *legal* expenses;"[5] or for the payment of "debts, funeral expenses, and the costs and charges of proving and attending the execution of the will and the several trusts therein named,"[6] it was held that the words were broad enough to embrace the payment of the costs of the administration of the trusts, and that such charges must be paid out of the fund so created. Where a testator bequeathed a leasehold estate and all his personal property to his wife, and devised his real estate to be sold, and the proceeds applied to the payment of his funeral and testamentary expenses and debts, and the residue invested, it was held that the funeral and testamentary expenses were thrown upon the real estate in exoneration of the personal, but that the costs of taking the opinion of the court upon a special case were not testamentary expenses within the meaning of the will, but fell upon the personalty, which was specifically devised to the wife.[7] So a trust created by will in both real and personal estate, to pay out of the personal the expenses of probate and the execution of the trusts, does not authorize the trustees to pay out of the personal any other expenses than *executors* would be authorized to pay in that character, and the trustees cannot dis-

3 Mont. D. & D. 399; Alleyne *v.* Darcey, 4 Ir. Eq. 199; Pannell *v.* Hurley, 2 Coll. 241; Portlock *v.* Gardner, 1 Hare, 166; Bodenham *v.* Hoskyns, 2 De G., M. & G. 903; Att'y-Gen. *v.* Leicester, 7 Beav. 176; Morgan *v.* Stephens, 3 Gif. 226.

[1] Price *v.* Loaden, 21 Beav. 508.

[2] Brown *v.* Groombridge, 4 Mad. 495; Stringer *v.* Harper, 26 Beav. 585; Linley *v.* Taylor, 1 Gif. 69; Webb *v.* De Beauvoisin, 3 Beav. 573; Gilbertson *v.* Gilbertson, 34 Beav. 354.

[3] Wilson *v.* Heaton, 11 Beav. 492. [4] Webb *v.* De Beauvoisin, 31 Beav. 573.

[5] Coventry *v.* Coventry, 2 Dr. & Sm. 470.

[6] Alsop *v.* Bell, 24 Beav. 451, 469.

[7] Gilbertson *v.* Gilbertson, 34 Beav. 354.

charge the expenses of the trust of the real estate out of the personal.[1]

§ 909. If the trust fund is insufficient for the reimbursement of the trustee, he may call upon the *cestui que trust* in whose behalf and at whose request he acted, and recover of him personally reasonable compensation for the time and trouble and money expended.[2] So trustees may call upon the *cestui que trust* for indemnity, before proceeding to incur expenses and liabilities.[3] But to enable trustees to enforce their claim for expenses against a *cestui que trust*, they must have proceeded strictly within the limits of their power, unless they have the express or implied promise of the *cestui que trust* to indemnify them.[4]

§ 910. Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty.[5] Thus a trustee will be reimbursed all his necessary travelling expenses,[6] and all reasonable fees paid for legal advice in the discharge of his duties.[7] And this rule will

[1] Brougham *v.* Paulett, 19 Beav. 119; Saunders *v.* Miller, 25 Beav. 154.

[2] Balsh *v.* Hyham, 2 P. Wms. 453; *Ex parte* Chippendale, 4 De G., M. & G. 19, 54; Phené *v.* Gillam, 5 Hare, 9, 13.

[3] Ibid.

[4] Leedham *v.* Chawner, 4 K. & J. 458; Collinson *v.* Lister, 20 Beav. 368.

[5] Warrall *v.* Hartford, 8 Ves. 8; Att'y-Gen. *v.* Norwich, 2 M. & Cr. 406, 424; Rex *v.* Inhab. of Essex, 4 T. R. 591; Rex *v.* Com'rs, 1 B. & Ad. 232; Brocksopp *v.* Barnes, 5 Mad. 90; How *v.* Godfrey, t. Finch, 361; Heriot's Hospital *v.* Ross, 12 Cl. & Fin. 512; Caffrey *v.* Darby, 6 Ves. 497; *Re* Ormsby, 1 B. & B. 190; Godfrey *v.* Watson, 3 Atk. 518; Hide *v.* Heywood, 2 Atk. 126; Dawson *v.* Clarke, 18 Ves. 254; Morison *v.* Morison, 7 De G., M. & G. 214; Morton *v.* Barrett, 22 Me. 257; Pennell's App., 2 Barr, 216; Morton *v.* Adams, 1 Strob. Eq. 76; Miller *v.* Beverleys, 4 Hen. & M. 415; Ames *v.* Downing, 1 Bradf. Sur. 331; Myers *v.* Myers, 2 McCord, Ch. 214; Miles *v.* Bacon, 4 J. J. Marsh. 457; Jones *v.* Dawson, 19 Ala. 672; Hatton *v.* Weems, 12 Gill & J. 83; Perkins *v.* Kershaw, 1 Hill, Eq. 350; Egbert *v.* Brooks, 3 Harring. 110; Love *v.* Morris, 13 Ga. 165.

[6] *Ex parte* Lovegrove, 3 D. & C. 763; Malcolm *v.* O'Callaghan, 3 M. & C. 62; Bridge *v.* Brown, 2 Y. & Col. Ch. 181; *Ex parte* Bray, 1 Rose, 144; *Ex parte* Elsee, 1 Mont. 1; Burr *v.* McEwen, Baldw. C. C. 154; Towle *v.* Mack, 2 Vt. 19.

[7] Cary, 14; McElhenny's App., 46 Penn. St. 347; Wilson's App., 41 Penn. St. 94; McNamara *v.* Jones, Dick. 587; Fearns *v.* Young, 10 Ves. 184; Burge

be applied, although the trust may subsequently be declared void,[1] if the trustees were without blame in the matter. So trustees will be allowed all the expenses of litigation concerning the fund, and all costs which they are ordered to pay to strangers, if the litigation was forced upon them, or was necessary for the protection of the estate;[2] but if a trustee is deprived of his costs, or ordered to pay costs by reason of his own misconduct, or if the suit was improperly instituted by him, he cannot be allowed for such disbursements, but he must bear them personally as a penalty for his misconduct.[3] Allowances for legal expenses and costs are always within the discretion of the court; and such claims can be modified and reduced, if in the judgment of the court they are unreasonable.[4] Interest upon such payments, will not be allowed to a trustee, although he had no trust money in his hands at the time of the payment.[5]

§ 911. A trustee ought to keep a regular account of his expenses, and if he does not do so, every intendment of fact will be made against him,[6] and the lowest estimate put upon his charges for expenses.[7] Thus in Hethersell *v.* Hales, the trustee made a charge of £2500 for expenses, having kept no account; the court upon inquiry found that he had expended large sums, which might well amount to £2500, but, as there was no regular account, it allowed only £2000.[8] The court may reject the whole sum claimed as expenses where no account has been kept, and allow only such sums as are clearly proved by competent evidence,[9] and appear reasonable.

§ 912. A trustee may employ necessary assistants in executing the trust and pay them; thus he may employ agents, collectors, accountants, and other persons properly employed in similar affairs.[10] Even where a sum of money was given to trustees for

v. Brutton, 2 Hare, 373; Johnson *v.* Telford, 3 Russ. 477; Poole *v.* Pass, 1 Beav. 604; Brady *v.* Dilley, 27 Md. 570.

[1] Stewart *v.* McMinn, 5 W. & S. 100; *Re* Wilson, 4 Barr, 430; Hawley *v.* James, 16 Wend. 61.

[2] See chapter on Costs.

[3] Caffrey *v.* Darby, 6 Ves. 497; Peers *v.* Ceeley, 15 Beav. 209; Leedham *v.* Chawner, 4 K. & J. 458.

[4] Johnson *v.* Telford, 3 Russ. 477.

[5] Gordon *v.* Trail, 8 Price, 416.

[6] *Ex parte* Cassell, 5 Watts, 442; Green *v.* Winter, 1 John. Ch. 27.

[7] McDowell *v.* Caldwell, 2 McCord, Ch. 42.

[8] 2 Ch. R. 158.

[9] Miller *v.* Whittier, 36 Me. 577.

[10] Wilkinson *v.* Wilkinson, 2 S. & S. 237; Henderson *v.* McIver, 3 Mad. 275;

their care and trouble, it was held that they might employ necessary collectors and agents, and pay for their services from the trust fund, and that the gift in the will was for their own care and trouble in overseeing and conducting the trust.[1] So the ordinary brokerage fees will be allowed for transferring stocks,[2] where a transfer is proper.[3] The concurrence of a cotrustee is not necessary for the incurring of expenses, if the expenses are proper in themselves;[4] but if they are unnecessary, and are incurred against the protest of the *cestui que trust*, they will not be allowed by the court.[5]

§ 913. The disbursements that will be allowed to a trustee will depend very much upon the character of the trust and the directions given in the instrument of trust. If he has a power of sale, he will be allowed all the expenses of a sale.[6] If he has power of managing the estate, he will be entitled to all the expenses of keeping up the estate, such as hire of servants, salaries, taxes, cost of repairing, rebuilding farm-houses, manuring, draining, fencing, and other expenses of that kind.[7] If, however, there is a tenant for life entitled to the possession of the estate, the trustee can expend no part of the general fund upon the estate, unless he is specially directed to do so.[8] But if the trustee is to reside upon the estate, he will be allowed all the ordinary expenses of living.[9] He cannot, however, be allowed for a park-keeper, or for keeping up a mere pleasure establishment, nor for pulling down and rebuilding houses.[10]

§ 914. If a trustee uses proper care in the custody of the trust

Davis v. Dendy, 3 Mad. 170; Hopkinson v. Roe, 1 Beav. 180; Turner v. Corney, 5 Beav. 515; Weiss v. Dill, 3 M. & K. 26; Kennedy's App., 4 Barr, 150. In England the court will not allow more than two and one-half per cent to be paid to a collector. Weiss v. Dill, 3 M. & K. 26; Stackpole v. Stackpole, 4 Dow, 226.

1 Wilkinson v. Wilkinson, 2 S. & S. 237; Webb v. Shaftesbury, 7 Ves. 480; Fountaine v. Pellet, 1 Ves. Jr. 337.

2 Jones v. Powell, 6 Beav. 485.

3 Weiss v. Dill, 3 M. & K. 27. See Hopkinson v. Roe, 1 Beav. 183.

4 Miller v. Beverleys, 4 Hen. & Munf. 415.

5 Berryhill's App., 3 Penn. St. 245.

6 Crump v. Baker, 18 Ves. 285.

7 Fountaine v. Pellet, 1 Ves. Jr. 337; Bridge v. Brown, 2 N. C. C. 181; Webb v. Shaftesbury, 7 Ves. 480; Bowes v. Strathmore, 8 Jur. 92.

8 Ibid.; Bostock v. Blakeney, 2 Bro. Ch. 653; Hibbert v. Cook, 1 S. & S. 552; Nairn v. Majoribanks, 3 Russ. 582; Caldicott v. Brown, 2 Hare, 144; Jones v. Dawson, 19 Ala. 673.

9 Fountaine v. Pellet, 1 Ves. Jr. 337.

10 Ibid.; Webb v. Shaftesbury, 7 Ves. 480; Bridge v. Brown, 2 N. C. C. 191.

property, and it is stolen from him, he will not be responsible; but the amount so lost may be allowed in his accounts.[1] So if the funds are properly deposited in a bank or with a banker, and the money is lost by the failure of the bank, the trustee may be allowed such loss in his accounts.[2] If the settlor directs the employment of a particular person, and any part of the trust fund is lost by him without the fault of the trustee, such sum will be allowed.[3] In some cases, it has been held that a trustee receiving a stipulated commission or compensation is liable, upon the same principles that a bailee for hire is liable.[4] But the more common rule is, that trustees are liable only for *good faith* and common prudence, and that if a loss happens to the trust fund in relation to which they have exhibited this care and prudence, they may be allowed for the loss in their accounts.[5] A loss that happens through the negligence of the trustee must be borne by him.[6] The loss may be proved by the affidavit of the trustee.[7]

§ 915. What the court will allow upon suit, may be done by the trustee without suit.[8] Thus any disbursements, which the court would order the trustee to make, will be allowed to the trustee, if he makes them without an order; and expenditures for the good of the estate may be allowed to him: as, where he buys in a burdensome lease;[9] or pays off an incumbrance,[10] or makes any other ad-

[1] Morley *v.* Morley, 2 Ch. Ca. 2; Knight *v.* Plymouth, 3 Atk. 480; 1 Dick. 120; Jones *v.* Lewis, 2 Ves. 240; *ante*, § 441; Neff's App., 57 Penn. St. 91; Campbell *v.* Miller, 38 Ga. 304.

[2] Ibid.; Routh *v.* Howell, 3 Ves. 564; Adams *v.* Claxton, 6 Ves. 626; Freeme *v.* Woods, 1 Taml. 172; Massey *v.* Banner, 4 Mad. 416; Belcher *v.* Parsons, Amb. 219; Clough *v.* Bond, 3 M. & Cr. 290.

[3] Kilbee *v.* Sneyd, 2 Moll. 199; Doyle *v.* Blake, 2 Sch. & Lef. 239.

[4] *Ex parte* Cassel, 3 Watts, 442.

[5] Chaplin *v.* Givens, Rice, Eq. 132; Mikel *v.* Mikel, 5 Rich. Eq. 442; Bryant *v.* Russell, 23 Pick. 546; Nyce's Est., 5 W. & S. 254; Twaddell's App., 5 Barr, 15; Sollee *v.* Croft, 7 Rice, Eq. 46; Gray *v.* Lynch, 8 Gill, 403.

[6] Litchfield *v.* White, 3 Seld. 444.

[7] Morley *v.* Morley, 2 Ch. Ca. 2; Furman *v.* Coe, 1 Caine's Ca. in Er. 96.

[8] Balsh *v.* Higham, 2 P. Wms. 453; Gray *v.* Lynch, 8 Gill, 403; Hutton *v.* Weems, 12 G. & J. 83; Gibson *v.* Bott, 7 Ves. 150; Lee *v.* Brown, 4 Ves. 369; Bath *v.* Bradford, 2 Ves. 590; Cooks *v.* Parsons, Pr. Ch. 185; Inwood *v.* Twyne, 2 Ed. 153; Hutcheson *v.* Hammond, 3 Bro. Ch. 145; Terry *v.* Terry, Gilb. 11; Shaw *v.* Borrer, 1 Keen, 576; Co. Lit. 171 a.

[9] Fountaine *v.* Pellett, 1 Ves. Jr. 343.

[10] Murray *v.* De Rottenham, 6 John. Ch. 62; Freeman *v.* Tompkins, 1 Strob. 53; Pennell's App., 2 Barr, 216; Mathews *v.* Dragaud, 3 Des. 25.

vances, for the benefit of the trust estate.[1] So trustees may expend moneys for the support of an infant, if the court shall subsequently approve of the expenditure;[2] and he may disburse money for the protection of an adult *cestui que trust*, where he is insane or otherwise incompetent to take care of himself.[3] Advances to the *cestui que trust* on the faith of the estate may be allowed to the trustee as against creditors.[4]

§ 916. The English rule as stated in Robinson *v.* Pett,[5] that trustees can have no compensation for time and trouble, was cited with approbation by Chancellor Kent in two early cases, and enforced with his usual clearness and vigor;[6] and in the State of Delaware that rule is applied in all cases.[7] And perhaps the same rule prevails in Ohio and Illinois.

§ 917. But this is the extent of the application of the rule in the United States. It has been said, that "the state of our country and the habits of our people are so different as to have induced the legislatures of nearly all the States to introduce provisions by statute for competent remuneration to those to whom the law commits the care and charge of the estate of infants and deceased persons, and the courts make a reasonable allowance to receivers appointed by them beside reimbursing their expenses; . . . and the equity of the statute is by construction generally extended to conventional trustees where the agreement is silent."[8] Mr. Story said, that "the policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interests, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character."[9] These views have received the sanction of the

[1] Altimus *v.* Elliott, 2 Barr, 62.

[2] Barlow *v.* Grant, 1 Vern. 255; Franklin *v.* Greene, 2 Vern. 137; Sisson *v.* Shaw, 9 Ves. 285; Prince *v.* Hine, 26 Beav. 634. See Lewin, 419.

[3] Nelson *v.* Duncombe, 9 Beav. 211; Chester *v.* Rolfe, 4 De G., M. & G. 798.

[4] Iredell *v.* Langston, 1 Dev. Eq. 392; Balsh *v.* Higham, 2 P. Wms. 455; Att'y-Gen. *v.* Norwich, 2 M. & C. 424; Att'y-Gen. *v.* Pearson, 2 Coll. 581; Quarrell *v.* Beckford, 1 Mad. 282; Sandon *v.* Hooper, 6 Beav. 246; Bright *v.* North, 2 Phil. 216.

[5] Robinson *v.* Pett, 3 P. Wms. 132; 2 Eq. Ca. Ab. 454.

[6] Green *v.* Winter, 1 John. Ch. 37; Manning *v.* Manning, 1 John. Ch. 534.

[7] Egbert *v.* Brooks, 3 Harring. 112; State *v.* Platt, 4 Harring. 154.

[8] Boyd *v.* Hawkins, 2 Dev. Eq. 334.

[9] 2 Story, Eq. Jur. § 1268 n.

courts and the legislatures of nearly all the States; and trustees are now entitled to compensation for their time and trouble, either in the form of a commission upon the property under their care, or of a gross sum allowed to them as compensation for their services.[1]

§ 918. The general principle prevails in all the States except Delaware, and perhaps Ohio and Illinois, that trustees are to have a reasonable compensation for their time, trouble, and skill in managing the fund and in executing the trust, although there is some diversity in the manner of determining the amount.[2] In the larger

[1] Barney *v.* Saunders, 16 How. 542; Shirley *v.* Shattuck, 6 Cush. (Miss.) 26; Robinson *v.* Pett, 2 Lead. Ca. Eq. 436, 473 (Amer. notes).

[2] In Maine, there is allowed one dollar for every ten miles' travel to and from court, and one dollar for each day's attendance, and a commission at the discretion of the court, not exceeding five per cent on the amount of the personal assets, together with reasonable sums paid for professional aid, regard being had to the nature and difficulty of the trust. Rev. Stat. 1857, c. 116, § 16.

In New Hampshire, compensation is within the discretion of the court, and it is usually made up from the expenses of attending court, a *per diem* allowance at court, and commissions varying from two to five per cent. Wendell *v.* French, 19 N. H. 210; Tuttle *v.* Robinson, 33 N. H. 118. The court has declined to allow a commission upon the value of specific articles delivered to a specific legatee. Gordon *v.* West, 8 N. H. 444. But an executor who, being an attorney at law, has rendered valuable services to the estate in that capacity, has been held to be entitled to adequate compensation for such services. Wendell *v.* French, 19 N. H. 210.

In Vermont, all expenses will be allowed, and such fees for services as the law provides. Rev. Stat. c. 53, § 12; Hubbard *v.* Fisher, 25 Vt. 542. A gross sum in addition to expenses has been allowed. Evarts *v.* Nason, 11 Vt. 122.

In Massachusetts, trustees are allowed their reasonable expenses, and such compensation as the courts may order. Gen. Stat. c. 98, § 10. In Burrell *v.* Joy, 16 Mass. 229, five per cent upon the gross amount of property coming into their hands was allowed. Denny *v.* Allen, 1 Pick. 147; Jenkins *v.* Eldridge, 3 Story, 225; Longley *v.* Hall, 11 Pick. 124; Ellis *v.* Ellis, 12 Pick. 183; Gibson *v.* Crehore, 5 Pick. 161. The amount is within the discretion of the court, and may be varied to meet the requirements of each case. Scudder *v.* Crocker, 1 Cush. 382; Dixon *v.* Homer, 2 Met. 422. Blake *v.* Pegram, 101 Mass. 592.

In Connecticut, the matter of compensation is wholly within the discretion of the court: Cantfield *v.* Bostwick, 21 Conn. 555; Kendall *v.* New Eng. Carpet Co., 13 Conn. 392; and a fair compensation will be allowed. Clark *v.* Platt, 30 Conn. 282.

In New York, the compensation of executors and guardians is established by statute at five per cent upon the first one thousand dollars, two and one half per cent upon the next four thousand dollars, and one per cent upon all above those amounts. 2 Rev. Stat. 93; Matter of Roberts, 3 John. Ch. 43; and see 3 John.

number of States, the compensation is determined by a percentage or commission upon the trust fund, and this commission varies

Ch. 630. They are to be allowed all their reasonable expenses in addition. 3 Rev. Stats. 180 (ed. 1859), Dakin *v.* Demming, 6 Paige, 95. These provisions are extended to trustees. Roberts, 3 John. Ch. 43; Meacham *v.* Sterns, 9 Paige, 403; Livingston's Case, 9 Paige, 442; Jewett *v.* Woodward, 1 Edw. Ch. 199. Compensation to trustees is to be computed upon the whole property, real and personal. De Peyster's Case, 4 Sandf. Ch. 514; Waggstaffe *v.* Lowerre, 23 Barb. 224. These commissions to trustees include all allowances for expenses. Stevenson *v.* Maxwell, 2 Sand. Ch. 284; Griffin *v.* Barney, 2 Comst. 372. Nichols *v.* McEwen, 21 Barb. 66. If a deed of trust should make a larger provision for compensation, it will not be allowed. Griffin *v.* Barney, 2 Comst. 372. And an assignment in trust for creditors was held to be void, for the reason that it provided for the expenses of the trustees in addition to their commissions. Nichols *v.* McEwen, 21 Barb. 66. But if a trustee undertakes a trust from motives of friendship and kindness, no commissions can be allowed. Mason *v.* Rosevelt, 5 John. Ch. 534. The compensation is confined to commissions, and it cannot be allowed as a gross sum, or as a *per diem* charge. M'Whorter *v.* Benson, Hopk. 28; Vanderheyden *v.* Vanderheyden, 2 Paige, 288; Valentine *v.* Valentine, 3 Barb. Ch. 438. But see Jewett *v.* Woodward, 1 Edw. Ch. 199. This compensation is a matter of right under the statutes, and not of discretion. Vanderheyden *v.* Vanderheyden, 2 Paige, 288; Rapalje *v.* Hall, 1 Sandf. Ch. 406; Meacham *v.* Sterns, 9 Paige, 405; Cairns *v.* Chaubert, 9 Paige, 161. But care will be taken not to allow double commissions when the estate is transferred from one trustee to another. Jones's Case, 4 Sandf. Ch. 616; Kellogg's Case, 7 Paige, 267; Hosack *v.* Rogers, 9 Paige, 468; Valentine *v.* Valentine, 3 Barb. Ch. 438; White *v.* Bullock, 20 Barb. 99. As to commissions in cases of constructive trust, see Cowing *v.* Howard, 46 Barb. 579; Duffy *v.* Duncan, 32 Barb. 587; see Slocomb *v.* Barry, 38 N. Y. 46; Ogden *v.* Murray, 39 N. Y. 202.

In New Jersey, previous to 1855, there was great confusion as to the compensation of executors, trustees, and other fiduciary officers. See Voorhees *v.* Stoothorf, 6 Hals. 149; Jackson *v.* Jackson, 2 Green, Ch. 113; Worbass *v.* Armstrong, 2 Stockt. Ch. 263; State Bank *v.* Marsh, Saxt. 296; Mathis *v.* Mathis, 3 Harrison, 67; Stevenson *v.* Phillips, 1 Zabr. 71; Lloyd *v.* Rowe, Spencer, 685. The statute of that year provided that the commissions of trustees, over and above their necessary expenses, should not exceed seven per cent upon the first thousand dollars, four per cent on the next four thousand dollars, three per cent on the next five thousand dollars, and two per cent upon all sums above ten thousand dollars, provided that all allowances shall not exceed one-fifth of the estate. Nixon's Dig. 562, Act of 1855, §§ 9, 10. The trustee may forfeit his compensation by misconduct, but in such case he may be allowed compensation for the value to the estate of any services performed by him. Moore *v.* Zabriskie, 3 Green, 51.

In Pennsylvania, by a statute June 14, 1836, it was made lawful for the court to allow such compensation to trustees as shall be just and reasonable. The courts had always allowed compensation under an act passed in 1713. Wilson *v.* Wilson, 3 Binn. 560; Anderson *v.* Neff, 11 S. & R. 218; Heckert's App., 12 Harris, 486; Prevost *v.* Gratz, 3 Wash. C. C. 434. The courts of Pennsylvania

somewhat in the different States. In some States, a gross sum is allowed for time and trouble ; and in others, a *per diem* compensation is

hold, however, that compensation is a matter of judicial and equitable discretion, and that they may withhold it if there is any misconduct on the part of the trustee. Berryhill's App., 35 Penn. St. 245; *Ex parte* Cassel, 3 Watts, 443; Robenett's App., 38 Penn. St. 112; Swartswalter's Acct., 4 Watts, 79; Witman's App., 4 Casey, 378; Raybold *v.* Raybold, 8 Harris, 308; Stehman's App., 5 Barr, 414; Dyott's Est., 2 W. & S. 566; Say *v.* Barnes, 4 S. & R. 116; Aston's Est., 4 Whart. 240; Fournier *v.* Ingraham, 7 W. & S. 31; Drysdale's App., 2 Harris, 537; Bell's Est., 2 Pars. Eq. 200; McCahan's App., 7 Barr, 59. This rule was applied to deprive an attorney of his commissions where he withheld for a long time money collected. Bredin *v.* Kingland, 4 Watts, 420. But a trustee will not be deprived of his commission for a mistake in judgment. Meyer's App., 62 Penn. St. 109. The general practice is to allow compensation by commissions, and five per cent is the ordinary rule. Pusey *v.* Clemson, 9 S. & R. 209; Hemphill's Est., 1 Pars. Eq. 31; Bird's Est., 2 Pars. Eq. 171; Pennell's App., 2 Barr, 216. But the amount is under the control and discretion of the court, and it may give more or less as circumstances require. Pusey *v.* Clemson, 9 S. & R. 209; Marsteller's App., 4 Watts, 268; Harland's Accts., 5 Rawle, 331; Stephenson's Est., 4 Whart. 104; Walker's Est., 9 S. & R. 225; Miller's Est., 1 Ash. 335; Nathans *v.* Morris, 4 Whart. 389; Shunk's App., 2 Barr, 307; Green's Est., 1 Ash. 317. Double commissions will not be allowed. Aston's Est., 4 Whart. 241; Stevenson's Est., 1 Pars. Eq. 19. Nor commissions on reinvestments. Barton's Est., 1 Pars. Eq. 29; Trustees of Hemphill, 1 Pars. Eq. 31; Hemphill's App., 6 Harris, 303. Nor interest on commissions. Armstrong's Est., 6 Watts, 286; Callaghan *v.* Hall, 1 S. & R. 241; Say *v.* Barnes, 4 S. & R. 116. There can be but one compensation, however numerous the trustees. Stevenson's Est., 1 Pars. Eq. 19. Where a testator directed his trustees to pay the interest upon a fund set apart to his widow, it was held that the trustees could not withhold a part of the income of such fund as commissions. Solliday *v.* Bisset, 2 Jones, 347; but the late case, Spangler's App., 9 Harris, 33, is inconsistent with the first case. Professional and extra services of a trustee may be compensated. Lowrie's App., 1 Grant, Ca. 373; but not services rendered necessary by the trustee's own wrong. Stearley's App., 38 Penn. St. 525. If an investment remains as it was left by the testator, the trustee can have commissions only on the income. McCauseland's App., 38 Penn. St. 466; Luken's App., 47 Penn. St. 356.

In Maryland, the court had power, by the act of 1798, to vary executor's commissions from five to ten per cent on the amount of the inventory. Scott *v.* Dorsey, 1 Har. & J. 232. And he must pay a tax of ten per cent to the State upon such commissions. Act of 1844, c. 187; William *v.* Mosher, 6 Gill, 454. The right to this compensation is absolute. McKim *v.* Duncan, 4 Gill, 72, and extends to trustees. Ringgold *v.* Ringgold, 1 Har. & G. 27; Nicholls *v.* Hodges, 1 Pet. 565; West *v.* Smith, 8 How. 411; Abbott *v.* Baltimore, &c., Packet Co., 4 Md. Ch. 315; Mitchell *v.* Holmes, 1 Md. Ch. 287. Commissions for the sale of lands by order of the court are established by rules of court at seven per cent on the first hundred dollars, six per cent on the second, five on the third, four on the fourth, three and a half on the fifth and sixth, three on the seventh and eighth,

made for time, travel, and labor. In many States, the percentage or commissions are established by statutes; in others, the rates are ad-

two and one-half on the ninth and tenth, and three per cent on all above $3000, in addition to all expenses not strictly personal. Gibson's Case, 1 Bland, 147. A *per diem* allowance is disfavored, but the courts are liberal in allowing for expenses. Ringgold *v.* Ringgold, 1 Har. & G. 27; Diffenderfer *v.* Winter, 3 G. & J. 347; Jones *v.* Stockett, 2 Bland, 417; Chase *v.* Lockerman, 11 G. & J. 185; Compton *v.* Barnes, 4 Gill, 57; Green *v.* Putney, 1 Md. Ch. 267; Dorsey *v.* Dorsey, 10 Md. 471; 6 Md. 460; *Ex parte* Young, 8 Gill, 287; Northern C. R. Co. *v.* Keighler, 29 Md. 572.

In Virginia, the courts allow a commission of five per cent upon the receipts. Granberry *v.* Granberry, 1 Wash. 246; Taliaferro *v.* Minor, 2 Call, 197; Miller *v.* Beverleys, 4 Hen. & M. 420; Triplett *v.* Jameson, 2 Munf. 242; Hipkins *v.* Bernard, 4 Munf. 83; Kee *v.* Kee, 2 Grat. 132; Waddy *v.* Hawkins, 4 Leigh, 458. Trustees to sell real estate may have the same commission. Lyons *v.* Byrd, 2 Hen. & Munf. 22; Deanes *v.* Scriba, 2 Call, 416. But in cases where the duties of the trustees have been long and arduous, and the care and responsibility great, a larger sum has been allowed. Fitzgerald *v.* Jones, 1 Munf. 156; McCall *v.* Peachy, 3 Munf. 306; Hipkins *v.* Bernard, 4 Munf. 93; Farneyhough *v.* Dickerson, 2 Rob. 589; Cavendish *v.* Fleming, 3 Munf. 201.

In North Carolina, trustees may be allowed a sum not exceeding five per cent, together with their necessary disbursements. This sum is under the control of the court, and may be reduced, but not enlarged. Hodge *v.* Hawkins, 1 Dev. & Bat. 567; Bond *v.* Turner, 2 Taylor, 125; Peyton *v.* Smith, 2 Dev. & Bat. 349; Walton *v.* Avery, 2 Dev. & Bat. 405; Turnage *v.* Green, 2 Jones, Eq. 66. And commissions are allowed, although trustees are so much at fault that they are charged with compound interest. Peyton *v.* Smith, 2 Dev. & Bat. 325; Thompson *v.* McDonald, 2 Dev. & Bat. 471. And although the trustees have legacies, unless the legacies are given in place of commissions. Oden *v.* Windley, 2 Jones, Eq. 445. But Arnold *v.* Byard, 2 Dev. Eq. 4, seems to imply that commissions would not be paid to a trustee who misconducts himself, nor where regular accounts are not kept. Finch *v.* Raynad, 2 Dev. Eq. 141. These rules apply to trustees, as well as to executors and guardians. Boyd *v.* Hawkins, 2 Dev. Eq. 211, 334; Sheril *v.* Shuford, 6 Ired. Eq. 228; Raiford *v.* Raiford, 6 Ired. Eq. 495; Ingram *v.* Kirkpatrick, 8 Ired. Eq. 62.

In South Carolina, a commission of two and one-half per cent is allowed as compensation by statute, and the courts disclaim any discretionary power over it. Ten per cent is allowed upon the income of all sums at interest. These sums embrace all personal expenses, so that all charges for travel are disallowed. Act of 1789; *Ex parte* Witherspoon, 3 Rich. Eq. 14; Norton *v.* Gillison, 4 Rich. Eq. 219; Logan *v.* Logan, 1 McCord, Ch. 5; Snow *v.* Callum, 1 Des. 542. Though where executors were obliged to travel to Cuba to settle an estate, the gift of $1000 by the legatee was upheld. Erwin *v.* Seigling, Riley, Eq. 202; Ruff *v.* Summers, 4 Dev. 529. Annual accounts must be filed, and any omission to file them is a forfeiture of all commissions. Benson *v.* Bruce, 4 Dev. 464; Edmonds *v.* Crenshaw, Harp. 233; Frazier *v.* Vaux, 1 Hill, Ch. 203; Wright *v.* Wright, 2 McCord, Ch. 196. So if vouchers are not filed with the accounts. Black *v.* Blakely, 2 McCord,

justed upon equitable principles. These statutes generally refer to the fees or compensation of executors, administrators, and guar-

Ch. 8; McDowell *v.* Caldwell, 2 McCord, Ch. 59. Trustees are subject to the same rules, except they are not required to file annual accounts. Bonn *v.* Davant, Riley, Ch. 44; Muckenfoss *v.* Heath, 1 Hill, Ch. 184; Tanaux *v.* Ball, 1 McCord, Eq. 458. But if they agree to serve without compensation, they are not entitled to commissions. McCaw *v.* Blunt, 2 McCord, Eq. 90; Vestry, &c., *v.* Barksdale, 1 Strob. 197. In Sollee *v.* Croft, 9 Rich. Eq. 474, a trustee was allowed for his personal services in going to Alabama to secure the trust property.

The statutes of Georgia are very similar to those of South Carolina. An executor forfeits all compensation if he neglects to make annual returns. Fall *v.* Simons, 6 Ga. 274; Kenan *v.* Paul, 8 Ga. 417. By act of Feb. 1850, 2 Cobb, Dig. 540, trustees are entitled to a commission: Lowe *v.* Morris, 13 Ga. 169; but not to encroach upon the *corpus* of the estate. Burney *v.* Spear, 17 Ga. 225. See Price *v.* Cutts, 29 Ga. 142.

In Alabama, compensation is allowed to trustees. Spence *v.* Whitaker, 3 Porter, 327; Phillips *v.* Thompson, 9 Porter, 669; Bothen *v.* McColl, 5 Ala. 314; Carrol *v.* Moore, 7 Ala. 617; Benford *v.* Daniels, 13 Ala. 613. No statute has determined the rate, and each case is left to depend upon the labor and trouble, and the amount of the estate. Harris *v.* Martin, 9 Ala. 899; Gould *v.* Hayes, 25 Ala. 432. Though five per cent commission is the ordinary allowance. Bendell *v.* Bendell, 24 Ala. 306. But a *per diem* allowance may be made: Marshall *v.* Halloway, 2 Stewart, 453; Magee *v.* Cowperthwaite, 10 Ala. 968; or a gross sum. O'Neil *v.* Donnell, 9 Ala. 738. Expenses are also allowed. Hearns *v.* Savage, 16 Ala. 291. Compensation, however, is a matter of discretion, and may be withheld for misconduct. O'Neil *v.* Donnell, 9 Ala. 738; Powell *v.* Powell, 10 Ala. 914; Gould *v.* Hayes, 25 Ala. 432; Hall *v.* Wilson, 14 Ala. 295; Doneldson *v.* Pusey, 13 Ala. 752.

In Mississippi, an allowance of from five to ten per cent upon the amount of an estate upon final settlement is made. Hutch. & How. Dig. 414, § 96; Merrill *v.* Moore, 7 How. Miss. 292; Cherry *v.* Jarratt, 3 Cush. Miss. 221; Shurtleff *v.* Witherspoon, 1 Sm. & M. 622. These commissions are intended to embrace all the expenses of settling an estate. Satterwhite *v.* Littlefield, 13 Sm. & M. 306. There may be cases where an extra allowance will be made for legal expenses. Cherry *v.* Jarratt, 3 Cush. 221; Shirley *v.* Shattuck, 6 Cush. 26.

In Tennessee, previous to 1822, no compensation to trustees for time and trouble, or travelling, was allowed, but reasonable costs for prosecuting and defending suits were allowed: Stephenson *v.* Stephenson, 3 Hayw. 123; Bryant *v.* Pickett, 3 Hayw. 225; Stephenson *v.* Yandle, 5 Hayw. 261; but since 1822, reasonable compensation is allowed. See act January 27, 1838.

In Kentucky, the English rule of not allowing compensation for time and trouble was adhered to for a considerable time. Hite *v.* Hite, 1 B. Mon. 179; Breckenridge *v.* Brooks, 2 A. K. Marsh. 339; McMullen *v.* Scott, 2 Mon. 151. But it was altered by statute. 1 Morehead & Brown, Dig. 668. Five per cent is allowed in some cases. Logan *v.* Troutman, 3 A. K. Marsh. 67; Ramsey *v.* Ramsey, 4 Mon. 152; Wood *v.* Lee, 5 Mon. 66; McCracken *v.* McCracken, 6 Mon. 342; Webb *v.* Webb, 6 Mon. 167. In other cases, seven and one-half

dians; but the courts by equitable construction have extended their provisions to trustees and others performing fiduciary duties.

§ 919. The usual practice in relation to trusts is to allow trustees a commission upon the amount of the yearly income received and paid out by them. This commission varies according to the rules in the various States. In some States, commissions are allowed for receiving and investing the principal fund, and another commission allowed at the close of the trust for the care of the fund and for paying it over or distributing it to the persons entitled. Care is taken that double commissions are not allowed. In many States the commissions and compensation of the trustees depend upon their fidelity in the administration of the trust. If they are guilty of any breach of trust, or of any vexatious or improper conduct, the courts can withhold all compensation, or they can allow such compensation as will pay for the value of their services so far as they have been beneficial to the estate. In other States, it has been held that the trustees have a vested right to the commissions or compensation given by the statutes.[1]

per cent, and in others ten per cent, has been allowed. Wood *v.* Lee, 5 Mon. 66; Bowling *v.* Cobb, 6 B. Mon. 358; Floyd *v.* Floyd, 7 B. Mon. 292. No sum is fixed as proper compensation for trustees, but a reasonable sum will be allowed. Phillips *v.* Bustard, 1 B. Mon. 350; Lane *v.* Coleman, 8 B. Mon. 571; Bank of United States *v.* Hirst, 4 B. Mon. 439; Greening *v.* Fox, 12 B. Mon. 190.

In Ohio, under Act 1840, c. 208, § 175, Kerwin, Dig. 607, executors may receive commissions at the rate of six per cent upon the first thousand dollars, four per cent upon the next four thousand dollars, and upon all sums above five thousand dollars two per cent; and the court may make such further allowance for expenses and extra services as may seem reasonable. It has been thought that trustees do not come within the provisions of the act, and that they were not entitled to compensation in the absence of an agreement to that effect. Gilbert *v.* Sutliff, 3 Ohio St. 149. They shall be allowed their expenses, but if they refuse to account or misconduct themselves their expenses may be disallowed.

In Illinois, executors may receive a commission not exceeding six per cent on the personal estate, and three per cent upon the money arising from the sales of land, and such further allowances for expenses as are reasonable. 2 Rev. Stat. 1219, March, 3, 1845, § 36. But trustees receive no compensation except under a special stipulation. Constant *v.* Matteson, 22 Ill. 546.

In Missouri, executors are allowed commissions not exceeding six per cent on the personal estate and the sales of land. A gross sum may be allowed. Fisher *v.* Smart, 7 Mo. 581.

In Iowa, see First National Bank *v.* Owen, 23 Iowa, 185.

In California, professional services of the trustee must be paid for out of the income of the property. Elling *v.* Naglee, 9 Cal. 683.

[1] See rules in the various States in notes to § 918.

CHAPTER XXXII.

DETERMINATION OF THE TRUST AND DISTRIBUTION OF THE TRUST FUND.

§ 920. Trusts may be terminated by decree upon the consent of all parties.
§ 921. How the responsibility of a trustee may be terminated.
§ 922. Whether trustees are entitled to a release and discharge.
§ 923. Effect of a release or discharge.
§ 924. Where the fund is distributed under a decree.
§ 925. If trustees pay to new trustees they may insist upon a release.
§ 926. Trustees must see that the fund reaches the proper persons.
§ 927. Trustees are responsible for any mistake in that respect.
§ 928. Right of the trustees to a decree of the court.
§ 929. Trustees may pay the fund to agents and attorneys, but they must see to the validity of their authority to receive it.
§ 930. To what persons they may pay.
§§ 931, 932. Remedies in case they pay to the wrong parties.
§ 933. The costs of distributing the trust property must be paid out of the fund.

§ 920. THERE are two modes in which a trust may be terminated. (1.) It may terminate upon the accomplishment of the purposes for which it was created. When the time expires during which a trust is to exist, or when the event happens upon which a trust is to cease, and the trustees have performed all their duties and distributed the fund as directed, the trust is at an end. It has been previously stated, that when the purposes of a trust are accomplished, conveyances from the trustees will be presumed after a sufficient lapse of time.[1] (2.) Although a trust may not have ceased by expiration of time, and although all its purposes may not have been accomplished, yet if all the parties, who are or may be interested in the trust property, are in existence, and *sui juris*, and if they all consent and agree thereto, courts of equity may decree the determination of a trust and the distribution of the trust fund among those entitled. It was for some time doubtful whether a trust could be thus determined prior to the time contemplated by a testator; but it is now well settled that where all the parties are capable of acting, and desire to terminate the trust, courts can decree its determination.[2] There can be no doubt upon

[1] Manice *v.* Manice, 43 N. Y. 203.

[2] Bowditch *v.* Andrew, 8 Allen, 339; Smith *v.* Harrington, 4 Allen, 566–568.

principle, that when all those, who have the entire legal and beneficial interest in property, agree to dispose of it in a particular manner, courts will give effect to their agreements.

§ 921. The trustee may be discharged from the office and from future liability in several different ways. (1.) The expiration or full performance of all the trusts, and a conveyance or transfer of the trust property according to the terms of the trust is a discharge of the trustee.[1] (2.) The trustee may be discharged by a decree of the court declaring, with the assent of all parties in interest, the trust at an end, and that the trustee shall distribute the fund.[2] (3.) Although the trust is not determined, the trustee may be discharged from his office with the concurrence of all the *cestuis que trust*, if *sui juris*; and the appointment of a new trustee is not absolutely necessary to give validity to the discharge.[3] (4.) A trustee may be discharged, and a new one appointed, by virtue of a power to that effect contained in the instrument of trust.[4] (5.) The death of a trustee operates to discharge his estate from all responsibility for acts done by his cotrustees or others after his decease.[5] (6.) A trustee may be discharged by a decree of court, appointing another trustee, or giving such other directions to the trust as it sees fit.[6] (7.) The sale of the trust estate under a prior incumbrance, or taking it from the trustee under a title paramount, puts an end to his duties and responsibility.[7] So a release by the trustee to the assignor, in an assignment for creditors, puts an end to the trust;[8] and a purchase of the trust estate by the trustee ends the trust, if the trustee is duly authorized to make the purchase.[9] A conveyance by the trustee to the *cestui que trust* merges the titles and determines the trust, where it is proper that such conveyance should be made; but if the *cestui que trust* is a minor, the trustee will[10] be holden, notwithstanding such conveyance.[11] So if the *cestui que trust* is a married woman, a conveyance to her by the trustee will not discharge him; but after the death of her husband such conveyance will discharge him.[12] A mere relinquishment of the trust, or of the property, which does not purport

[1] Goodson *v.* Ellison, 3 Russ. 593; Halford *v.* Phipps, 3 Beav. 434; Tavenner *v.* Robinson, 2 Rob. (Va.) 280. [2] See *ante*, §§ 920.

[3] *Ante*, §§ 274, 285. [4] *Ante*, §§ 288, 297. [5] *Ante*, § 426. [6] *Ante*, §§ 282, 283.

[7] De Bevoise *v.* Sandford, 1 Hoff. Ch. 195. [8] Huckabee *v.* Billingsly, 16 Ala. 414.

[9] Johnson *v.* Johnson, 5 Ala. 90. [10] Waugh *v.* Wyche, 23 L. J. Ch. 823.

[11] *Ante*, § 624. [12] *Ante*, § 652; Parker *v.* Converse, 5 Gray, 336.

to convey the property to some person authorized to receive it, does not discharge the trustee.[1]

§ 922. The discharge of a trustee, upon the determination of the trust, or upon the appointment of another trustee, does not of itself release the trustee from responsibility for his past conduct, and the *cestui que trust* may still inquire into his administration prior to his discharge.[2] Therefore it is usual, upon the final settlement and transfer of the trust property to the parties entitled, to discharge the trustee by a formal release of all claims executed by all the *cestuis que trust* who are *sui juris.* It seems to be a reasonable requirement, on the part of the trustee, when he parts with the fund, and the muniments of title, and, in some sort, with the means of defence, that he should be secured against future litigation; for although the *cestuis que trust* may impeach such a receipt and discharge on the ground of fraud, accident, or mistake, yet it is *prima facie* evidence, and throws the burden upon those seeking to impeach it.[3] It has been determined, however, that where a *cestui que trust* has a clear right to a conveyance or transfer of the property, the trustee cannot demand a release, and refuse to make the transfer until it is given.[4] It has also been said, that, where trustees transfer the property in accordance with the terms of the instrument of trust, they are not entitled to a receipt or discharge, as a debtor, making a tender of payment of a debt owed by him, cannot demand a receipt;[5] but if they transfer the trust property to the *cestuis que trust*, in a manner, or at a time not contemplated by the instrument, they may require a receipt and discharge.[6] Mr. Lewin criticises this distinction made by Vice-Chancellor Kindersley;[7] but it is obvious that the trustees cannot be compelled to transfer the property, except in the exact manner, and upon the terms, and at the time pointed out in the instrument of trust; if, therefore, the *cestuis que trust* agree that the trustees may depart from the terms of the instrument, they

[1] Dick *v.* Pitchford, 1 Dev. & Bat. Eq. 480; Richardson *v.* Cole, 2 Swan, 100; Diefendorf *v.* Spraker, 10 N. Y. 246; Waugh *v.* Wyche, 23 L. J. Ch. 833.

[2] Wright's Trusts, 3 K. & J. 419; ——— *v.* Osborne, 6 Ves. 455.

[3] Fowler *v.* Wyatt, 24 Beav. 232.

[4] Fulton *v.* Gilmour, 8 Beav. 154; Hill on Trustees, 580; Chadwick *v.* Heatley, 2 Coll. 137; Wright's Trusts, 3 K. & J. 421; Warter *v.* Anderson, 11 Hare, 303.

[5] King *v.* Mullins, 1 Drew. 308.

[6] Ibid.; *Re* Cater's Trust, 25; Beav. 366; Wright's Trusts, 3 K. & J. 421.

[7] Lewin on Trusts, 289 (5th ed.).

may require a release under seal, or even a bond of indemnity, and they may refuse to part with the fund until such security is given. It has been held, however, that an executor, in winding up and distributing an estate, is entitled to a release.[1] So where the title of the *cestui que trust* is not perfectly clear, or there is a possibility that there may be other claimants, or that the propriety of the conveyance or payment may be called in question at some future time, the trustees may require an indemnity against such future claims, or may refuse to convey without a decree of the court.[2]

§ 923. Of course, a person not *sui juris*, as an infant, cannot bind himself by a receipt, release, or bond of indemnity.[3] If a release is executed to a trustee by a *cestui que trust* just after coming of age, the courts will investigate the transaction, and require evidence that the trustee took no advantage of his position and influence.[4] A release by the *cestuis que trust* will not be binding, unless the parties are made fully acquainted with their own rights, and the nature and full extent of the liabilities of the trustee.[5] Any concealment, misrepresentation, or other fraudulent conduct, will vitiate such a release.[6] There should, therefore, be a full statement and detailed explanation of the accounts, which should be referred to in the receipt, release, or discharge, especially if there is any thing in the nature of a breach of trust.[7] Even if the accounts are clearly stated, the release will be set aside, if there is any misapprehension as to the basis upon which they are made up.[8] As before stated, a release executed under proper advice, with ample time for mature deliberation, and upon full information, is *prima facie* valid; and the burden is upon the party disputing it to impeach it.[9]

[1] King *v.* Mullins, 1 Drew. 311; Chadwick *v.* Heatley, 2 Coll. 137.

[2] Goodson *v.* Ellison, 3 Russ. 583; *Re* Primrose, 23 Beav. 590; Talbot *v.* Radnor, 3 M. & K. 252; Curteis *v.* Candler, 6 Mad. 123; Knight *v.* Martin, 1 R. & M. 70; Taml. 237; Taylor *v.* Glanville, 3 Mad. 176; Angier *v.* Stannard, 3 M. & K. 566; Campbell *v.* Horne, 1 Y. & Col. Ch. 664; Gardiner *v.* Downes, 22 Beav. 397; Merlin *v.* Blagrave, 25 Beav. 137.

[3] Overton *v.* Banister, 3 Hare, 503.

[4] Walker *v.* Symonds, 2 Swans. 69; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41.

[5] Ibid.; Charter *v.* Trevelyan, 8 Jur. 1015; 11 Cl. & Fin. 714.

[6] Ibid. [7] Ibid. [8] Ibid.

[9] *Re* Sherwood, 3 Beav. 338; Portlock *v.* Gardner, 1 Hare, 594; Millar *v.* Craig, 6 Beav. 433; Fowler *v.* Wyatt, 24 Beav. 232.

§ 924. Where the trustee pays and distributes the trust fund under the direction and decree of the court, he is indemnified by the order itself, and needs no release. It would be impossible to hold any trustee responsible for obeying the orders of a court. It is, however, his duty to inform the court fully of all material facts within his knowledge; for a decree procured by any concealment or other management would be opened, and the trustee might be held responsible.[1]

§ 925. If the *cestuis que trust* create by agreement a new trust, and desire the trustees of the old trust to convey the property to new trustees under a new settlement, the old trustees may insist upon a receipt for the property; but whether they can insist upon a discharge from all past liabilities, or upon a general indemnity, is doubtful. Mr. Lewin says, that this requisition of the trustees is generally complied with, though it could not be enforced.[2]

§ 926. Trustees, and all other persons having money in their hands to distribute and pay over to other persons, must see that the money reaches the hands of the persons entitled to receive it; for if they make any mistake in the person to whom they pay the money, they are still liable to pay it to the proper person. If a person borrows money of a trustee, and subsequently discovers that it is trust money, loaned in breach of the trust, he cannot safely pay it back, unless the trustee has the power of signing receipts.[3] If the trustee has notice of an assignment by the *cestui que trust*, he cannot safely pay to the assignor either principal or interest, although the assignment is in the nature of a mortgage only;[4] for notice to the trustee of the assignment is equivalent to taking possession by the assignee under a mortgage.[5] Even if the deed is fraudulent and voidable, the trustee cannot pay to the assignor until it is avoided. On the other hand, it is said that the trustee

[1] Waller *v.* Barrett, 24 Beav. 366; Farrell *v.* Smith, 2 B. & B. 337; Williams *v.* Headland, 4 Gif. 495; Fletcher *v.* Stevenson, 3 Hare, 370; Gillespie *v.* Alexander, 3 Russ. 137; Sawyer *v.* Birchmore, 1 Keen, 401; David *v.* Frowd, 1 M. & K. 209; Smith *v.* Smith, 1 Dr. & Sm. 384; Knatchbull *v.* Fearnhead, 3 M. & Cr. 126; Underwood *v.* Hatton, 5 Beav. 39; Bennett *v.* Lytton, 2 John. & Hem. 155; Low *v.* Carter, 1 Beav. 426; Moor's App., 10 Barr, 435; Coventry *v.* Coventry, 1 Keen, 758; Greenwood *v.* Wakeford, 1 Beav. 576.

[2] Lewin, 289; Hill, 581; *Re* Cater's Trusts, 25 Beav. 366.

[3] Sheridan *v.* Jones, 7 Ir. Eq. 115.

[4] Cresswell *v.* Dewell, 4 Gif. 460.

[5] Loveridge *v.* Cooper, 3 Russ. 58.

may safely pay to the assignee, until the deed is impeached, especially if the assignee has the power of signing receipts.[1] If the *cestui que trust* is dead, payment is to be made to his personal representatives; and if the trustee refuses to make such payment, and involves himself in disputes over the *cestui que trust's* estate, he will be ordered to pay the costs of a suit for the recovery of the fund.[2] If the *cestui que trust* is a married woman, the property, if settled to her separate use, may be paid over to her; or if she is divorced, it may be paid to her as if her husband was dead.[3]

§ 927. If through any misapprehension on the part of a trustee, he makes a payment to a person not authorized by the terms of the trust to receive it, he will be held personally responsible for the misapplication, to the persons who can establish a better right; and the advice of counsel will not protect him in making a wrong payment.[4] There is a *dictum* to the contrary in Vez *v.* Emery;[5] but the general rule prevails. But if trustees act in *good faith* in such case, and under the advice of counsel, the court will not impose costs.[6] If the payment is to be made according to the laws of the domicile of the trustees, they must be taken to know the law, and, if they mistake the law, they are personally responsible; but they are not bound to know the laws of foreign countries, unless called to their notice; if, therefore, they proceed in the ordinary manner, according to the *prima facie* line of their duty, they will be excused if they mistake the laws of foreign lands.[7] But as personal property is regulated by the law of the domicile of the owner, it is always safer for the trustee to inquire as to the law, if the *cestui que trust* is domiciled abroad; although he may not be liable for a mistake, if the difference between the laws of the two countries is not brought to his notice.[8]

[1] Beddoes *v.* Pugh, 26 Beav. 407.

[2] Smith *v.* Bolden, 33 Beav. 262.

[3] Wells *v.* Malbon, 31 Beav. 48.

[4] Doyle *v.* Blake, 2 Sch. & Lef. 243; Peers *v.* Ceeley, 15 Beav. 209; Urch *v.* Walker, 3 M. & C. 705; Boulton *v.* Beard, 3 De G., M. & G. 608; Turner *v.* Maule, 3 De. G. & Sm. 497; *Re* Knight's Trusts, 27 Beav. 49.

[5] 5 Ves. 141.

[6] Angier *v.* Stannard, 3 My. & K. 566; Dewey *v.* Thornton, 9 Hare, 232; Field *v.* Donoughmore, 1 Dru. & W. 234.

[7] Leslie *v.* Baillie, 2 Y. & Col. Ch. 91.

[8] See Chrichton's Trusts, 24 L. T. 267; *In re* Blithman, L. R. 2 Eq. 23; *Re* Hellman's Will, L. R. 2 Eq. 363.

§ 928. A trustee cannot be expected to incur the least risk in the distribution of the trust fund. Therefore where there is a mere shadow of doubt as to the rights of the parties, he may require a bond of indemnity. Such a bond, however, is not very satisfactory, as the obligors may decease and their property be divided long before there is a call upon them to indemnify the trustee; and if it appears that trustees have committed a breach of trust under cover of such a defence, the court shows no mercy.[1] Therefore, if a third person makes a claim, or if he refuses to state whether he has a claim, where the trustee has a right to know, the trustee may bring such person before the court by bill; and if he claims improperly, or has improperly refused to answer, he will be charged with the costs.[2] So where the equities are not perfectly clear, the trustee may decline to act without the sanction of the court; and his costs and proper expenses will be allowed.[3] The trustee himself will be protected by the decree of any court having jurisdiction, and exercising the jurisdiction regularly, upon proper notice given;[4] but if he appeals from such decree to a higher court, he may be compelled to pay costs.[5] If other parties appeal, he must follow the case wherever it is carried, and he will be allowed his costs and expenses. The suit in such cases may be instituted by the trustee himself asking for the direction of the court; or parties claiming to be the *cestuis que trust* may institute the suit against the trustee, and others claiming to be the *cestuis que trust*. If, at the hearing, it appears that the question was doubtful, and required the interposition of the court, all parties may have their costs out of the trust fund, although the decree may be against some of them.[6]

§ 929. A trustee may pay the money to the parties entitled, or

[1] Lewin, 253 (5th ed.).

[2] *Re* Primrose, 23 Beav. 590.

[3] Talbot *v.* Radnor, 3 My. & K. 252; Goodson *v.* Ellison, 3 Russ. 583; Knight *v.* Martin, 1 R. & M. 70; Taml. 237; Angier *v.* Stannard, 3 M. & K. 566; Curteis *v.* Candler, 6 Mad. 123; Campbell *v.* Horne, 1 Y. & Col. Ch. 664; Gardiner *v.* Downes, 22 Beav. 397; Merlin *v.* Blagrave, 25 Beav. 137; Taylor *v.* Glanville, 3 Mad. 176; Loring *v.* Steineman, 1 Met. 207.

[4] Loring *v.* Steineman, 1 Met. 207; Tucker *v.* Horneman, 4 De G., M. & G. 395; Rowland *v.* Morgan, 13 Jur. 23.

[5] Ibid.

[6] Westcott *v.* Culliford, 3 Hare, 274; Turner *v.* Frampton, 2 Coll. 336; Merlin *v.* Blagrave, 25 Beav. 134; Boreham *v.* Bignall, 8 Hare, 134; Lee *v.* Delane, 1 De G. & Sm. 1.

to an agent authorized to receive it; and such authority need not be shown by a power of attorney, nor by a deed, nor even by an order in writing: but a trustee should not pay over money without some proof in writing, signed by the parties, of the authority of the agent to receive it. So the trustee must see to the genuineness of the authority of the agent to whom he pays or transfers the property; for if there is forgery or fraud, or want of authority in the person to whom the property is transferred, the trustee will be responsible.[1] If the *cestui que trust* is abroad, payments are generally made by the trustee to an agent under a power of attorney; the death of the *cestui que trust* is a revocation of such agency or power, and the trustee is personally responsible for payments made afterwards, although without notice of the death. The *cestui que trust* may, however, direct the trustee to pay to a particular person until further orders; and such payments will be good, against the representatives of the *cestui que trust*, until notice of the death is given to the trustee:[2] but if the *cestui que trust* is a tenant for life only, such payments, made after his death, would not be good as against the remainder-man.[3] Mr. Lewin suggests that the safe course, where the *cestui que trust* is abroad, is for the trustee to remit the money to some reliable bank, to be drawn out on the personal checks or receipts of the *cestui que trust*.[4] The difficulty is remedied in England by Lord St. Leonard's act, which makes all payments by the trustee to a properly authorized person good and valid, in the absence of any notice of the death of the *cestui que trust*.[5]

§ 930. Where a trustee was to pay a small sum to a wife who had deceased, the court ordered it to be paid to the husband without administration;[6] and so where the trustee was to pay a small sum to a husband, the court ordered it to be paid to his widow, although there was no administration.[7] When the sum is considerable, the court will not hold the trustee justified in paying it over without administration, in case the person is deceased, to whom it was to

[1] Bostock *v.* Floyer, L. R. 1. Ch. 26; Ashby *v.* Blackwell, 2 Ed. 299; Eaves *v.* Hickson, 30 Beav. 136; Sloman *v.* Bank of England, 14 Sim. 475; Harrison *v.* Pryse, Barn. 324; *Ex parte* Joliffe, 8 Beav. 168.

[2] Vance *v.* Vance, 1 Beav. 605; Harrison *v.* Asher, 2 De G. & Sm. 436; Kiddill *v.* Farnelt, 3 Sim. & Gif. 428.

[3] *Re* Jones, 3 Drew. 679.

[4] Lewin, 285.

[5] 22 & 23 Vict. c. 35, § 26.

[6] Hinnings *v.* Hinnings, 2 Hem. & Mil. 32.

[7] Lewin, 286.

be paid.[1] So if the trustee is to pay to an infant, a guardian must be appointed to receive it; but if an infant fraudulently represents himself of age, and procures the money, the trustee will not be held liable to pay it again when the infant becomes of age.[2] If the trustee is to pay over to a firm or partnership, he may pay to the surviving partner or partners without the concurrence of the legal representatives of a deceased partner, although it is better to have such concurrence.[3] So a trustee may pay over to a single surviving trustee, although the court in the exercise of its discretion does not order such payments to be made.[4]

§ 931. If a trustee by mistake pays the wrong person, and is compelled to pay again to the proper person, the court will not impose interest.[5] If he has overpaid a particular sum to a *cestui que trust*, he may recoup himself out of any other interest of that *cestui que trust* in the trust funds in his hands.[6] Where a trustee had paid wrong parties upon certificates forged by one of the *cestuis que trust* the court ordered the wrong parties to repay what each had received, and also ordered the fraudulent *cestui que trust* to make up to the parties rightfully entitled, to the relief of the trustee, what should not be repaid.[7] In a suit against a trustee for breach of trust, the court ordered a tenant for life, who was overpaid by the breach of trust, to pay back the money to the trustee, without the institution of another suit for that purpose.[8] A *cestui que trust* may, notwithstanding the statute of limitations, if there has been no improper laches, recover from another *cestui que trust* an overpayment, erroneously made to him by the trustee.[9]

§ 932. But if an executor overpays a legatee, the court will not generally order him to refund, but will leave the parties to their legal rights;[10] especially if the executor pays voluntarily, and in spite of

[1] Lewin, 286.

[2] Overton *v.* Bannister, 3 Hare, 503; Wright *v.* Snowe, 2 De G. & Sm. 321; Nelson *v.* Stocker, 4 De G. & J. 458.

[3] Phillips *v.* Phillips, 3 Hare, 289.

[4] *Re* Dickinson's Trust, 1 Jur. (N. S.) 724.

[5] Saltmarsh *v.* Barrett, 31 Beav. 349.

[6] Livesay *v.* Livesay, 3 Russ. 287; Dibbs *v.* Goren, 11 Beav. 483.

[7] Eaves *v.* Hickson, 30 Beav. 136.

[8] Hood *v.* Clapham, 19 Beav. 90; Baynard *v.* Woolley, 20 Beav. 583; Downs *v.* Hodgson, 25 Beav. 177; Griffiths *v.* Porter, 25 Beav. 236; Moore *v.* Moore, 1 Coll. 54.

[9] Harris *v.* Harris, 29 Beav. 110.

[10] Downes *v.* Bullock, 25 Beav. 54.

doubts expressed by the legatee.[1] Nor can the court order a purchaser from the legatee to refund to an executor, although the executor may be liable to creditors.[2] But an executor who has been made to pay a creditor, and has under his control a legacy appropriated by him as such, and not actually paid over, may be allowed to recoup the debt from such legacy;[3] but he is not entitled to his costs for obtaining such relief.[4] A creditor who is not barred by the statute of limitations, or to whose suit the statute is not pleaded, may recover assets from a legatee to whom they have been improperly paid by an executor;[5] but he cannot recover them from purchasers for value, as from persons claiming under a marriage settlement.[6]

§ 933. The costs of winding up a trust and distributing the money, and all expenses for documents, deeds, and other papers, must be paid from the trust fund.

[1] Bate *v.* Hooper, 5 De G., M. & G. 338.
[2] Noble *v.* Brett, 24 Beav. 499.
[3] Ibid.
[4] Noble *v.* Brett, 26 Beav. 233.
[5] Fordham *v.* Wallis, 10 Hare, 217.
[6] Dilkes *v.* Broadmead, 2 Gif. 113; 2 De G., F. & J. 566.

INDEX.

[THE FIGURES REFER TO SECTIONS.]

A.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

N.

O.

P.

U.

W.

Cambridge: Press of John Wilson and Son.